



**REPUBLIC OF KENYA**

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

**ELC CIVIL SUIT NO. 1018 OF 2013**

**JOHNSON MWANGI WANJIHIA.....PLAINTIFF**

**VERSUS**

**ALEX WAINAINA T/A**

**JOHN COMMERCIAL AGENCIES .....1<sup>ST</sup> DEFENDANT**

**JOAN ONYANGO T/A JOANS**

**BEAUTY/EXCELLENT PHONE DEALERS**

**EMBAKASI TASSIA STAGE (MPESA).....2<sup>ND</sup> DEFENDANT**

**IRENE KARANJA T/A GLORY MOTORCYCLES.....3<sup>RD</sup> DEFENDANT**

**EUNICE KANGETHE T/A EUNILITE AGENCIES,**

**ELECTRICAL & HARDWARE STALL.....4<sup>TH</sup> DEFENDANT**

**KENNEDY NYAPINDA T/A KEN INVESTMENT.....5<sup>TH</sup> DEFENDANT**

**RULING**

**The Plaintiff's Application**

The Plaintiff is the appointed Attorney of one Jane Waiigwe Gathura, and he has filed a Chamber Summons dated 19<sup>th</sup> August 2013 in which he seeks the following orders:

1. The Defendants, their employees, agents and or servants, tenants, sub-tenants, lessees/and any other persons claiming under them be evicted from L.R No. Nairobi/Block 97/384.
2. In the alternative, a mandatory injunction be issued compelling the Defendants, their employees, agents and or servants, tenants, sub-tenants, lessees and any other person claiming under them to vacate L.R No. Nairobi/Block 97/384 (hereinafter "the suit property").
3. The orders of this Court be supervised and/or enforced by the Officer Commanding Police Division (OCPD), Embakasi Division.

The grounds for the application are stated in the said Notice of Motion, and in a supporting affidavit and supplementary affidavit sworn on 19<sup>th</sup> August 2013 and 1<sup>st</sup> October 2013 respectively by the Plaintiff.

The Plaintiff states in this regard that Jane Waigwe Gathura is the registered owner of the suit property having acquired it on 5<sup>th</sup> August, 2011. He attached a copy of the Certificate of Lease of the said property in Jane Waigwe Gathura's name, a copy of a certificate of official search confirming that the suit property is still registered in her name, and a sale agreement entered into between the said Jane Waigwa Gathura and Falcon Properties Limited dated 12<sup>th</sup> October 2010 for the purchase of the suit property. He also attached a copy of the registered power of attorney granted by Jane Waigwa Gathura in his favour.

The Plaintiff claims that the said Jane Waigwa Gathura bought the suit property with vacant possession, and that the 1<sup>st</sup> Defendant subsequently moved into the said land and constructed semi-permanent business structures thereon illegally, which he is now leasing to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and other tenants for commercial purposes. The Plaintiff annexed a copy of a report compiled by a private investigator to establish the situation on the ground.

The Plaintiff also gave a history of the dispute herein, stating that there had been an attempted sale of the suit property to the 1<sup>st</sup> Defendant, but that the same was successfully challenged by Falcon Properties Limited who was the original registered owner of the suit property in **Nairobi High Court (Judicial Review and Constitutional Division) Misc. Civil Application No. 59 of 2008**. The Plaintiff attached a copy of the judgment in the said case, and stated that the effect of the said judgement was that it terminated any existing perceived express or implied proprietary or ownership claim by the 1<sup>st</sup> Defendant to the suit property, and re-asserted unconditional ownership thereof to Falcon Properties Limited, the original registered owner. Further, that the judgment nullified any purported sale of the property to the 1<sup>st</sup> Defendant and quashed the decision to sell the property by the subordinate court which did not have jurisdiction conferred upon it by the law.

The Plaintiff further stated that he was aware that the 1<sup>st</sup> Defendant had filed a subsequent suit in High Court in **Nairobi High Court Civil Suit No. 633 of 2009**, however that the said suit cannot overturn the decision that was made in **Nairobi High Court (Judicial Review And Constitutional Division) Misc. Civil Application of 59 of 2008** as it cannot interfere with a decision of a court of parallel jurisdiction. Further, that the title of Jane Waigwe Gathura to the suit property has never been challenged and still stands unchallenged to this day.

The Plaintiff claims that the registered owner of the suit property has been unable to develop the same despite her wish so to do because the Defendants have adamantly remained thereon, despite several demand letters and reminders that they give vacant possession thereof to the owner. Further, that several attempts have been made to fence the plot but all the time the fence has been pulled down by hooligans who are on hire to frustrate any efforts of the owner in reclaiming the property. The Plaintiff avers that the intervention of this Court is necessary to ensure peaceful vacation of the land while in observation and maintenance of law and order.

The Plaintiff's counsel filed written submissions dated 14<sup>th</sup> October 2013 in which he reiterated the foregoing facts, and submitted that it is not disputed that the registered owner of the suit property is Jane Waigwe Gathura and that she acquired the same through compliance with the laid down legal procedures, for value and that there was no fraud involved. Therefore that her title is indefeasible and it is the duty of this Court to protect private property. The counsel cited various judicial authorities in support of his submissions.

### **The Defendants' Response**

The 1<sup>st</sup> Defendant filed a replying affidavit and supplementary affidavit sworn on 9<sup>th</sup> September 2013 and 10<sup>th</sup> October 2013 respectively, in response to the Plaintiff's application. He stated that the suit property was not vacant in 2011 as he took vacant possession of the suit property in the year 2007 after buying the same in a public auction. He further stated that the suit property was advertised for sale by public auction by Ideal Auctioneers as agents of the then City Council of Nairobi in the ***Kenya Times*** newspaper of 30<sup>th</sup> November 2007, and he attached a copy of the said advertisement.

Further, that he bid for the suit property at the said auction and being the highest bidder, paid the 25% bid price and was issued with a memorandum of sale. That he thereafter took vacant possession of the said parcel of land and paid the balance sum due to the City Council of Nairobi via a cheque number 100369 through Kamunya Gichigi & Burugu Advocates. He annexed copies of the said memorandum of sale and cheque. The 1<sup>st</sup> Defendant stated that before he could get title he came to learn that M/s Falcon Enterprises Limited purporting to be the owners of the said parcel of land had filed a suit against the City Council of Nairobi in **High Court (Judicial Review and Constitutional Division) Misc. Civil Application No. 59 of 2008**. He also stated that the advocates for M/s Falcon Enterprises Limited offered to sell the suit property to him, and he objected to the said sale.

The 1<sup>st</sup> Defendant admitted that he thereafter filed a civil suit in the High Court of Nairobi being **Nairobi High Court (Environmental and Land Division) Civil Suit ELC No. 633 of 2009** against the said City Council of Nairobi and M/s Falcon Properties Limited, which case is still pending in court. He states that he has at all material times been in vacant possession of the suit property, and that he has lawfully leased the suit property to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. Further, that he has registered a caution against the title to the suit property; that Falcon Properties Limited and the Plaintiff illegally and unlawfully colluded to buy the suit property while knowing that he had bought it in a public auction; and that the suit which he had filed in court is still pending for hearing.

A.G.N Kamau Advocates, the 1<sup>st</sup> Defendant's counsel, filed written submissions dated 29<sup>th</sup> October 2013 wherein they argued that the Plaintiff's application is an omnibus one as he asks for both a temporary and mandatory injunction, which remedies are different and call for the application of different principles of law. Further, that the application as drawn by way of a chamber summons and offends the provisions of Order 40 of the Civil Procedure Rules under which it is brought.

The 1<sup>st</sup> Defendant's counsel further submitted that the application does not satisfy the test in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as a temporary injunction is granted for the preservation of *status quo*, and the counsel cited various authorities in this regard which were however not attached or filed. Further, that the current *status quo* of the suit property is that the Defendants have been in physical possession of the suit property since 2007, and that it is not in dispute that the Plaintiff has never been in possession of the same.

The counsel also cited various decisions to argue that a mandatory injunction cannot be granted under Order 40 of the Civil Procedure Rules, and that Order 40 cannot be invoked where there is no allegation that the suit property is in danger of being wasted, damaged or alienated or wrongfully sold. Further, that that it would be undesirable for the court to issue a mandatory injunction on an interlocutory application, as it may have the effect of disposing of the suit with finality without the court having the benefit of receiving all the relevant evidence.

### **The Issues and Determination**

I have read and carefully considered the pleadings, annexed evidence and submissions made by the parties herein. The first issue to be determined is whether the Plaintiff has met the threshold for the grant of the mandatory injunctions sought. I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated by the Court of Appeal in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109** that for a mandatory injunction to issue, there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

For the avoidance of doubt, and to address the preliminary issue raised by the Defendant as to the competence of the Plaintiff's application, this Court notes that the Plaintiff brought his application pursuant to section Order 40 Rule 10 (1) (b) of the Civil Procedure Rules and section 63(e) of the Civil Procedure Act. Section 63(e) of the Civil Procedure Act gives this Court powers to make such interlocutory orders as may appear to the court to be just and convenient, including orders of mandatory injunction. In addition, Order 40 of the Civil Procedure Rules gives courts powers to grant temporary

injunctions and other interlocutory orders as may be just and necessary in the circumstances stated in the order.

The Plaintiff's application is therefore properly before the court, and the fact that it was brought by way of Chamber Summons and not a Notice of Motion is a procedural flaw that is not fatal, in light of the provisions of Article 159(2)(d) of the Constitution that Courts should not give undue regard to procedural technicalities at the expense of substantial justice.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215** as follows:

**“a prima facie case in a civil application includes but is 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 will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

The Plaintiff in the Plaint filed herein dated 19<sup>th</sup> August 2013 is seeking prayers of eviction of the Defendants or in the alternative a mandatory injunction compelling them to vacate the suit property, as well as a prayer for mesne profits. The Plaintiff has brought evidence that Jane Waigwa Gathura is the registered owner of the suit property, and as registered owner it is the law that she is entitled to possession of the same, as confirmed by the Court of Appeal in the decision in **Moya Drift Farm Ltd vs Theuri (1973) EA 114**. She is also entitled to the protection of her right to the suit property as guaranteed by Article 40 of the Constitution. The Plaintiff has thus shown a *prima facie* case.

It was argued by the 1<sup>st</sup> Defendant in this respect that he has been in possession of the suit property, and granting the mandatory injunction sought at this stage would mean that the court is determining the suit with finality at an interlocutory stage. The 1<sup>st</sup> Defendant has however not brought any evidence of any title document on which he relies on for his claim to the suit property. The 1<sup>st</sup> Defendant's claim to the suit property is that he purchased the same at a public auction and produced a copy of the memorandum of sale and of the cheque used to pay for the suit property.

The Plaintiff has brought evidence to show that the sale of the suit property to the 1<sup>st</sup> Defendant at the said public auction was the subject of a judgment delivered on 24<sup>th</sup> November 2004 in **Nairobi High Court (Judicial Review And Constitutional Division) Misc. Civil Application of 59 of 2008- Falcon Propoerties Limited vs Senior Resident Magistrate, City Court; the Nairobi City Council and Lee Mwachhi Kimani**, in which the proceedings and orders of the Magistrates Court that ordered the said public auction and sale namely in CMCC No. 19 of 2007 were quashed, and the vesting orders and certificates of sale procured thereby were declared null and void. Therefore the current position now is that the memorandum of sale relied upon by the 1<sup>st</sup> Defendant has been declared null and void by a Court of law.

I am in this respect also 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 a party who has been issued with a good title takes precedence over other equitable rights to the title. In addition, the 1<sup>st</sup> Defendant in its Defence filed herein on 6<sup>th</sup> September 2013 does not raise any counterclaim to challenge the Plaintiff's title or seek any claim or prayers of ownership to the suit property. The 1<sup>st</sup> Defendant still has the opportunity in this respect to ventilate any claims of ownership to the suit property or challenge the Plaintiff's title at the full hearing of this suit, and the other pending suits filed with respect to the suit property.

I am therefore of the view that special circumstances exist in this case to warrant the grant of the mandatory injunction sought of vacant possession. This finding notwithstanding, I appreciate the fact that the 1<sup>st</sup> Defendant and the other Defendants have erected structures on the suit property, and may therefore

require adequate notice and time to remove the said structures.

The Plaintiff's Chamber Summons dated 19<sup>th</sup> August 2013 is accordingly allowed and it is hereby ordered as follows:

1. That the Defendants, their employees, agents and or servants, tenants, sub-tenants, lessees/and any other persons claiming under them shall within sixty (60) days of service by the Plaintiff of the orders granted herein yield vacant possession of all that property known as L.R No. Nairobi/Block 97/384 to the Plaintiff. Eviction orders shall issue upon default.
2. The Plaintiff shall serve the Defendants with the orders herein within fourteen (14) days of the date of this ruling.
3. The Officer Commanding Police Division (OCPD), Embakasi Division shall supervise and ensure compliance and enforcement of the orders given herein.
4. The costs of the Plaintiff's Chamber Summons dated 19<sup>th</sup> August 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_18<sup>th</sup>\_\_\_\_ day of \_\_\_\_September\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**