



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC NO. 42 of 2014

SHEILA JEROTICH BETT.....PLAINTIFF/APPLICANT

VERSUS

FRED MUTUA T/A NZIOKA MUTUA &

ASSOCIATES.....1ST DEFENDANT/RESPONDENT

MBUKONI HOLDINGS LIMITED ..2ND DEFENDANT/RESPONDENT

RULING

The matter coming up for determination is the Notice of Motion dated 21st January, 2014 brought by the Plaintiff/Applicant herein, **Sheila Jerotich Bett**, seeking for orders against the Defendants. The Orders sought are:-

- i. *That pending the hearing and determination of this suit, the honourable court be pleased to issue an order of temporary injunction restraining the Defendants by themselves, their servants and or agents from trespassing into the Plot No. 21 being portion of LR NO. 12715/53 and or from occupying, selling, charging, conveying and or in any manner interfering with the plaintiff's occupation of the suit property.*
- ii. *Costs of the application be provided.*

The application was supported by the following grounds:

That the Plaintiff is the lawful owner and proprietor of plot No. 21 being a portion of **LR No. 12715/523**, further that the Defendants have without any lawful justification purported to indicate that a different person named **Jacqueline Koki Wambua** other than the Plaintiff owns plot No.21 . In addition, the Plaintiff stands to suffer irreparable loss and damages and it is for the interest of justice to grant the orders sought.

Further, the application was supported by the Affidavit of **Sheila Jerotich Bett**, who averred that she is the proprietor of plot No.21 being a portion of LR NO. 12715/53 having purchased the same from the 2nd Defendant and she obtained a certificate No. 2870 annexure No. SJB1. She further stated that she has never sold and or transferred the said plot and /or in any manner conveyed her interest in plot No. 21 to

one **Jacqueline Koki Wambua** or anyone at all. She contends that she stands to suffer irreparable loss and damages if the Orders sought are not granted.

The application is vehemently opposed by the 1st Defendant herein **Fred Mutua T/A Nzioki Mutua & Associates**. He averred that he is an advocate of the High Court of Kenya, and he acts for the property owner, one **Joseph Nzuna Vili** and upon whose instruction his engagement on LR No. 12715/523 is based.

He further averred that it came to his knowledge that their client **Joseph Nzuna Vili** severed his relationship with the 2nd Defendant, **Mbukoni Holdings Ltd** in the year **2006** or thereabout when the 2nd Defendant failed to pay their client his full amount for the land he had proposed to purchase being **LR No. 12715/523** and the said **Joseph Nzuna Vili** subsequently took back his land. It was his contention that there was no sale agreement between the plaintiff and the property owner **Joseph Nzuna Vili** and the 2nd Defendant is no longer in possession of the suit land.

The parties herein filed written submissions which I have considered. I have also considered the dispositions herein and the annexures thereto. I have also taken into account that at this juncture, the court is not called upon to decide or make any conclusive findings of the fact or law on the basis of affidavit evidence (See the case of **Tours and Travel Ltd vs National Industrial Credit Bank, Nairobi (Milimani) High Court, Civil case No. 1234 of 2004.**

The applicant herein is seeking for an order of Temporary injunction. This is an equitable remedy which is granted at the discretion of the court. However, this discretion must be exercised judicially. (See the case of **Hasmukh Khetshi Shah Vs Tinga Traders Ltd, Civil Appeal No. 326 of 2002 (2002) KLR 4628**

In considering an application for injunction, the court will be guided by the three principles set out in the case of **Giella Vs Cassman Brown Ltd (1973) EA 358**, where it was held that; applicant must make out a prima facie case with probability of success at trial, that normally an injunction will not be granted unless it is shown that the applicant is likely to suffer irreparable injury which cannot be compensated in damages and thirdly, that is the court is in doubt it should decide on a balance of convenience”.

Has the application herein established the above stated principles?

The suit property in issue is LR No. 12715/523 in Machakos County. The Applicant herein alleged that she bought the suit plot No. 21, a portion of **LR No. 12715/523** from one **Evans Onger** for **Kshs. 330,000/=** and the said **Evans Onger** surrendered his rights over the said plot to her. However, the plaintiff did not attach any sale agreement between her and the said **Evans Onger** or any receipt issued to her by the said **Evans Onger** for money paid.

The 1st Defendant on his part alleged that the suit Land **LR No. 12725/523** belongs to one **Joseph Nzuna Vili** who has instructed his law firm to deal with the conveyance issues. He further submitted that the 2nd Defendant had intention of buying the same and when he defaulted in his payment of the full purchase price, the 1st Defendant's client reclaimed his property. 1st Defendant submitted that the said **Joseph Nzuna Vili** is the registered owner of the suit land and has not entered into any sale agreement with the plaintiff herein. That allegation has not been disputed by the Plaintiff. If the said **Joseph Nzuna Vili** is the registered owner of the suit land, then injuncting the Defendants herein would be an exercise in futility. The issues raised herein can be decided after a full trial. The court finds that the applicant has not established that she has a prima facie case with probability of success.

On the second principles, the applicant alleged that she purchased the land for **Kshs.330,000/=** no evidence that she has taken possession of the suit land. She has not been given Title Certificate for the suit land. Her annexure **SJB 2** shows that the value of **1/8 acre** was about **1.5 and Kshs. 1.8 Million**. The value of this plot can therefore be ascertained. In the event the applicant succeeds in her claims, then the value of the suit land can be ascertained and she can be compensated by way of damages. No

evidence therefore that applicant will suffer irreparable loss which cannot be compensated by an award of damages (See the case of Wilfred Oanda Kirochi Vs David Pius Mugamba , Civil Appeal No. 76 of 1995), where the court held that :-

“ If damages can suffice injunction not to be granted”.

In this matter, the court is no in doubt since the Plaintiff herein does not have certificate of Title. The share certificate in itself does not confer interest superior to the person who is the registered owner. The applicant herein is also not in possession of the suit property and the court cannot hold that she has been enjoying quiet possession. The court finds and holds that the balance of convenience herein does not tilt in favour of the applicant.

From the foregoing, the court finds that the applicants Notice of Motion dated 21st January, 2014 is not merited. The same is dismissed entirely with costs to the 1st Defendant.

It is so ordered.

Dated, Signed and delivered this **9th** day of **June, 2014**

L. GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiffs/Applicants

None attendance for the 1st Defendant/Respondent

None attendance for the 2nd Defendant/Respondent

Kabiru: Court Clerk

L. GACHERU

JUDGE

9/6/2014