



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**SUIT NO. 329 OF 2012**

**CATHERINE WANGUI KARIUKI ..... PLAINTIFF**

**VERSUS**

**NYAHURURU D.E.B PRIMARY SCHOOL SUED THROUGH  
THE OFFICIALS OF ITS COMMITTEE NAMELY**

**JOHN ALUMA EKAI - CHAIRMAN**

**MARY NJERI MUNENE - SECRETARY**

**GERALD NDUHIU - TREASURER ..... DEFENDANT**

**RULING**

1. The plaintiff vide a notice of motion application dated **19<sup>th</sup> December, 2012** stated to be brought under **Order 40 Rules (1), (2) and (4), Order 51 Rule 1 of the Civil Procedure Rules and Section 1A of the Civil Procedure Act, seeks *inter alia* among others;**

**(i) That an order of injunction do issue restraining the defendant either by itself, its agents, servants and anybody else whatsoever either claiming in or by its names from entering, remaining, interfering, erecting structures or in any other way whatsoever from dealing with title No. Nyandarua/ Nyahururu Municipality Block 6/650 ('Suit Land') which is distinct and owned by the plaintiff pending the hearing and determination of this suit.**

**(ii) That the defendant be condemned to pay costs of this suit**

2. Grounds in support of the application are stated on its face and there is a supporting affidavit sworn by the applicant. The thrust of the applicant's application is that she is the owner of the suit land. She was bequeathed the same vide **Nakuru High Court succession cause No. 55 of 2007** on the demise of her husband, **Charles Peter Murage Kariuki** (hereafter refer red to as the deceased), Confirmation of grant and grant of letters of Administration intestate (**CWK I (a) and (b)**) evidencing the same have been exhibited.

3. The land was subsequently registered in the name of the plaintiff on **6<sup>th</sup> April, 2010 (see CWK 3)** and a certificate of lease issued by the Lands office in her name.

4. The deceased had made an application for allocation of a plot in Nyahururu Municipality on **9<sup>th</sup> May, 1992**. By a letter dated **13<sup>th</sup> April, 1993** the Commissioner of Lands confirmed that the plot was available and in a commercial Zone (**CWK 5**). On **12<sup>th</sup> May, 1993** the District Physical Planning Officer - Nyandarua wrote to all the statutory authorities within the district inviting their comments or objections on the allocation of the suit plot to the deceased but no known objections were ever received.

5. On **31<sup>st</sup> May, 1994**, the deceased was issued with an allotment letter and paid all the, requisite fees which was acknowledged by the Commissioner of Lands vide his letter dated **2<sup>nd</sup> August, 1994 (CWK 9)** and the deceased was issued with a certificate of lease on **29<sup>th</sup> April, 1996 (CWK 12)**

6. In **1994**, one **Joseph Mbaria Muchina** encroached on the vacant suit land and started storing building materials there in without the consent of the deceased forcing the deceased to institute **civil case No. 2018 of 1996** against him but the deceased passed on before Judgment could be delivered.

7. The respondent through his agents have now erected a perimeter fence around the suit land and are purporting to carry out developments therein. This has caused the applicant great loss as she has been unable to develop her plot and her rights should be protected by this court.

8. The applicant has approached the court seeking the orders alluded above whose effect will be to have the respondent removed from the suit land. As I understood the prayers and submissions by counsel for the applicant he wishes that this court grants them an interlocutory mandatory injunction.

9. In a rejoinder, the respondent thought the Attorney General opposes this application. The chairman of the school management committee, Nyahururu D.E.B Primary school, has filed a replying affidavit. In summary, the respondent contends that the suit land initially belonged to Nyahururu Municipal Council who were given title to the land on **1<sup>st</sup> May, 1954** by the Colony and protectorate of Kenya (**JEA 1**).

10. This land was a park but was allocated to the school for future development (**JEA 3**) vide a letter dated **17<sup>th</sup> April 2013**. This letter followed a resolution passed by Nyahururu Municipal Council Town planning and housing Committee in a meeting held on **4<sup>th</sup> August, 1992 (JEA2)**.

11. **On 4<sup>th</sup> May, 2012** Nyahururu D.E.B Primary school made a formal application to the Commissioner of Lands to be issued with a title deed for the suit land (**JEA 4**) and subsequently wrote to the Attorney General that the applicant was trying to grab public land in collaboration with corrupt officials from Ministry of Lands.

12. The long and short of the respondents contention is that there was impropriety in the manner in which the suit land was allocated to the deceased as the respondent is a public school which gives very critical service in terms of providing primary education to the public. The respondent's counsel's view is that, for all the reasons stated in his written and oral submissions the present application should fail.

13. The application was disposed of by way of written submissions. In his submissions, Counsel for the applicant reiterated what was contained in the applicant's grounds and supporting affidavit. He relied on the case of **Cheruiyot vs Bartiony, Civil Appeal No. 79 of 1986, (1988) KLR 422** where the court of appeal held; "**the contest of title having been fully determined in the respondent's favour, he is entitled, as a necessary incident of that ownership, to have full and exclusive possession of the suit land as against the appellant** "

14. The Respondent's Counsel equally filed written submissions. He too reiterated what was contained in the replying affidavit of **John Aluma Ekai**. He submitted that the applicant had not come to court with clean hands. He relied on the cases of **Kent Liboso and Another vs.**

**Cirkon Trust Co. Ltd & two others ELC 288 of 2011 and Virginia Njoka. vs Joel Nathan Ouma & Another ELC 285 of 2012.**

15. As far as I understood the parties, I am called upon to determine several issues which will lead to the success or failure of this application as follows:-

**(1) Was the deceased properly allocated the "suit land" or put differently; Was there impropriety by the deceased in the manner of acquiring the "suit land"?**

**(2) If there was impropriety, was the deceased part of the same or at the very least was he aware, at time of allocation of the "suit land" that the respondent had any rights (perceived or real) over the same or that it had been set aside for future development of Nyahururu D.E.B Primary school?**

**(3) Does the respondent have any rights over the "suit land"**

**(4) If indeed the respondent had any rights were the same extinguished by the allocation of the "suit land" to the deceased and subsequently the issuance of the certificate of lease.**

16. In considering the first issue, it is worth reiterating that the deceased was the registered owner of the suit land before the same was bequeathed to the applicant. He applied for allocation of a plot in Nyahururu Municipality on **9<sup>th</sup> May, 1992** which was approved on **17<sup>th</sup> December, 1992** and he was issued with an allotment letter on **31<sup>st</sup> May, 1994**. He accepted the allotment on **19<sup>th</sup> July, 1994**, paid all the requisite fees which was acknowledged by the Commissioner of Lands vide his letter dated **2<sup>nd</sup> August, 1994**. He was issued with a certificate of lease on **29<sup>th</sup> April, 1996**.

17. Before the allotment letter was issued, a lot of correspondence was being exchanged between the Ministry of Lands office, its sister Ministries and local administration in relation to the suit land. By a letter dated **13<sup>th</sup> April, 1993** to the District Commissioner Nyandarua, the Commissioner of Lands, affirms to me that the suit land had been "earmarked as a special purpose plot". In his letter he states that there was a plot available and in a commercial Zone but had a problem. In part he states "**the plot shown on the plan attached has had Government approval but documentation has not been possible because the plot is planned as a special purpose plot. I would propose that a special purpose plot be planned elsewhere because this is a commercial zone and the plot be planned for that purpose. I would appreciate if the planner is requested to do that so that this allocation can be finalised.**"

18. To cure this problem, the District physical planning officer Nyandarua on **12<sup>th</sup> May, 1993** wrote to the Commissioner of Lands enclosing the part development plans for the Commissioners' processing and documentation. He copied this letter to the District Commissioner Nyandarua, Permanent Secretary Ministry of Lands and settlement, through the director physical planning department. This appears to have dealt with the "special purpose plot" because thereafter this plot was allocated to the deceased as a commercial plot. To my mind this also implied that the plot was no longer available for the original intended purpose. -

19. It appears to me that the deceased followed the required channel in obtaining and processing his title to the suit land. It is also clear that the Commissioner of Lands was aware of the initial intended use of the plot and took the trouble to regularize the same through the District Commissioner Nyandarua and the relevant departments.

20. There is no evidence adduced by the respondent that the deceased was aware that this land had been earmarked for expansion of Nyahururu D.E.B Primary school or that there was impropriety on his part. It cannot therefore be said that the deceased was aware of the history of the suit land prior to the issuance of the allotment letter and later the certificate of lease. Failure to adduce evidence to prove such assertions is clearly in contravention of **Section 107 of the Evidence Act (Cap 80) Laws of Kenya** which provides:-

**"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists."**

That disposes issues No. 1 & 2 above.

21. As regards the third issue, the respondent is predicating its claim over the suit Land on a resolution passed by the Nyahururu Municipal Council Town Planning and Housing Committee in a meeting held on **4th August, 1992** regarding public parks in Nyahururu as **follows;" regarding the park next to Nyahururu Primary School, the committee recommended that the site be planned by the District Physical planning officer as an extension of the Primary school for future development"**.

22. According to the respondent, this resolution was what conferred ownership rights to the respondent which was confirmed by **W.H Wahome** in his letter dated **17<sup>th</sup> April, 2013** which stated in part as follows **This is to confirm that the park next to Nyahururu D.E.B Primary school was allocated to the school for future development vide min. No. TPW& H 41/92 of 4<sup>th</sup> August 1992...."**

23. It was not until **4<sup>th</sup> May, 2012** that Nyahururu D.E.B Primary school made a formal application to the Commissioner of Lands to be issued with a title deed for the suit land and subsequently wrote to the Attorney General complaining that the plaintiff was trying to grab public land in collaboration with corrupt officials from Ministry of Lands.

24. The deceased was issued with a certificate of lease on **29<sup>th</sup> April, 1996** which was thereafter bequeathed to the applicant and she was issued with her own certificate of lease on **6<sup>th</sup> April, 2010**. The applicant as the registered owner in terms of **Section 26 (1) of the Land Registration Act No. 3 of 2012**, her title is absolute and indefeasible and can only be challenged on the grounds set out under **Section 2(1) (a) and (b)** of the Land Registration Act 2012. Section 26 (1) of the Land Registration Act provides;

**"The certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge,**

Except;

- a. on the grounds of fraud or misrepresentation to which the person is proved to be a party or**
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."**

25. As I have noted there is no evidence that the deceased was party to any alleged impropriety and from the evidence tendered, the deceased was allotted and/ acquired the suit property legally and procedurally. Any perceived rights the respondent thought they had by the resolution passed by Nyahururu Municipal Council Town planning and Housing Committee in a meeting held on **4th August, 1992** were illusory and non- existent at the time. This resolution did not confer any rights to the respondent. Having answered this issue as above it follows that issue number 4 collapses as well. I say so because the foregoing demonstrates that the Nyahururu Municipal Council Town planning and Housing Committee though passed the said resolution, they failed to follow up by issuing an allotment letter to the respondent so as to confer rights to them and enable them process a title deed for the suit land.

26. Having made the findings as I have, the question that comes to the fore is this, and should this court grant an interlocutory mandatory injunction? There is no doubt in my mind that the answer is in the affirmative.

27. What then is the criteria for the grant of this kind of relief seeing as it appears, that such orders will have the effect of substantially concluding the suit? Fortunately for us, the East African Court of Appeal and our very own court of Appeal have dealt with this kind of situation before; see for instance, **The Despina Pontikos (1975) 1E.A.-38; Mucuha -vs- Ripples Ltd (1990-1994) 1 EA 338; Kenya**

**Breweries Limited- -vs. Okeyo)2002) 1EA 109 CAK.** These decisions and others have reiterated that an interlocutory injunction shall only be granted in very special cases and in very clear circumstances.

27. Our High Court has followed\* this principle for grant of interlocutory mandatory injunction; see for instance, **Bojani -vs. - Mwaghoti (2002) 2 KLR 774; John Kirika Kimani & Another -vs. Hannah Njeri Nganga (2006) eKLR.**

28. Do the circumstances of this case satisfy the criteria repeatedly reiterated by the above cases and others? In my view they do. The deceased was validly allocated the suit land and had it registered in his name and thereafter in the plaintiffs name using the laid down procedure in **Government Lands Act Cap 280**. In any event, as stated above, the resolution passed by the Nyahururu Municipal Council Town planning and Housing Committee did not confer any such rights. Therefore to allow the respondent to continue in occupation of the suit land a minute longer will be an affront to the rights of the applicant as conferred to her by Law. I think I have said enough to show that this application must succeed.

29. Now, the applicant is effectively seeking interlocutory mandatory injunction. She requires the Respondent to cease being present on the suit land. That means that the respondent must vacate the Suit land and thereafter not interfere with the applicant's quiet occupation of the same. The court of Appeal in; **KIG Bar Grocery & Restaurant Ltd vs Gatabaki & Another (1972) 1EA 503**, held inter alia that, "**an order for mandatory injunction should be couched in positive terms rather than negative terms**".

30. In that regard, the order of this court shall be that the respondent is hereby ordered to vacate the Suit land within the next **Thirty (30)** days from the date of this ruling and hand over the same to the applicant. Should the respondent fail to do so, the applicant is at liberty to evict him from the Suit land. In doing so the applicant should enlist the assistance of the court bailiff.

**Dated, signed and delivered in open Court at Nakuru this 20<sup>th</sup> day of June 2014.**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mrs Katambi for the Defendants

N/A for the plaintiffs

Emmanuel Maelo: Court Clerk

**L N WAITHAKA**

**JUDGE**