



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 213 OF 2012**

**CHRISTOPHER WACHIRA GITHUI.....1<sup>ST</sup> PLAINTIFF**

**VERSUS**

**JORETH LIMITED .....1<sup>ST</sup> DEFENDANT**

**NYALI BEACH CYCADS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff has filed an application by way of an Amended Chamber Summons dated 12<sup>th</sup> February 2013, seeking an injunction against the Defendants to restrain them from evicting the Plaintiff from Parcel No. L.R. No. 13330/506 or from selling, disposing transferring, alienating or registering any transfer they may have executed in favour of anybody and/or third party or interfering in any way with parcel No. LR 13330/506 and/or plot number 226 at Thome Farmers No. 5 Limited Estate Nairobi (hereinafter the suit property) until the hearing and determination of this suit. Further, that the Plaintiff be allowed to retain possession of Plot No. L.R. 13330/506 until the hearing and determination of this suit.

The Plaintiff gave a detailed account of his grounds and interest in the suit property in a supporting affidavit and further affidavit he swore on 12<sup>th</sup> February 2013 and 3<sup>rd</sup> May 2013 respectively. In summary he claims to have bought plot No 226 from one Stanley Gichuki Maitho who was allotted the said plot by Thome Farmers 5, and that the said plot was part of land known as LR No 13330 which Thome Farmers No 5 had purportedly bought from the 1<sup>st</sup> Defendant. He attached the said sale agreement and a share certificate issued to him by Thome Farmers No. 5. He also stated that the Directors of the 1<sup>st</sup> Defendant had agreed by resolution to sell L.R No. 4920/3/1/ and LR 4920/3/2 to Thome Farmers Ltd, and that payments were made to the said Directors pursuant to this resolution. However, that the said land does not seem to have been transferred to Thome Farmers No 5, and the 1<sup>st</sup> Defendant subsequently filed HCCC 6206 of 1992 to remove trespassers who were on the said land. He attached copies of the said resolution and the payment receipts.

The Plaintiff claimed that pursuant to a consent reached in HCCC 6206 of 1992 to the effect that those who had plots in the said parcels of land pay Kshs 200,000/= to the 1<sup>st</sup> Defendant to obtain titles, he paid the 1<sup>st</sup> Defendant's advocates Kshs 40,000/= in November 2005 and was to pay the balance of Kshs 160,000/= when his titles had been prepared. However, that in January 2011 and March 2012 he received notices to vacate the suit property from the 1<sup>st</sup> Defendant, and that on 31<sup>st</sup> October 2012 the suit property was invaded by persons assisted by the police, who pulled down the wall and semi-permanent house he had erected thereon. He attached various letters written by his Advocates and the Advocates of the 1<sup>st</sup> Defendant in this regard.

The Plaintiff further stated that upon inquiry from the Officer Commanding Station (OCS) of Kasarani Police Station, he was informed that the said OCS had been served with a Court Order directing him to assist Mr. Kangeri Wanjohi t/a Kindest Auctioneers to levy distress against the Plaintiff for arrears of rent of Kshs.300,000/=, which was owed to the owner of the suit property, being the 2<sup>nd</sup> Defendant herein. Further, that the Plaintiff then instructed his advocates on record to challenge the said orders issued by the Chief Magistrate's Court in Nairobi in Miscellaneous Application Number 849 of 2012, and was granted orders by the said Court stopping construction on the suit property by the 2<sup>nd</sup> Defendant. The Plaintiff stated that the 2<sup>nd</sup> Defendant in its reply to his application challenging the distress for rent order claimed to have bought the suit premises from the 1<sup>st</sup> Defendant and exhibited a title to that effect. He attached copies of the various court orders.

The Plaintiff claims that the 2<sup>nd</sup> Defendant's workers were subsequently removed from the suit property by the OCS Kasarani, and that he was aware that Mr. Nderitu Wachira who is the majority shareholder of the 2<sup>nd</sup> Defendant Company is an employee and/or an agent of the 1<sup>st</sup> Defendant herein, and was aware of his interest in the suit premises even before the alleged sale of the plot between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

The 1<sup>st</sup> Defendant opposed the Plaintiff's Notice of Motion in a Replying affidavit sworn on 20<sup>th</sup> March 2013 by its Director, Duncan Ndegwa, who stated that at no point has the suit property ever been vested in one Stanley Gichuki Maitho or Thome Farmers No. 5 to enable them pass any interest in the land to the Plaintiff, and that the ownership, beneficial or otherwise of the suit property never vested in the Plaintiff. Further, that at all material times, the subject property was registered and owned by the 1<sup>st</sup> Defendant which is the registered owner of all the piece of land known as Land Reference Number 13330, having been so registered on 19<sup>th</sup> December 2000.

The deponent further stated that the 1<sup>st</sup> Defendant is not the same as Thome Farmers No. 5 Limited, neither are the two entities related by partnership, joint venture or in any other way. Further, that there was no transfer of Land Reference Number 13330 to the said Thome Farmers No. 5 Limited by the 1<sup>st</sup> Defendant at any time whether amalgamated and/or as a sub-division thereof, and that the said land at all times remained the property of the 1<sup>st</sup> Defendant.

The deponent gave a detailed account of its ownership of the parcels of land L.R No. 4920/3/1/ and LR 4920/3/2 which were later amalgamated to be L.R. No. 13330, and of its resultant sub-division to the suit property. He admitted that the 1<sup>st</sup> Defendant filed HCCC Number 6206 of 1992 against persons who had trespassed onto what is now L.R Number 13330, which suit was determined in the year 2002 by a consent order. Further, that the Plaintiff by his own admission has acknowledged being aware of the stated consent order, and that his payment of Kshs.40,000/= was in violation of the said consent order which provided for the payments in full of Kshs.200,000/=, and it was not for the Plaintiff to determine how he would pay the said sum without consent being first obtained from the 1<sup>st</sup> Defendant.

Lastly, the 1<sup>st</sup> Defendant stated that being the sole and rightful owner of the subject land it has rightfully and lawfully transferred the suit property to the 2<sup>nd</sup> Defendant who purchased the same and obtained a valid title to the suit premises. Further, that the Plaintiff has illegally and without any colour of right whatsoever in law, entered into the premises and purported to put up a building thereon without the consent of the 1<sup>st</sup> Defendant.

The 2<sup>nd</sup> Defendant's response was in a replying affidavit sworn on 21<sup>st</sup> March 2013 by its Director, Nderitu Wachira. He stated therein that the 2<sup>nd</sup> Defendant is the legal owner of the suit property and attached a copy of the 2<sup>nd</sup> Defendant's title deed. Further, that the 2<sup>nd</sup> Defendant is in possession of the suit property having obtained eviction orders from the Chief Magistrate's Court in Nairobi in Miscellaneous Application Number 849 of 2012. The deponent stated that at the time of obtaining the said eviction orders, the 2<sup>nd</sup> Defendant had not been enjoined as a party to the suit herein, nor were they made aware of any orders issued herein. The deponent denied that he is neither an employee nor agent of

the 1<sup>st</sup> Defendant, and that the only relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant is that of a willing buyer and seller. Further, that the 2<sup>nd</sup> Defendant was not aware of the Plaintiff's interest in the suit property before it purchased the same.

The parties were directed to file and serve written submissions in which they reiterated the averments made in their pleadings. The Plaintiff's counsel in submissions dated 8<sup>th</sup> May 2013 argued that the Plaintiff had shown a *prima facie* case as he had established that he lawfully and legally entered into the suit premises through a purchase from the then owner Mr. Gichuki Maitho, who had been allocated the property by Thome Farmers No.5 Ltd. Further that he had produced evidence of the sale of the suit property between Thome Famers No. 5 and the 1<sup>st</sup> Defendant. The counsel also argued that the Plaintiff had brought evidence of an offer by the 1<sup>st</sup> Defendant to sell the suit property to him at Kshs 200,000/= and of part payment of Kshs 40,000/=. Further, that the said contract had not been rescinded and the 1<sup>st</sup> Defendant therefore did not have capacity to sell the suit property to the 2<sup>nd</sup> Defendant.

The counsel for the Plaintiff further submitted that the 2<sup>nd</sup> Defendant was not a *bona fide* purchaser as he was aware of the Plaintiff's occupation and possession of the suit property. Further, that as the Plaintiff had been in occupation of the said property from 1987 to October 2012 when he was evicted by the 2<sup>nd</sup> Defendant, his loss of use of the said property cannot be adequately compensated in monetary terms.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counsel filed submissions dated 8<sup>th</sup> May 2013. He argued that the 1<sup>st</sup> Defendant was registered owner of the suit property and subsequently transferred it to the 2<sup>nd</sup> Defendant, and that it is trite law that a party who holds a certificate of title issued by the Registrar shall be taken to be the indefeasible owner of a parcel of land under section 23 of the repealed Registration of Titles Act. Further, that the Plaintiff had thereby failed to show a *prima facie* case as he is not the registered owner of the suit property and cannot enjoy more rights than the registered owner.

The Defendants' counsel further submitted that the 1<sup>st</sup> Defendant did not enter into any contract with, receive consideration from, or issue any certificate of allotment to the Plaintiff, and cannot be bound by the agreement entered into with Stanley Gichuki Miano or Thome Farmers No 5 Ltd by the said Plaintiff. Further that as the Plaintiff failed to pay the sum of Kshs 200,000/= pursuant to the consent order dated 27<sup>th</sup> June 2002, no contractual relationship existed between the Plaintiff and 1<sup>st</sup> Defendant for the purchase of the suit property.

I have read and carefully considered the pleadings, annexed evidence and submissions made by the Plaintiff and Defendants. The issues arising herein are whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** to be granted a temporary injunction, and if so whether the Plaintiff has also met the requirements for the mandatory injunction sought. The requirement for the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

In the case of mandatory injunctions it was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, in this regard that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. I note from the Plaintiff's Amended Plaint dated 12 February 2013 that he is seeking a declaration that the sale between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant was null and void and orders cancelling the transfer of the suit property to the 2<sup>nd</sup> Defendant, of specific performance of the offer issued to the Plaintiff by the 1<sup>st</sup> Defendant in the notice in the Daily Nation newspaper of 23<sup>rd</sup> July 2005, and of payment by the 2<sup>nd</sup>

Defendant of Kshs 160,000/= as compensation.

The Plaintiff relies on the shareholder certificate issued to him by Thome Farmers No.5 and a resolution dated 26<sup>th</sup> February 1974 by the Directors of Joreth Ltd to sell to Thome Famers Ltd L.R No. 4920/3/1/ and LR 4920/3/2 which were later amalgamated to be L.R. No. 13330. He also brought as evidence the consent order entered into on 22<sup>nd</sup> June 2002 in **HCCC 6206 OF 1992, Joreth Ltd vs Lewis Kibue and Others** and the advertisement of the same in the Daily Nation newspaper of 23<sup>rd</sup> July 2005 as to payment of Kshs 200,000/= by persons wishing to be issued with titles to the said land. The Plaintiff did not bring any evidence of title to the suit property and/or LR 33330 by Thome Farmers No 5 Ltd.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have on the other hand brought evidence of their title to LR 33330 and to the suit property respectively. I find that in these circumstances, the Plaintiff has not established a *prima facie* case since he has not brought any evidence of a title to the suit property acquired by Thome Farmers No 5 Ltd from whom he claims to derives his interest in the suit property, or of any agreement entered into with the 1<sup>st</sup> Defendant who were the registered owner of the suit property at the time he took possession of the same. In addition he has not shown compliance with the consent order entered into on 22<sup>nd</sup> June 2002 in **HCCC 6206 OF 1992, Joreth Ltd vs Lewis Kibue and Others** in which he was required to pay Kshs 200,000/= within 6 months of the date of the said order, which by his own admission he has not done.

Lastly, as the suit property is now registered in the name of the 2<sup>nd</sup> Defendant, this court is guided by the decision of the Court of Appeal in **Dr. Joseph arap Ngok vs Justice Moiwo ole Keiwa & 4 Others, Nairobi CA No 60 of 1997** that in the cases of double allocation a party who has been issued with a good title takes precedence over other equitable rights to the title. However, the issue of whether the title issued to the 2<sup>nd</sup> Defendant with respect to the suit property is good title will have to be determined after full trial and not at this stage. Likewise, the question as to whether the agreement entered into between the 1<sup>st</sup> Defendant and Thome Farmers No 5 Lt for the purchase of the suit property, and if so, the effect thereof, will have to be determined after examination of evidence during full trial.

The Plaintiff's Amended Chamber Summons dated 12<sup>th</sup> February 2013 is accordingly denied for the foregoing reasons. The costs of the said Amended Chamber Summons shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 4<sup>th</sup> day of March, 2014.

**P. NYAMWEYA**

**JUDGE**