



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ENVIRONMENT AND LAND DIVISION**

**ELC NO. 1011 OF 2013**

***ABDIRASHID ABDULLALI HUSSEIN*,.....**PLAINTIFF****

**=VERSUS=**

***SALESION N KAMWARA*.....**DEFENDANT****

***CHARLES NDORIA KANGANGI*.....**2<sup>ND</sup> DEFENDANT/RESPONDENT****

***EMBAKASI RANCHING CO.LTD*.....**3<sup>RD</sup> DEFENDANT/RESPONDENT****

**RULING**

The matter coming up for determination is the Notice of Motion Application dated **21<sup>st</sup> August, 2013** brought by the Plaintiff/Applicant herein ***Abdirashid Abdulkalim Rashid***, under ***Order 40 Rules 1,2 and 4 (1) of the Civil Procedure Rules 2010, Section 3A 63(c) and (e) of the Civil Procedure Act*** and all other enabling provisions of the law.

The applicant has sought for the following Orders.

- i. *That the 2<sup>nd</sup> Defendant/Respondent be restrained by an Order of Injunction by himself , his employees , servants , agents or in any other manner howsoever from trespassing , transferring, building , constructing any structure remaining on or carrying any activity of whatever nature on plot No. V10271 also had known as Nairobi/Block 105/1828 pending he hearing and determination of this suit.*
- ii. *That a Mandatory injunction to issue against the 2<sup>nd</sup> Defendant / Respondent ordering the 2<sup>nd</sup> Defendant/Respondent to vacate and handover vacant possession of plot No. V10271 also known as Nairobi Block 105/1825 pending the hearing and determination of the suit.*
- iii. *That cost of this application be provided for.*

The application is supported on the grounds stated on the face of the application and on the supporting Affidavit of ***Abdirashid Abdullali Hussein***, the Plaintiff, /Applicant herein.

These grounds are:

- a. That the Plaintiff is the owner of **Plot No. V10271** also known as **Nairobi/Block 105 /1828**.
- b. On or about 16<sup>th</sup> August 2013, the 2<sup>nd</sup> Defendant trespassed into the Plaintiffs plot **No. V 10271** also known as **Nairobi/Block 105/1828** and started illegally to dig foundation trenches , brought construction stones , ballast and construction steel unto the said parcel of land with the intention of illegally and unlawfully constructing a building on Plaintiffs land.
- c. That the 2<sup>nd</sup> Defendant /Respondent said acts of trespass have been carried out with un paralled disregard for the law.
- d. That the said acts of the 2<sup>nd</sup> Defendant /Respondent are intentional , deliberate , criminal in nature , carried out with gloss disregard for the sanctity of property , illegally , unlawfully extremely provocative and callous to the extreme.
- e. The 2<sup>nd</sup> Defendant /Respondent have continued to unlawfully trespass upon the Plaintiff/Applicant trespass upon the Plaintiff/Applicant's said Plot No. **V 10271** also known as **Nairobi/Block 105/1828** thereby denying the Plaintiff use and enjoyment of the said plot.
- f. Further that the said acts of the 2<sup>nd</sup> Defendant /Respondent are continuing and unless the Honourable Court grants a Mandatory Injunction, the applicant will suffer irreparable loss.
- g. That the 2<sup>nd</sup> Defendant intends unless restrained by this Honourable Court to continue trespassing , remaining on Plaintiffs said plot , constructing or building thereon illegally and disposing the plot thereby denying the plaintiff use and enjoyment of the same.
- h. Further that the Plaintiff disclose a prima facie case with overwhelming chances of success.
- i. Again that the 2<sup>nd</sup> Defendant / Respondent does not have a clear title but one obtained pursuant to the fraudulent acts of 1<sup>st</sup> Defendant/Respondent carried out jointly and in collusion with the 2<sup>nd</sup> Defendant/Respondent and 3<sup>rd</sup> Defendants/Respondent.

In his supporting affidavit, the Plaintiff/Applicant **Abdirashid Abdullahi Hussein**, averred that the 3<sup>rd</sup> Defendant/Respondent had allocated its surveyor and shareholder one **Jack Kamau Wachira** plot no. **10271** also known as **Nairobi/Block 105 /1828** . Further that the said **Jack Kamau** sold plot no. 10271 also known as **Nairobi/Block 105 /1828** to the applicant with 3<sup>rd</sup> Defendant /Respondent's knowledge, consent and approval. He further averred that on **25<sup>th</sup> May 2006**, he was allotted by the 3<sup>rd</sup> Defendant /Respondent the said plot **No. V10271** also known as **Nairobi/Block 105/1828** and he was also issued by the 3<sup>rd</sup> Defendant with share certificate plot ownership ERC No. 021362 dated **25<sup>th</sup> May 2006**, indicating that 3<sup>rd</sup> Defendant had allocated plot **No. V10271** also known as **Nairobi /Block 105/1828** to the applicant. Further, the 3<sup>rd</sup> defendant and its surveyor **Jack Kamau Wachira** identified the beacons of the said plot to him on **25<sup>th</sup> May 2006** and he took possession of the same and he has been in possession to date. However on **16<sup>th</sup> August 2013**, the 2<sup>nd</sup> Defendant trespassed into his said plot and started to illegally dig foundation trenches, brought construction stones, ballast, and construction steel into the said parcel of land with the intention of illegally and unlawfully constructing a building on the plot. Further that the 2<sup>nd</sup> Defendant intends to continue trespassing, remaining on the said plot unless restrained by this Court and thus this application.

The application is contested. The Respondents filed their Replying Affidavit in opposition to the instant Notice of Motion. **Salesio N Kamwara** , the 1<sup>st</sup> Defendant averred that the relationship that existed between him and the 3<sup>rd</sup> Defendant was that of a buyer and a seller of a property . Further that he entered into a contract with the 2<sup>nd</sup> Defendant /Respondent for sale of plot **No. V10218** which the 2<sup>nd</sup> Defendant/Respondent informed him that he had bought from the 3<sup>rd</sup> Defendant /Respondent herein and

he was therefore unaware of or have any interest with regard to plot No. **V 10271** . He contended that he was not claiming purchase or ownership of plot **No. V10271** but rather purchase and ownership of plot **No. V10218** and he alleged he had documentary evidence to show that plot **No. V 10218** was owned by the 2<sup>nd</sup> Defendant before he purchased the same. Further that the said plot **No.V 10218** was confirmed to him, on 12<sup>th</sup> July 2010, by the company surveyor upon payment of the requisite fee to the 3<sup>rd</sup> Defendant by the 2<sup>nd</sup> Defendant. That upon confirmation of the site and transfer of the said plot to him, he entered into a sale agreement with the 2<sup>nd</sup> Defendant on **29<sup>th</sup> July, 2010** , as evidenced by **annexture SNK3** . Therefore a transfer was effected and he was issued with certificate of plot ownership No. 025643 dated 29<sup>th</sup> August 2012 as evidence by **annexture SNK4** . Furthermore that what is in dispute is not ownership of the plot as he is not claiming ownership of plot **No. V10271**, but rather the location of the site of plots **No. V 10218** and **V 10271** . He therefore averred that he is the lawful allottee owner of plot **No. V 10218** which was duly assigned land reference No. **Nairobi/Block 105/1828** . He further stated that for the interest of justice and fairness, the Orders sought herein should not be granted and that applicant is not in possession of the suit plot.

The 2<sup>nd</sup> Respondent, **Charles Ndoria Kangangi** averred that he was the lawful allottee of Plot No. V10218 which he was allotted by the 3<sup>rd</sup> Defendant upon payment of the requisite allotment fees and was duly issued with certificate **No. 016747** on **6<sup>th</sup> October 2009**. Further, that on **12<sup>th</sup> July 2010**, he decided to sell the property to the 1<sup>st</sup> Defendant and he duly visited the site with one **Mr. David Nyika**, the 3<sup>rd</sup> Defendant's surveyor who confirmed his ownership of the property and also authorized that the transaction could go on. He alleged that he sold the property to the 1<sup>st</sup> Defendant and after payment of the transfer fees, he was allowed to transfer the property to the 1<sup>st</sup> Defendant pursuant to a transaction sale via an agreement for sale dated **29<sup>th</sup> July 2010**. It was his contention that the property currently in dispute between the Plaintiff and 1<sup>st</sup> Defendant is plot **No. V10218** and not Plot No. 10271 as alleged by the Plaintiff. Further, that the 3<sup>rd</sup> Defendant is the allocating authority and the Plaintiff ought to have liaised with the said company and its surveyors instead of laying claim to property that does not belong to him.

The 3<sup>rd</sup> Defendant through one **Godfrey Muhuri Muchiri** also filed a Replying Affidavit to oppose the Notice of Motion. He averred that he is a Director of the 3<sup>rd</sup> Defendant/Respondent and therefore competent to swear the Replying Affidavit. He also averred that the 3<sup>rd</sup> Defendant/Respondent official record indicate that the 2<sup>nd</sup> Defendant sold to the 1<sup>st</sup> Defendant plot No. V10218 at a consideration. That the said transaction was brought to their attention and the transfer was affected at the offices of the 3<sup>rd</sup> Defendant and after payment of the requisite transfer fees, the transfer was affected in favour of the 1<sup>st</sup> Defendant who was issued with share certificate **No. 016747 on 6<sup>th</sup> October 2009**.

Therefore the 2<sup>nd</sup> Defendant had a bonafide proprietary interest on the said plot **No. V10218**, which he had acquired through as allocation from the 3<sup>rd</sup> Defendant. He deposed that the plot in dispute is **Plot No. V10218** and not **V10271** which the Plaintiff claims. Further, that **Plot No. V10271** actually exists and the Plaintiff did not bother to raise his concerns with 3<sup>rd</sup> Defendant before coming to court to have it sorted out. He contended that the 3<sup>rd</sup> Defendant was heading and willing to engage its surveyors in assisting the Plaintiff to trace the actual location of his property as long as his documents of ownership are genuine. Further, that the 3<sup>rd</sup> Respondent is ready and willing to involve the Plaintiff and the 1<sup>st</sup> Defendant in a surveying process of identifying the actual location of the respective plots on the ground which will in return have the effect of resolving the dispute once and for all.

The parties herein canvassed this Notice of Motion by way of written submissions. I have now considered the written submissions, the pleadings in general, and the relevant provisions of law and I make the following findings.

The applicant herein has come to court seeking injunctive orders. These are equitable remedies which are granted at the discretion of the court. However, the discretion must be exercised judiciously. See the case of **CMC Motors Group Ltd and Another vs. Evans Kageche Boro, Civil Appeal nO. 295 of**

2001 (2001) LLR 6109, where the court held that:

*“In granting the injunctory reliefs, the superior court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge if it is satisfied that the learned judge did not exercise his discretion judicially and in accordance with the principles enunciated on in Giella’s case”.*

In deciding whether to grant the orders sought, the court will be guided by the well settled principles of grant of injunction orders as laid out in the case of Giella vs Cassman Brown & Co. Ltd 1973 EA 358 and later repeated in other judicial pronouncements. In the case of East African Development Vs Hyundai Motor Kenya Ltd, Civil Appeal No. 194 of 2004 (2004) LLR 6121, the court held that:

*“What was before the learned Judge was an application for equitable remedy of injunction and the conditions are first, an applicant must show a prima facie case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damage; thirdly, if the court is in doubt, it will decide an application on the balance of convenience. See also E.A. Industries vs Trufoods (1972) EAC 120.*

The Applicant herein therefore need to satisfy the above condition in order to succeed in his prayers. Has the applicant herein satisfied the court that he is deserving of the orders sought?

First, the applicant needed to establish that he has a prima facie case with possibility of success. In the case of Mrao Ltd vs First American Bank of Kenya & 2 Others (2003) KLR 125, the court described prima facie case as:

*“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself well concluded there exists a right which has apparently been infringed by the opposite party or to call for an explanation and rebuttal from the later”.*

From the above explanations, a prima facie case means more than arguable case that the evidence must show an **infringement of a right** and the **probability of success** of the applicant’s case at the trial.

While deciding whether the applicant has established a prima facie case, the court will be cautious not to make any conclusive findings of fact on disputed issues that form the subject of the main trial. See the case of Joseph Okoth Waudi vs National Bank of Kenya, Civil Appeal No. 77 of 2004.

Looking at the facts and annextures presented to this court, there is no doubt that the Plaintiff/Applicant did purchase plot No. **V10271** being plot No. **105/1828** on the map from one **Jack Kamau Wachira** on 20<sup>th</sup> June 2006 as per the Annexure **“AAH1”**.

There is also no doubt that on **25<sup>th</sup> May 2006**, he paid **Kshs. 32,000/=** to **Embakasi Ranching Company Ltd** the 3<sup>rd</sup> Defendant herein and he was issued with **annexture AAH 2(a) and AAH2 (b)**. His plot was described as **V10271**.

The applicant in his supporting affidavit alleged that after he paid the monies to the 3<sup>rd</sup> Defendant, he was taken to the site by the agent of 3<sup>rd</sup> Defendant and the vendor who was also a surveyor of 3<sup>rd</sup> Defendant on **25<sup>th</sup> May 2006** and he was shown the beacon of the said plot. It was his contention that he took over possession immediately and has been in possession to date.

There is also no doubt that one **Charles Ndoria Kangangi**, the 2<sup>nd</sup> Defendant was issued with Non-member certificate for **Embakasi Ranching Company Ltd** on **6<sup>th</sup> October 2009** for plot No. **V10218**. That was about three years after the applicant had taken possession of plot No. **V10271** also known as **Nairobi/Block 105/1828**. The 2<sup>nd</sup> Defendant paid **Kshs. 32,000/=** on **2/10/2009** and charges for site visit

on **1<sup>st</sup> July 2010**. The applicant herein had allegedly visited the site on **25<sup>th</sup> May 2006** when the beacons for the plot were pointed out to him and he took over possession.

It is also evident that the 2<sup>nd</sup> Defendant sold his alleged **plot No. V10218** to one **Salesio K. Kamwara** on **29<sup>th</sup> July 2010** as evidenced by annexure **SNK3**. The said transaction took place within a period of four (4) years after the applicant herein had taken possession of his plot **V10271**.

From the sale agreement annexure **SNK3**, between **Charles Ndoria Kangangi** and **Salesio Nyamu Kamwara**, the plot being sold was Plot No. **V10218** which **was not** described as also **Nairobi/Block 105/1828**.

I have also seen the Non-Member certificate of ownership No. 016747 issued to **Charles Ndoria Kangangi**, the 2<sup>nd</sup> Defendant herein on **6<sup>th</sup> October 2009**. The said Receipt shows the plot for 2<sup>nd</sup> Defendant was plot **No. V10218** but not **Nairobi/Block 105/1828**. However, the plaintiff sale agreement between himself and **Jack Kamau Wachira** dated 20<sup>th</sup> June 2006, shows that **plot No. V10271** was on the map plot **No. 105/1828**. That was there years before the 2<sup>nd</sup> Defendant was allocated his Non-Member certificate on **6<sup>th</sup> October 2009**. The Plaintiff had averred that after he was transferred his plot **No. V10271** also known as **Nairobi/Block 105/1828**, with the approval of the 3<sup>rd</sup> Defendant, he was taken to the site by 3<sup>rd</sup> Defendant and the vendor and shown the beacons. He took possession of the plot that he purchased and has remained in possession of it since then.

It is also not in doubt that on **8<sup>th</sup> September 2013**, **Wasonga Kimakia & Associates Advocates**, wrote to one **Suleiman Rashid Hilole**, the alleged caretaker for the Plaintiff applicant herein and alleged that **Plot No. 105/1828 (plot No. 10218)** was sold to 1<sup>st</sup> Defendant by 2<sup>nd</sup> Defendant and warned the said Suleiman that he was a trespasser. That letter led to the filing of this suit.

I have considered the affidavits filed by the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. The 3<sup>rd</sup> Defendant allegedly stated that what is in dispute is the location of the Plaintiff's plot rather than ownership dispute. **Godfrey Muchiri** alleged that the Plaintiff's plot is located elsewhere and that the suit plot belongs to the 1<sup>st</sup> Defendant. However, as I had observed earlier, the Plaintiff purchased his plot in the **year 2006** and was allegedly shown the plot by the 3<sup>rd</sup> Defendant and its surveyor. Applicant allegedly took possession of the suit plot and has remained in possession. It is also very clear that in the sale agreement, the plot was also described as **Plot No. 105/1828**. I must also observe that 2<sup>nd</sup> Defendant did purchase his plot in the year 2009. That was 3 years after plaintiff applicant had purchased his suit plot. The plot purchased by 2<sup>nd</sup> Defendant was **V 10218** which is totally different from the Plaintiffs. The Defendant have alleged that this plot **V 10218** is the same as **Nairobi/Block 105/1828**. However, In the year 2006, Plot No. 105/1828 was described as plot **No. V 10271** belonging to the Plaintiff. The Plaintiff was the first one in time and this Court being the Court equity will be guided the Maxim in equity which states that;

**“when two entities are equal, the first in time shall prevail”.**

Having now considered the pleadings herein and the annexures thereto, the Court finds that the Plaintiff is the one in possession of the suit plot and was the first in time to possess it after purchasing the same from one **Jack Kamau Wachira** with the approval of the 3<sup>rd</sup> Defendant. Applicant has therefore established that he indeed bought **plot No. V10271** also known as **Nairobi/Block 105/1828**. The same is now being claimed by 1<sup>st</sup> Defendant herein though Plaintiff has been in possession. The Court finds that the applicant/Plaintiff herein has shown an infringement of his right to own property and has therefore established a prima facie case with probability of success.

On the second principle, the applicant must show that he will suffer irreparable loss which cannot be compensated by an award of damages. Applicant averred that he purchased the suit plot in the year 2006 with an intention of putting up his residential home. It is evident that in the year 2013, his caretaker received a demand letter which alleged that now plaintiff was a trespasser to this suit plot that he had

purchased 7 years earlier. Though it has variously been held that where damages would be adequate remedy, however strong the Plaintiff's case appears, then no injunction would be granted, I am of the view that in this case the applicant had purchased the suit plot herein with intention of putting up his residential home. The plot herein is therefore of sentimental value to him, As was held in the case of **John Gichanga Vs Cooperative Bank of Kenya Ltd ( 2005) elk'**

***“Land is unique and no one parcel can be equated in value to another”.***

The value of the suit plot can be ascertained, however, it is not proper to state in this case that the Plaintiff would be compensated in damages. I therefore find that damages herein will not be a suitable remedy since Plaintiff has established an infringement of his right to property.

On the balance of convenience. I find that the Plaintiff /Applicant herein is in possession. The balance of convenience tilts in favour of maintaining the **Status Quo** and the **Status Quo** herein is that he Plaintiff/Applicant is in possession. Therefore the balance of convenience tilts in favour of the Plaintiff/Applicant.

The applicant has also sought for a mandatory injunction to issue against the 2<sup>nd</sup> Defendant /Respondent to give and/or handover vacant possession of **plot No. 10271** also known as **Nairobi/Block 105/1828** to the Plaintiff/Applicant pending the hearing and determination of the suit.

As I consider whether to grant the said Order or not, I take into account that an injunction Order is an equitable relief issued to prevent the ends of justice being defeated. I will also take into account that a Mandatory injunction is like final Order which is granted in very special circumstances and has the effect of bringing a matter to its finality. I will therefore be guided herein in case of **Kenya Breweries Ltd and another Vs Washington O Okeyo , Civil appeal No. 332 of 2000 (2000) LR 4984, ( IEA 109)** where the Court held that;

***“A mandatory injunction can be granted on an interlocutory application as well as the hearing but in the absence of special circumstances , it will not normally be granted , However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done which can be easily remedied or of the Defendant attempted to steal a March on the Plaintiff....a mandatory injunction will be granted on an interlocutory application”.*** See also **Volume 24 Halsbury Laws of England 4<sup>th</sup> edition paragraph 948.**

It is not in doubt that the applicant herein purchased his plot V 10271 also known as **Nairobi/Block 105/1828** in the year 2006. It is also not in doubt that the 2<sup>nd</sup> Defendant allegedly acquired his plot **No. V 10218** also allegedly known as **Nairobi Block 105/1828**(similar to the Plaintiffs) in the **year 2009**. He later sold the said plot of the 1<sup>st</sup> Defendant in the year 2010. The 1<sup>st</sup> Defendant has now given the Plaintiff **Notice** to vacate the suit plot. The Plaintiff was allegedly shown the suit plot 3 years before the 2<sup>nd</sup> Defendant acquired his plot. Though the 3<sup>rd</sup> Defendant alleges that it could assist the Plaintiff to trace the location of his real plot, it allegedly participated in the year 2006 in showing the Plaintiff/Applicant the suit plot that he is now in occupation. The Plaintiff has been in possession of the suit plot until 2013 when the advocates for the 1<sup>st</sup> Defendant wrote to the Plaintiff's caretaker that he was a trespasser on the suit plot. If the 1<sup>st</sup> Defendant would make his threat real and enter the suit plot, the plaintiff/applicant would lose possession of the plot that he has held since the year 2006. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants herein are later entry. The Plaintiff has established that there exist special circumstances that would dictate that the court do issue mandatory injunction.

The Defendants have all averred that the suit plot belongs to the 1<sup>st</sup> Defendant. It is evident that the Plaintiff acquired this plot way before 2<sup>nd</sup> Defendant. The 3<sup>rd</sup> Defendant participated in showing the Plaintiff /Applicant the Beacons of the suit plot. The 3<sup>rd</sup> Defendant has now turned round and alleged that the suit plot belongs to the 1<sup>st</sup> Defendant. The Court finds that in this matter, the defendants are trying to steal a March on the Plaintiff/Applicant

For the above reasons, the Court finds and holds that the Plaintiff/Applicant deserves a Mandatory injunction.

The Court has considered the whole Notice of Motion and noted that the applicant has sought for orders against the 2<sup>nd</sup> Defendant. However, I noted that the Plaintiff did amend the Plaintiff on **21<sup>st</sup> August; 2013**. The application is brought under **Order 40 Rules 1 & 2 and Section 3A of the Civil Procedure Act** and all the enabling provisions of the law. **Section 3A** donates to court the inherent jurisdiction **to issue such Orders that would enable end of justice to be met**. The Court will also be guided by overriding objective of the Civil Procedure Act as provided by **Section 1A and 1B of the Act and Article 159 of the Constitution** and holds that all the Orders sought herein will apply to all the (3) three Defendants.

Consequently, the Court allows the Plaintiff's/Applicant's Notice of Motion dated **21<sup>st</sup> August 2013** in terms of prayers **No.3 and No. 4** and the said Orders will apply against the **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**.

The applicant is also entitled to costs of this application to be borne by all the Defendants.

It is so ordered.

**Dated, Signed and delivered this 27<sup>th</sup> day of February, 2015**

**L. GACHERU**

**JUDGE**

In the Presence of:-

Ms Mwatsama holding brief Wachira for Plaintiff/Applicant

Mr Wasonga for 1<sup>st</sup> Defendant/Respondent and holding brief for Ngata for 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Respondents.

Kamau: Court Clerk

**L. GACHERU**

**JUDGE**