



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 1247 OF 2013**

**PETER KUNGU NGANGA.....PLAINTIFF**

**VERSUS**

**BONIFACE MAYABI .....1<sup>ST</sup> DEFENDANT**

**CAROLINE MATAGARO.....2<sup>ND</sup> DEFENDANT**

**KENYA INSTITUTE OF MASS**

**COMMUNICATION SUED THROUGH**

**THE PRINCIPAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

**The Application**

The Plaintiff filed an application in court by way of a Notice of Motion dated 16th October 2013. The Plaintiff is seeking orders of a temporary prohibitory injunction restraining the Defendants from forthwith interfering in any way with his quiet possession of the property known as L.R No. 209/14517 (hereinafter referred to as "the suit property"), and the ongoing construction on the said property pending the hearing and determination of this suit. Further, that an order do issue to the Officer Commanding Station, Industrial Area Police Station to ensure compliance thereof.

The Plaintiff claims that he is the registered owner of the suit property, and has obtained development permission from the City Planning Department allowing him to construct a building thereon. Further, that having complied with all the conditions stipulated by the City Planning Department, he commenced with construction on the site on 12<sup>th</sup> October, 2013. However, that on 15<sup>th</sup> October, 2013 and without any right or basis, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants mobilized the students of the 3<sup>rd</sup> Defendant to vandalise and destroy the site house and other property on suit property, on the ground that the said property belonged to the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are head of security and Chairman of the student's association of the 3<sup>rd</sup> Defendant respectively.

The Plaintiff claims that the Defendants' actions are in breach of his constitutional right to protection of his property in accordance with section 25 of the Land Registration Act as read together with Article 40 of the Constitution. He wants the court to allow him to continue with the construction of the approved development to be able to complete the same within the time lines fixed by the City Planning Department, as well as within the agreed time frame with the professionals involved. Further, that any delay will increase the cost of construction.

The Plaintiff in his supporting affidavit sworn on 16th October 2013 and supplementary affidavit sworn on 20th December 2013 explained that he bought the suit property from one Nancy Omwodo Deya. Further, that this was after carrying out due diligence and establishing that the suit property was first allotted as unsurveyed plot No. 282 on 1<sup>st</sup> July, 1999 by the Department of Lands to Jennifer Deya and Jacob Mucangi, and that the said plot had a residential house. He annexed a copy of the said letter of allotment. He also annexed copies of court orders issued in Miscellaneous Civil Application No. 189 of 2003 wherein the Ministry of Roads, Public Works and Housing was restrained from evicting the said owners of the plot, and of a schedule of allocations showing the plots that were allocated to various individuals and those allocated to the 3<sup>rd</sup> Defendant.

The Plaintiff further explained that after survey, the said Plot No. 282 became Land Reference No. 209/14517 which he purchased from Nancy Omwodo Deya who was the daughter of the original allottee. The Plaintiff annexed a certificate of grant in respect of the estate of Jennifer Deya dated 14<sup>th</sup> March 2012 issued in Succession Cause No. 126 of 2012, showing that L.R No. 209/14517 was given to her daughter Nancy Omwodo Deya. The Plaintiff averred that he was therefore satisfied that the property was lawfully acquired by the seller, and that his property is situated opposite the 3<sup>rd</sup> Defendant's premises and there is a road in between separating the two properties.

The Plaintiff reiterated that he bought the suit property with the sole intention of constructing rental flats thereon, and he explained the processes he engaged in preparation of the building plans, and the application for and grant of development permission. He attached copies of the said plans and development permissions. He also explained in great detail the events of 15th October 2013 when his property on the suit property was destroyed. He stated that thereafter, the residents occupying houses/plots along Mwembere road, South B wrote letters to the Principal Secretary, Ministry of Lands, Housing and Urban Development seeking assistance following distribution of threatening leaflets. He annexed copies of the said letters dated 23<sup>rd</sup> October, 2013 and 21<sup>st</sup> October 2013 as well as of the said leaflets.

Further, that he was informed by his neighbors that the Permanent Secretary, Ministry of information and Communication had by way of a letter dated 18<sup>th</sup> June 2010, issued the tenants 90 days' notice to vacate their houses on the basis that the houses belonged to Kenya Institute of Mass Communication. However, that the Ministry of Housing advised the Ministry of Information and Communications that the houses that were handed over to the management of Kenya Institute of Mass Communication are Mg 269-273 being 5 units and Mg 288-321 being 30 units. The Plaintiff stated that his unit being Mg 282 was clearly outside those allocated to Kenya Institute of Mass Communication. He annexed a copy of a letter dated 23<sup>rd</sup> September, 2010 as evidence of the above averments.

### **The Response**

The Defendants opposed the Plaintiff's application in a replying affidavit and further affidavit sworn on 4th December 2013 and 4th April 2014 respectively. The replying affidavit was sworn by Hiram Mucake, the Acting Director, Kenya Institute of Mass Communication, who stated that the Kenya Institute of Mass Communication had been a department of the Ministry of Information and Communications until it became a body corporate through the Kenya Institute of Mass Communication Order of 2011 that was in Legal Notice Number 197 of 2011.

Further, that on 1<sup>st</sup> February, 2002 a letter of allotment was issued to the then Permanent Secretary of Treasury as a Trustee of Kenya Institute of Mass Communication with respect to land measuring approximately 5.546 hectares for a term of 99 years from the said date, and for educational purposes. The deponent stated that the said acreage comprised of the following plot numbers 209/3578, 209/3579, 209/3592, 209/3593, 209/3586 - 3590 and a road reserve. He annexed a copy of the said letter of allocation.

The deponent further stated that Kenya Institute of Mass Communication through the Acting Principal accepted the letter of allotment and conditions thereto, and annexed a letter to this effect dated 24<sup>th</sup> July,

2002 addressed to the Commissioner of Lands. Further, that there were various follow-up processes by the Permanent Secretary Ministry of information and Communication who wrote to the Permanent Secretary, Ministry of Lands requesting for facilitation of title deeds, and by Kenya Institute of Mass Communication requesting the Director of Survey to locate boundary beacons. The said letters dated 11<sup>th</sup> November, 2008, and 7<sup>th</sup> March 2011 were annexed.

The deponent stated that the Ministry of Lands subsequently issued the indent letters on 20<sup>th</sup> November, 2012 requesting for the supply of deed plans for the registration of titles to LR Nos. 209/3578-3579, and 209/3592-3593. However, that for L.R No. 209/3579, the matter was suspended since from the records at the Director of Survey, the said land had been sub-divided into further portions including LR 209/14517, which subdivision was not done with the institute's consent.

Further, that a search on LR No. 209/3579 at the Ministry of Lands, Housing and Urban Development revealed that they do not have records for the said parcels of land. The 3<sup>rd</sup> Defendant's claim is that L.R. No. 209/14517 is amongst government houses that are within the Kenya Institute of Mass Communication's allotted land which was hived off L.R NO. 209/3579, and should be declared as part of the Institute's land.

The Defendants also relied on the further affidavit sworn by Patrick Mwenda Bucha, the Director of Government Estates, who deponed that plot 282 was a government house and registered in the Public Works Department Building Register, and that the Plaintiff did not follow the laid down regulations before the demolition of the said house. The deponent proceeded to explain in detail the applicable procedures as provided by the Government Financial Regulations and Procedures.

### **The Submissions**

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel filed submissions dated 3<sup>rd</sup> April 2014 and supplementary submissions dated 23<sup>rd</sup> June 2014. He relied on sections 24, 25 and 28 of the Land Registration Act to argue that the certificate of title issued to the Plaintiff was *prima facie* evidence that he was the proprietor of the suit property as the absolute and indefeasible owner, and the said title could only be defeated if it is proved that it had been acquired illegally, unprocedurally or through a corrupt scheme.

Further, that the 3<sup>rd</sup> Defendant had not invoked the procedure and mechanisms provided for under the Land Registration Act to challenge the title issued to the Plaintiff. He also submitted that a copy of official search the Plaintiff annexed confirmed his ownership of the suit property. Further, that the Plaintiff had demonstrated that he conducted due diligence to establish ownership of the suit property before buying it from the previous owners.

The Plaintiff's counsel further submitted that the Defendant's letter of allotment exhibited as proof of their ownership of the suit property was not specific as to the plots that were allocated to the 3<sup>rd</sup> Defendant. It was also argued that the Plaintiff had brought evidence from the Ministry of Housing to show that the suit property was not among the plots handed over to the management of the 3<sup>rd</sup> Respondent, and of a court order prohibiting the Ministry of Housing and the 3<sup>rd</sup> Defendant from evicting the owners of the suit property. It was also submitted that the 3<sup>rd</sup> Defendant had not brought any evidence to show that the suit property was hived off L.R No 209/3579, or that the said LR 209/3579 was ever allocated to it.

Lastly, the Plaintiff submitted that he would suffer irreparable harm as his right to own and enjoy his property would be defeated if the orders sought are not granted, and that the balance of convenience titled in his favour as the orders of injunction would prevent the wasting and damaging of his property. The Plaintiff's counsel sought to distinguish the judicial authorities relied on by the Defendants, mainly on the grounds that the facts in this case were different from those in the cited decisions.

The Defendants' counsel filed written submissions dated 10<sup>th</sup> June 2014 wherein he reiterated the

processes used to allocate the 3<sup>rd</sup> Defendant the plots it is claiming, and also that the government procedures were not used in the disposal of the government building on plot 282, which later became the suit property. The counsel urged the court to be guided by the public interest in the matter herein, and quoted extensively from the decisions on the public trust doctrine in **Chemei Investments Limited vs the Attorney General & Others, Nairobi Petition No. 94 of 2005**, and **Mureithi & 2 Others ( For Mbari Ya Murathimi Clan) vs Attorney General & 5 Others (2006) 1 KLR 443** in this regard.

### **The Determination**

I have carefully read and considered the pleadings and arguments made by the parties herein. The issue for determination is whether the Plaintiff has met the threshold required for the temporary injunction he seeks to issue. The requirements for the grant of a temporary injunction are stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, which 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.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of a title in his name with respect to the suit property, and development permission to construct on the property. He also brought evidence of the letter of allotment dated 1<sup>st</sup> July 1999 of an unsurveyed plot no 282 given to the previous owners of the plot, and he claims that after survey the said plot became the suit property. The title he produced in evidence was initially issued to the said allottees on 25<sup>th</sup> April 2013, and the suit property was subsequently transferred to the Plaintiff on 20<sup>th</sup> September 2013.

The 3<sup>rd</sup> Defendant on the other hand claims that the said property was a subdivision of L.R NO. 209/3579 that was allotted to it, and has relied on a letter of allotment dated 1<sup>st</sup> February 2002. I have perused the said letter of allotment and note that there is a plot that is allocated to the 3<sup>rd</sup> Defendant therein, which is referred to as the “site for Kenya Institute of Mass Communication”. However the relationship between the said plot and the suit property is not clear from the said letter allotment and attached plan. I also note that the letter relied upon by the Defendants dated 7<sup>th</sup> March 2011 from the Provincial Surveyor for Nairobi which was attached as annexure “HM4” to their replying affidavit states that what is on the ground differs from what is provided in the survey plans. The letter also indicated that the survey plans were attached, which plans were however not produced in evidence.

Therefore, the only way to determine if indeed the suit property was hived off the land allocated to the Kenya Institute of Mass Communication is by the production of the necessary survey plans. At this stage what is evident is that the Plaintiff has title to the suit property, and no evidence has been provided to show that the said property was part of the plot allocated to the 3<sup>rd</sup> Defendant. In the circumstances I find that the Plaintiff has shown a *prima facie* case, and as registered owner he is entitled to deal with the suit property. In addition the Defendants have not indicated that they are able to compensate him in damages if he were to succeed in his suit.

I cannot at this stage make any finding as to the application of the public trust doctrine until further evidence is provided by the 3<sup>rd</sup> Defendant of its entitlement to the suit property. Likewise, the issue of the applicability of government procedures as to the demolition of the structures on the suit property can only be decided upon after further evidence is given showing that the house on the suit property was a government house.

The Plaintiff's Notice of Motion dated 16th October 2013 is accordingly allowed, and it is hereby ordered as follows:

1. The Defendants, through themselves, their agents, employees, assigns, representatives or any other person authorized to act on their behalf be and are hereby restrained from interfering in any manner with the Plaintiff's possession of the property known as L.R No. 209/14517 and the

- ongoing construction on the said property pending the hearing and determination of this suit.
2. The Officer Commanding Station, Industrial Area Police Station shall ensure compliance and enforcement of the orders granted herein.
  3. The costs of the Plaintiff's Notice of Motion dated 16th October 2013 shall be in the cause

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_23<sup>rd</sup>\_\_\_\_ day of \_\_\_\_September \_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**