



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO.556 OF 2013**

**JOSEPHAT MWANZIA KASYOKA .....PLAINTIFF**

**-VERSUS-**

**PETER MUINDE MBITI.....1<sup>ST</sup> DEFENDANT**

**ANNA MUENI MBITI .....2<sup>ND</sup> DEFENDANT**

**GRISHON PETER MAKAU NZAVI.....3<sup>RD</sup> DEFENDANT**

**RULING**

Before the court for determination is a Notice of Motion dated 26<sup>th</sup> July 2012, brought by the Plaintiff under Order 40 Rule 1

(a), 2 and 4, Order 51 Rule 10 of the Civil Procedure Rules and section 3 and 63(c) of the Civil Procedure Act.

The Plaintiff is seeking a temporary injunction to restrain the Defendants, their servants, agents, assignees, transferees, licensees or any such other person, institution or organization claiming through them from entering, trespassing, utilization and or building and or in any manner occupying the Plaintiff's **plot no. 4 Mlolongo Ngwata Phase II C** (also erroneously referred to as Kasina Plot **No. 329**, Kasina Housing Estate) pending the hearing and determination of the suit.

The application is premised on grounds (a) - (g) set out on the face of the application which are detailed in the Plaintiff's supporting affidavit dated 26<sup>th</sup> July 2012. The Plaintiff's case is that he is the bonafide, genuine and legal owner of the suit property which was allocated to him in the year 2003 by Mavoko Quarry Self Help Group currently known as Mavoko Land Development Company Limited. The Plaintiff has annexed as evidence a copy of a survey fees payment receipt dated 7<sup>th</sup> August 2003 Council fees payment receipt for **Kshs 19,000.00** dated 7<sup>th</sup> August 2003 as well as a letter of allotment issued by Mavoko Municipal Council in his name dated 16<sup>th</sup> March 2004.

The Plaintiff has alleged that in the year 2006, he was informed that the parcel of land on which his plot stood was transferred to Kasina Housing Scheme where he was allotted plot **no. 330** and the Plaintiff has exhibited a copy of the letter of allotment dated 14<sup>th</sup> December 2007. It is the Plaintiff's case that he paid the monies demanded in the allotment letter and subsequently, that his application for approval of the building plans was allowed. Evidence of copies of payment receipts for **Kshs. 11,220.00** and **Kshs. 76,600.00** both dated 18<sup>th</sup> August 2008 as well as copies of the approved building plans has been furnished.

The Plaintiff has averred that in the year 2009, he commenced digging of the foundation on the suit property when he was served with stop orders by the council acting on the instructions of the 2<sup>nd</sup> Defendant who alleged that he was building on her property. Copies of the orders issued upon the Plaintiff dated 28<sup>th</sup> July 2009 and 16<sup>th</sup> December 2009 have been attached.

According to the Plaintiff, Kasina Housing Society's land title is a forgery and the Plaintiff has alleged that the housing society mischievously annexed part of the land belonging to Mavoko Land Development Company where his plot lies. The Plaintiff has annexed a copy of the 2<sup>nd</sup> Defendant's allotment letter dated 1<sup>st</sup> January 2008 as well as a letter dated 30<sup>th</sup> July 2009 from the District Commissioner Athi River District.

The Plaintiff attached an interim order issued by the court in **Machakos CMCC No. 307 of 2012** on 23<sup>rd</sup> April 2012, and the Plaintiff avers that the 3<sup>rd</sup> Defendant claims an interest in the property alleging to have bought the same from the 2<sup>nd</sup> Defendant for **Kshs 5,000,000.00**. Further, the Plaintiff has alleged that a search on a copy of the mother title allegedly belonging to Kasina Housing Scheme Society upon which the Defendant's derive interest shows that there is no existing title to **LR 11897/27** and the Plaintiff has annexed as evidence copies of the search conducted on **L.R 11897/27(IR 53390)**, search conducted on **L.R 25062 (IR 84437)** as well as a letter from Commissioner of lands dated 16<sup>th</sup> August, 2005.

According to the Plaintiff, Kasina Housing Scheme Society was registered on 24<sup>th</sup> February 2005 while their title shows that it commenced on January 1992 which is 15 years prior to the registration of the society. Evidence of a letter dated 22<sup>nd</sup> October, 2009 from the Deputy Registrar of Societies as well as a certificate of registration dated 24<sup>th</sup> February, 2005 issued to Kasina Housing Scheme Society has been attached. It is the Plaintiff's case that Mavoko Land Development Company has confirmed the status of his plot through a letter dated 4<sup>th</sup> April 2012 whose copy has been furnished. The Plaintiff has also annexed a copy of an application filed in Machakos **HCCC No. 366 of 2009** where Patel Concrete Company has sought to be enjoined in the suit instituted by Mavoko Land Development Company against Kasina Housing Scheme Society, alleging fraudulent dealing in LR 25062.

The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who filed a replying affidavit sworn by the 2<sup>nd</sup> Defendant on 4<sup>th</sup> September, 2012. The 2<sup>nd</sup> Defendant has stated that she was the lawful owner of plot number **UNS B.C.R 329** Athi River, which she sold to the 3<sup>rd</sup> Defendant on 25<sup>th</sup> March, 2011. The 2<sup>nd</sup> Defendant has annexed as evidence of her ownership a copy of the letter of allotment dated 1<sup>st</sup> January 2008, copy of rates payment receipt dated 23<sup>rd</sup> July 2009 a copy of the development plan dated 12<sup>th</sup> August 2009, copy of notification of approval of development permission dated 18<sup>th</sup> September 2009 as well as a copy of the approved development plan. The 2<sup>nd</sup> Defendant has also annexed a copy of the sale agreement for **UNS B.C.R plot no. 329** dated 25<sup>th</sup> March 2011 between her and the 3<sup>rd</sup> Defendant.

The 2<sup>nd</sup> Defendant has denied that the Plaintiff was allotted plot number **329** at the Kasina Housing Scheme and avers that the Plaintiff was temporarily allotted plot **no. 4 II C** by the Municipal Council of Mavoko which is different from plot **number 329** Kasina Housing Scheme. It is the 2<sup>nd</sup> Defendant's case that after the temporary allocation of the plots at Kasina Estate by the Municipal Council of Mavoko, letters of allotment were issued by the government and that the applicant was not allocated plot **329** as alleged. According to the 2<sup>nd</sup> Defendant, the Plaintiff is instead the owners of **UNS, B.C.R plot 330** and

the letter of allotment dated 14<sup>th</sup> December 2007 in respect of plot no. **330** issued in the Plaintiff's name has been attached as evidence. The 2<sup>nd</sup> Defendant has also annexed evidence of list of plots allocation for Kasina and reiterates that the plot that was allocated to the Plaintiff is plot no. **330** and not **329** which belongs to her.

While reiterating that the Plaintiff is the owner of plot **330** and not **329**, the 2<sup>nd</sup> Defendant annexed a site rates demand dated 18.08.08 issued to the Plaintiff by the Mavoko Municipal Council in respect of plot no. 330 as well as the payment receipt thereof. The 2<sup>nd</sup> Defendant further alleged that the Plaintiff applied for approval for building in plot **UNS B.C.R plot number 330** and the data application form dated 18.08.08 has been annexed as evidence.

The 2<sup>nd</sup> Defendant averred that the Plaintiff is not entitled to the equitable relief sought for deliberately distorting crucial facts and further, the 2<sup>nd</sup> Defendant averred that no injunction orders can issue against her and the 3<sup>rd</sup> Defendant as they are no longer owners and have no interest in the disputed plot and therefore, that there is a fatal misjoinder of parties in the suit.

The application was also opposed by the 3<sup>rd</sup> Defendant who in replying affidavit sworn on 1<sup>st</sup> October, 2012 stated that the suit plot **No. 329 Mlolongo** was sold to him by the 2<sup>nd</sup> Defendant and he attached as evidence the sale agreement dated 25.03.11. The 3<sup>rd</sup> Defendant further stated that he paid a deposit of Kshs 2,500,000.00 which is evidenced by a copy of a letter dated 25<sup>th</sup> March 2011 annexed to the application.

It is the 3<sup>rd</sup> Defendant's case that upon payment of the balance of the purchase price amounting to **Kshs 2,500,000.00**, a successful registration of the transfer of the letter of allotment was undertaken in his favour and he annexed the letter of allotment dated 5<sup>th</sup> January 2008 as evidence. Further, the 3<sup>rd</sup> Defendant stated that he complied with all registration formalities and presented his building plan to Mavoko Municipal Council and he annexed as evidence a rates payment receipt dated 23<sup>rd</sup> July 2009 as well as a copy of an approval letter from the Mavoko Municipal Council dated 8<sup>th</sup> March 2012.

According to the 3<sup>rd</sup> Defendant, the Plaintiff had been allotted plot no. 330 and that plot **No. 329** lawfully is owned by the 3<sup>rd</sup> Defendant. The Plaintiff's recourse if any would be against the person who built on his plot No. 330 or to pursue the government for allegedly issuing his plot to the 2<sup>nd</sup> Defendant. The 3<sup>rd</sup> Defendant has averred that he has put up a permanent building of up to 10 courses off the ground level but that the construction was temporary stopped by orders issued in **Machakos CMCC No. 307 of 2012**.

Further, the 3<sup>rd</sup> Defendant contends that he had secured a loan of **Kshs 6,000,000.00** to enable him develop the suit property. He asserts that the loan continues to accrue interest to date and that the intended orders to bar the construction will put him in a financial dilemma and grave prejudice.

While denying the Plaintiff's allegations that **LR No. 11895/27** does not exist, the 3<sup>rd</sup> Defendant stated that the parcel measuring **17.9 hectares** was changed during a beacon realignment exercise carried out in 2009 to a new **LR No. 11895/35** measuring **14.236 Hectares**. In proof of this allegation, the 3<sup>rd</sup> Defendant annexed a copy of a letter dated 15<sup>th</sup> December, 2009 from the Ministry of lands, survey Department.

According to the 3<sup>rd</sup> Defendant, the Plaintiff has no legal right to seek the court's discretion since by alleging that the title issued by Kasina Housing Society is fake, the Plaintiff's title is also by extension fake. Lastly, the 3<sup>rd</sup> Defendant stated that since it is evident that the Plaintiff's plot is **330** and his plot is **329**, it is fair and just that injunctive orders restricting his development of the plot and restraining his unlimited access to the plot should not be granted.

The application was canvassed by way of written submissions and the Plaintiff in submissions dated 8<sup>th</sup>

November 2012 reiterated the facts as set out in his supporting affidavit and in addition argued that the mother title to which he derives the property in question being **LR No. 25062 (IR No. 84437)** is genuine while the one possessed by the Defendants which is **LR No. 11895/27(IR 53390)** is a forgery and a fake. The Plaintiff submitted that a search conducted on the latter parcel yielded nothing. It was also submitted for the Plaintiff that the grant on land was issued to the housing society to hold for 99 years from 1<sup>st</sup> January 1992 while the housing society was registered on 24<sup>th</sup> February 2005. Counsel for the Plaintiff argued that this suit could only be settled through compelling the Commissioner of Lands to present before the court the correspondence files leading to the grants being processed as well as the deed files.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued in submissions dated 30<sup>th</sup> November 2012, that the Plaintiff had failed to prove that he has a prima facie case with a probability of success. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued that the Plaintiff was seeking interim orders of injunction in respect of a nonexistent land, plot **no. 4, Mlolongo Ngwata phase II C** which had been allotted on the basis of a temporary letter of allotment. Counsel submitted that the Plaintiff was granted a letter of allotment dated 14<sup>th</sup> December 2007 in respect to **plot 330**. It was further submitted for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that there is no proof by the Plaintiff that plot no. 4 is the same as plot **no. 329** which was owned by the 2<sup>nd</sup> Defendant before being transferred to the 3<sup>rd</sup> Defendant.

It is the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's submission that the Plaintiff had failed to demonstrate that he may suffer irreparable harm unless interim orders of injunction are awarded in his favour. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued that the balance of convenience tilts in favour of the 3<sup>rd</sup> Defendant who is in possession. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants stated that the Plaintiff had made serious allegations of fraud and that the court can only make a finding on the same after trial. Counsel urged that the application against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be dismissed with costs since the said Defendants have no interest in the disputed plot having sold the same to the 3<sup>rd</sup> Defendant.

The 3<sup>rd</sup> Defendant filed submissions dated 28<sup>th</sup> November 2012 where Counsel argued that the Plaintiff admitted in his Plaint and supporting affidavit to have been allotted plot **no. 330** and therefore the Plaintiff cannot seek injunctive orders in respect **plot no. 329** which he has no interest in. Counsel for the 3<sup>rd</sup> Defendant submitted that no prima facie case had been made to warrant the grant of Injunctive Orders.

It was submitted for the 3<sup>rd</sup> Defendant that the Plaintiff has not made any investments in the parcel he claims and therefore, that the Plaintiff did not discharge the burden of proving what loss or damage he will suffer which is irreparable and cannot be remedied by an award of damages. The 3<sup>rd</sup> Defendant relied on section **108** of the Evidence Act for the submission that the burden of proof lies on the person who would fail if no evidence at all were given on either side.

As to where the balance of convenience lies, Counsel submitted that the 3<sup>rd</sup> Defendant had put up substantial developments on the suit parcel which was not disputed by the Plaintiff who had not put in any financial contribution on the property he sought to injunct. It was submitted that the 3<sup>rd</sup> Defendant is servicing a loan and that if construction is halted, he will be greatly prejudiced and therefore, that the balance of convenience lies in favour of the 3<sup>rd</sup> Defendant who stands to suffer more if the injunction is granted. It was submitted that the Plaintiff will not suffer any prejudice as he still hold his allotment to plot **330** and that whatever happens to the suit property which is plot **329** will not affect his ownership of plot **330**.

Counsel for the 3<sup>rd</sup> Defendant urged the court to order for an undertaking as to damages from the Plaintiff as a condition precedent for granting of the injunction. It was argued that the 3<sup>rd</sup> Defendant had demonstrated that he had invested heavily in the plot by securing a loan of **Kshs 6,000,000.00** which continues to attract interest. The 3<sup>rd</sup> Defendant urged the court to safeguard his interest by ordering a security for **Kshs 6,000,000.00** equivalent to the amount advanced to him in the event the court were to prevent further developments. Counsel for the 3<sup>rd</sup> Defendant referred the court to the case of **Mokoi Ole**

**Nkare -vs- Commissioner of Lands & 3 others, Machakos HCCC No. 93 of 2012** as well as **Joseph Mutuku Mwanthi & others -vs- Aimi Ma Kilungu Co. Ltd Machakos HCCC No. 67 of 2011** where the court granted injunction on condition that the applicant executed an undertaking as to damages.

**The issue for determination is whether the Plaintiff has met the conditions for the grant of an injunction as enunciated in the GIELLA –VS- CASSMAN BROWN CASE (1973) EA 358 to entitle him to the order of injunction**

In my view, the Plaintiff has not established a prima facie case in that his claim to plot **no. 329** is not supported by any evidence. In the Plaintiff's own admission, he was on 16<sup>th</sup> March 2006 issued with a temporary allotment letter for plot **no. 4 Mlolongo Ngwata Phase II C**. Further, that in 2006, he was informed that the parcel where his plot stood had been transferred to Kasina Housing Scheme and on 14 December 2007, he was allotted plot **no. 330**.

The Defendants have denied that the Plaintiff has an interest in plot no. 329 and they have insisted that the Plaintiff's plot is no. 330. The Plaintiff has not brought any evidence to show that his plot **no. 4 Mlolongo Ngwata Phase II C or 330** is the same as plot **no. 329** owned by the 3<sup>rd</sup> Defendant who claims purchaser's interest and has availed proof of his acquisition.

The Plaintiff's claim to plot no. 329 is highly contested and a prima facie case has not been established. In the case of **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125**, a prima facie case was said to be *one in which on the material presented to the court or 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 opposite party.*

The Plaintiff has not also demonstrated what loss if any he stands to suffer if the orders sought are not granted and further, that the loss cannot be compensated with an award of damages. Indeed my view is that the Plaintiff cannot suffer any damage that cannot be compensated for by an award in damages in case the injunction is not granted and he is successful at the trial. The value of the suit plot could easily be determined at the conclusion of the case. The balance of convenience is clearly in favour of the 3<sup>rd</sup> Defendant who has demonstrated that he purchased the suit plot from the 2<sup>nd</sup> Defendant and has taken possession and has commenced development on the plot and has put in a substantial amount of money. This evidence of substantial investment by the 3<sup>rd</sup> defendant has not been rebutted and on that basis I am persuaded the balance of convenience tilts in favour of the 3<sup>rd</sup> Defendant.

In the premises I find and hold that the Plaintiff has not established that he has a prima facie case with any probability of success and I decline to grant the order of injunction sought and the Plaintiff's notice of motion application dated 26<sup>th</sup> July 2012 is accordingly dismissed with costs to the Defendants.

**Ruling Dated and Delivered this 15<sup>th</sup> day of November 2013**

**J.M.MUTUNGI**

**JUDGE**