



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.63 OF 2018

ELIZABETH MUTHONI HUSSEIN.....PLAINTIFF/APPLICANT

VERSUS

VIKESH JINIT SHAH.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* Application dated 26th February 2018, brought under *Sections 1A, 1B* and *3A* of the *Civil Procedure Act* and *Order 40 Rule 1(a)* and *Order 51 Rule 1* of the *Civil Procedure Rules 2010* and any other enabling provisions of the Law. The Applicant has sought for the following orders:-

- 1. That the Honourable court be pleased to issue an injunction order restraining the Defendant herein by himself and any other person acting on his behalf from in any way trespassing, dealing, alienating or wasting the portion of land No.Thika Municipality Block 6/2 pending the hearing and determination of this suit.*
- 2. That the Honourable court be pleased to issue an injunction directing the defendant at his own cost to immediately demolish any of his structures standing on plot No.Thika Municipality Block 6/2 and remove all debris or structures on the said Land and in default the county Government of Kiambu be at liberty to demolish the same under the supervision of the Officer Commanding Station, Thika at the defendants cost pending the hearing and determination of this suit.*
- 3. Cost of this Application be provided for.*

This Application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of the Applicant *Elizabeth Muthoni Hussein*. These grounds are:-

- a) The Plaintiff Applicant is the owner of Title No.Thika Municipality Block 6/2 which is approximately four point zero hectares (4,00HA) carrying on business in the name of *Liz Trades of Thika*.*
- b) The Plaintiff has been paying the required rent, rates, standard premium, stamp duty and all the necessary payments pertaining to this land.*
- c) The Respondent has wrongfully entered and taken possession of portions of the suit property namely the Thika Municipality Block 6/2 and have thereafter wrongfully started construction in the premise thereof as a consequence whereof the Applicant has suffered loss and damage.*
- d) The defendant is a fraud since he claims to be the owner of land Title Thika Municipality Block 6/2 and have thereafter started construction in the premise thereof as a consequence whereof, the Applicant has suffered loss and damage.*

e) *That notwithstanding the fact that the defendant has no right to the suit property he has trespassed upon and intends to erect permanent structures on the land to the utter detriment of the Plaintiff*

f) *That if the construction proceeds further the Plaintiff will be unable to reclaim her land forever. The said land is very valuable and if the Plaintiff is unable to utilize it, it will suffer great loss, which cannot be compensated by way of damages.*

g) *That by virtue of the Respondents wrongful occupation of portions of the suit property, he has misused, damaged, wasted, destroyed, polluted and degraded the suit property which truly belongs to the defendant.*

h) *Accordingly the Respondent threatens and intend unless restrained by this Honourable Court to continue or remain in wrongful occupation of portions of the suit property.*

i) *The Applicant is likely to suffer great prejudice unless the orders sought herein are granted.*

In her *Supporting Affidavit*, the Applicant reiterated the contents of the grounds in support of the application and further averred that she had been allocated the suit property on *1st September 2011* by *Letter of Allotment, Ref 10/1/XV/85* which was later surveyed and became *Block 6/1071* for a *lease of 99 years* as evident by *annexture AW-3*. Further she averred that she had discovered that the said plot had earlier been allocated to *Mitel Supplies* in *1995*. She averred that she had started some development of residential estate in the suit land and had already committed substantial amount of money into the project which she feared she would lose if she did not proceed with the development. She stated that she made an application to the *Commissioner of Lands* on *26th July 2011*, requesting to be allocated an alternative site for development of Residential Estate and if her application was approved, she was willing to surrender the title for *Block 1/286-Thika*.

She further averred that she requested a *Land Surveyor* to confirm the status of the suit land as evident by *annexture AW-6* and on *7th October 2011*, the *Director of Surveys* confirmed there was no development on the suit property as evident by *annexture AW-7*. She further averred that she was allocated an alternative *plot Thika Municipality Block 6/2(LR.No.953/2144)* and she was issued with a *Certificate of Lease* on *4th October 2016*. She averred that on the *23rd November 2015*, her allotment letter and receipts for her property were completely burnt and she reported the matter to the police as evident by *annexture AW-8* and thereafter requested for copy replacement of her documents and made payments.

It was the Applicant's contention that on the *14th February*, she saw a structure in her premises and found out that the Defendant/Respondent was behind the construction and she has since discovered that the same plot had earlier been allocated to *Vikesh Jint Shah* on *6th November 2012*. She alleged that she has been making all payments pertaining to the land and the Defendant has not been paying the required *rent, stand premium, stamp duty* or any other payments. She further averred that the Respondent has entered and taken possession of portions of the suit property and started construction.

She further averred that the Respondents acts are *illegal, highhanded, oppressive wrongful, a nuisance* and that the same constitutes *unlawful deprivation* of private property. Further that unless the Court intervenes to stop the encroachment and order demolition of the Respondents structure, she stands to suffer irreparable loss not compensable in damages. Therefore it is in the interest of justice that the orders sought should be granted to avert gross miscarriage of justice.

The application is contested and *Vikesh Jinit Shah* the Defendant/Respondent, filed a *Replying Affidavit*. He averred that he is the duly registered owner and a *bonafide* purchaser for value of the suit property having purchased the same from *Arrowland Consultants* in *2012*. He further averred that during the sale transaction, he instructed the *Firm of Gathoga Wairegi & Company Advocates* who represented him and carried out due diligence and confirmed that *LR No. 4953/2144 –Thika Municipality* was allocated to *Arrowland Consultants* vide a *Letter of Allotment, Ref No.TP10/1/XXIV* as evident from *Exhibits 7 to 7A*. He averred that as per the *Letter of Allotment, LR No. 4953/2144 –Thika Municipality* was approximately *4.0 Hectares* and for a term of *99 years* from *1st day of July* with *Thika Municipality/Block/6/2* and subsequently a *Certificate of Lease* in the name of *Arrowland Consultants* was given on *29th January 2009* for *Municipality /Block6/2*. He averred that *Jeremiah Ndege* and *Pacific Akimbi Ndege* carry on business in the name of *Arrowland Consultants*. He further averred that the position of the beacons in respect of the boundaries of the suit property were pointed out and certified by *Samuel Maina* a duly registered *Surveyor*.

Thereafter his advocates proceeded to carry out the registration of transfer of the suit property in his favour and lodged the completion documents at the *Ministry of Lands, Nairobi*. He averred that all proper procedures and payments were followed during

the sale transaction.

He stated that sometime in **November 2012**, he made an application to the then **Municipal Council of Thika** which went before the **Planning Committee**, where he alleged the Plaintiff was a member and his Building Plans were approved. He then proceeded to make several developments on the suit property and he has continued to **occupy, possess and improve** the suit property. He alleged that he has continued to pay land **Rent and rates** over the suit property as evident by **Exhibit A** at **pages 42 to 61**. He further averred that the registration of **Arrowland Consultants** was first in time which made them **absolute and indefeasible** proprietors of the suit property with rights and privileges over the said parcel of land with rights to sell and transfer to him.

He further averred that as per the Plaintiff's **Certificate of Lease**, she was registered on **1st April 2016** and was issued after **Arrowland Consultants**. He alleged that the Plaintiff has admitted that the **Letter of Allotment** she has annexed to her documents and dated **1st September 2011**, was in respect to a different plot and she has failed to evidence any purported Letter of Allotment specifically for the suit property. He further alleged that the **Director of Surveys** in **7th September 2015**, informed the **National Land Commission** to confirm the authenticity of the allocation documents before registration in respect to the Plaintiff's application seeking to be allocated the suit property. He further averred that the **Thika District Surveyor** confirmed in his letter dated **26th August 2016**, that the suit property was a conversion of **L.R No. 4953/2144** and the same was already surveyed and developed. He alleged that the officers of the relevant authorities along with the Plaintiff clearly colluded to fraudulently, illegally and/or negligently cause the issuance of a **Certificate of Lease** in the name of the Applicant and that the officers of the relevant authorities together with the Plaintiff must have been aware that he was the registered owner but still went ahead to issue a **Certificate of Lease** and therefore the issuance of the same is null and void.

He further alleged that the document that have been attached to the Plaintiff's application shows that she is party to fraud, misrepresentation and has acquired the purported title **illegally, unprocedurally** or through a **corrupt scheme**. He further alleged that the Plaintiff is continually using the said fraudulent and illegal Certificate of Title to interfere with his rightful ownership and peaceful enjoyment of the suit property. He further averred that if the Applicant is granted the orders sought she will deal with the property in a manner that is adverse to his rights and interest and ultimately cause irreparable loss. He urged the Court to dismiss the instant Application.

This application was canvassed by way of written submissions, wherein the **Law Firm of Macharia Kahonge & Company Advocates**, for the Plaintiff/Applicant filed their submissions on **23rd April 2018**, and urged the Court to allow the instant Application.

It was submitted that the registration of the transfer of the suit property in favour of the Applicant conferred upon her absolute ownership rights and privileges in terms of **Sections 24 and 25** of the **Land Registration Act No. 3 of 2012** and these rights are indefeasible unless it is proved that the registration of the title was obtained through fraud within the meaning of **Section 26(1)(a)** and **(b)** of the said Act. The Applicant further relied on **Section 25(1)** of the **Land Registration Act** which provides as follows:-

“The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of the court shall not be liable to be defeated except as provided in this Act and shall be held liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject:

- 1. To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register ad***
- 2. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to noting on the register unless the controversy is expressed in the register.***

It was further submitted that the certificate of title can be challenged under the following circumstances:-

- 1) On the grounds of fraud or misrepresentation to which the person is proved to be a party***
- 2) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

The Applicant further relied on the case of *Exclusive Estates Ltd...Vs.... Kenya Posts & Telecommunications Corporation & Another, Civil Appeal No.62 of 2004* where the court held that:-

‘A temporary injunction is issued in a suit to preserve the property in dispute in the suit of the rights of parties under determination in a suit pending the disposal of the suit, to preserve the subject matter’

It was also submitted that the Applicant has met the threshold set out in *Giella...Vs...Cassman Brown and Co Ltd (1973) 358*, wherein;

- i. The Plaintiff must establish that he has a prima facie case with high chances of success*
- ii. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages*
- iii. If the Court is in Doubt it will decide on a balance of convenience.*

The Applicant further relied on the case of *Moses C Muhia Njoroge & 2 others...Vs....Jane W Lesaloi & 5 others*, where the Court cited the Court of Appeal decision in the case of *Mrao Ltd....Vs.....First American Bank of Kenya*, where it was held that:-

“A prima facie case in civil application includes but not confined to a genuine and arguable case. It is a case on the material presented to a court, tribunal properly directing itself it will conclude there exists a right which has apparently been infringe by the opposite party as to call for an explanation or rebuttal from the later”

The applicant further relied on the case of *Kenleb Cons Ltd...Vs....New Gatitu Station & Another*, where the Court held that:-

‘..to succeed in an application for injunction ,an applicant must not only make a full and frank disclosure of relevant facts to the just determination of the Application but must also show he has a right legal or equitable which requires protection by injunction.

It was therefore submitted that the Applicant has proved ownership of the suit property by providing her letter of allotment together with the lease and the same proved a *prima facie* evidence of ownership unless it can be challenged.

It was further submitted that that land is unique and no one parcel can be equated in value to another, and it would not be right to say that the Applicant can be compensated by way of damages since damages are not always suitable where the Applicant has established a legal right and on this the Applicants relied on the case of *JM Gichanga versus Cooperative Bank of Kenya Limited (2005) eKLR*, where the court held that:-

‘A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it’

The Court was urged to allow the Plaintiff’s application with costs.

The Defendant/Respondent through the *Law Firm of Menezes & Partners Advocates* filed their written submissions on **4th June 2018** and submitted that the Applicant has not met the threshold for grant of injunctive orders and the instant application should be dismissed with costs.

The Respondents identified the issues to be determined and relied on various decided cases and provisions of law. The Respondent stated the issues to be determined are:-

- a) Whether the Plaintiff/Applicant has a prima facie case*
- b) Whether the Plaintiff/Applicant stands to suffer irreparable harm.*

c) *Whose side does the balance of convenience lie*"

On the above principles, the Respondent relied on the case of *Panari Enterprises Limited...Vs...Lijoodi & 2 Others (2014) eKLR*.

The Respondent further relied on the case of *Arthi Highway Developers Limited...Vs...West End Butchery Limited & 6 Others (2015) eKLR*, where the Court held that:-

"My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regard the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors vs Commissioner of Lands C.A No.71/1997 (unreported) Like equity keep teaching us the first on time prevails so that in the event such as this one where by mistake that is admitted the Commissioner of Lands issue two titles in respect of the same parcel of land then both are apparently and on the face they were issue regularly and procedurally without fraud save for the mistake then the first in time shall prevail".

The Respondent further relied on the case of *Charles Alex Njoroge...Vs... National Bank of Kenya Ltd & Another (2015)eKLR*, where the court in quoting the court in *Jan Bolden Nielsen...Vs... Herman Phillipius Steyn & 2 others (2012) eKLR*, held that:-

"I believe that in dealing with an application for an interlocutory injunction the court is not necessarily bound to the three principles set out in Giella..Vs..Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law."

The Respondent further relied on the case of *Suleiman...Vs...Amboseli Resort Ltd (2004) eKLR 589*, where the Court held that:-

'...Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella vs Cassman Brown in 1973 cast in stone and no new element may be added into that position. I am not with respect in agreement with counsel in that point for the law was always kept growing to greater level of refinements as it expands to cover new situations not exactly foreseen before, Justice Hoffman in the English case of Films Rover international made this point regarding the grant of injunctive relief (1986)3All ER 722 at Page 780-781 "A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should always opt for the lower risk of injustice".

The Respondent relied on *Article 64* of the *Constitution* that provides that:-

- a) *Registered land held by any person under freehold tenure*
- b) *Land held by any person under leasehold tenure*
- c) *Any other land declared private land under an Act of Parliament.*

The Respondent further relied on *Section 24* and *25(1)* of the *Land Registration Act* and *Section 25(1)* of the *Land Registration Act*.

The Respondent further relied on *Section 2* of the *Registration of Titles Act Cap 281 of 2010*, that provides:-

"Fraud shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person whose interest he knowingly and wrongfully defeats by that registration."

On this it was submitted that this is sufficient evidence to rule out the question of the Respondent pertaining to acquiring a leasehold tenure in the suit property. The court was urged to dismiss the instant Application.

The Court has now carefully considered the pleadings in general and the annexure thereto. The Court too has also considered the written submissions, the cited authorities and the relevant provisions of law and makes the following orders:-

The application herein is anchored under **Order 40 Rule 1(a)** of the **Civil Procedure Rules** which provides:-

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b).... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

Further, the application is premised under **Sections 1A, 1B** and **3A** of the **Civil Procedure Act** which Sections empower the court to facilitate the overriding objective of the **Civil Procedure Act** which is to ensure **just, expeditious** and **proportionate** determination of the matters before the court.

Further, the court is called upon under **Section 3A** to make or issue such orders that are necessary for end of justice to be done and also to prevent abuse of the court process.

Since the Applicant is seeking for injunctive orders, at this juncture, the court will not deal with the disputed issues with a finality given that the available evidence now is through affidavits. The court is only called upon to determine whether the Applicant is deserving of injunctive orders based on the usual criteria laid down in the case of **Giella... Vs... Cassman Brown & Co. Ltd 1973 EA 358**, and later repeated in various judicial pronouncements. See the case of **Kibutiri... Vs... Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also EA Industries ..Vs..Trufoods (1972) EA 420.”

There is no doubt that the Applicant herein is seeking for injunctive orders against **Thika Municipality Block 6/2** on allegation that the said suit land belongs to her. She attached a title deed in her name which was issued to her on **4th October 2016**, after she allegedly discovered her earlier plot **No.Block 6/1071** had earlier been allocated to **Mitkei Suppliers** in **1995**.

However, it is not in doubt that this plot **No.Thika Municipality Block 6/2**, had been allocated to **Vikesh Jinit Shah ID 238990430** on **6th November 2012**, as is evident from the **Certificate of Lease AKI-II**. Therefore by the time the Plaintiff acquired her title on **4th October 2016**, the Defendant/Respondent was in possession of his title deed. The Defendant/Respondent has also annexed documents which show the root of his title. On whether the Defendant's/Respondent's title is genuine or not, that is not an issue that can be determined at this juncture without calling evidence at the main trial. However, it is evident that the Defendant's/Respondent's Certificate of title is the first in time. On the face of it, then the Defendant's/Respondent's title being the first in time, it should prevail unless there is contrary evidence. See the case of **Gitwany Investment Ltd & 3 Others... Vs...Commissioner of Lands, HCCC No.1114 of 2002**, where the Court held that:-

“The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail”.

Therefore, the Court finds that even if the Plaintiff/Applicant has a title deed in her favour over the suit property, the Defendant/Respondent too has a title deed over the same property which was issued earlier and evidence has to be called at the main trial to determine which one of the title herein is genuine.

For the above reasons, the Court finds that the Plaintiff/Applicant has not established that she had a *prima-facie* case with probability of success.

On the second limb of whether she will suffer irreparable loss which cannot be adequately compensated by an award of damages, the Court finds that the photographs attached by the Plaintiff/Applicant are of an old perimeter wall, which is not a recent construction.

Further, it is evident that the Plaintiff/Applicant has never been in possession of the suit property and there would be certainly no injury or damages that would be occasioned to her if injunctive orders are not granted. Therefore the Court finds that damages herein would be adequate compensation in the event the Applicant turns out to be the successful litigant after the main trial. See the case of Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322, where the Court held that:-

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

On the balance of convenience, the Court is not in doubt.

However, if the court was to decide on the balance of convenience, the

same would tilt in favour of maintaining the *status quo* and the *status quo* herein is that the Defendant is in possession. See the case of Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR, where the Court of Appeal held that:-

“The general principle which has been applied by this court is where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.

The 4th prayer herein is for demolition of the Defendant’s structures on the suit plot **Thika Municipality Block 6/2**. That prayer is a mandatory injunction which is normally granted on very exceptional circumstances. See the case of Kenya Breweries Ltd & Ano....Vs....

Washington O. Okeyo, Civil Appeal No.332 of 2000. IEA 109, where the Court held that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See Volume 24 Halsbury Laws of England 4th Edition Paragraph 948.

As the Court observed earlier, the Plaintiff/Applicant has never been in possession of the suit property and the perimeter wall in issue is not a new construction. Therefore, there are no exceptional circumstances herein and no evidence that the Defendant/Respondent is trying to steal a march against the Plaintiff herein.

For the above reasons, the Court finds that the Plaintiff/Applicant herein has not established the threshold for grant of both temporary and mandatory injunctions as sought in her **Notice of Motion** application dated **26th February 2018**.

Consequently, the Court finds the said Notice of Motion application dated **26th February 2018**, not merited and proceeds to dismiss the same entirely with costs to the Defendant/Respondent.

Further, the parties are directed to comply with Order 11 within a period of 30 days from the date hereof and Pre-trial directions on 7th March, 2019 before the Deputy Registrar of this Court.

It is so ordered.

Dated, Signed and Delivered at **Thika** this **10th** day of **December, 2018**.

L. GACHERU

JUDGE

10/12/18

In the presence of

None Attendance for Plaintiff/Applicant

Mr. Kinyanjui holding brief for Mrs. MacSila for Defendant/Respondent

Lucy- Court Assistant

L. GACHERU

JUDGE

10/12/18



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