



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 232 OF 2013**

**CHEMVEST LIMITED.....1<sup>ST</sup> PLAINTIFF**

**NZEYIMANA NOE AVEQUE .....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**KAHOZI NYEMBO THEOPHILE.....DEFENDANT**

**RULING**

The application before this court for determination is the Notice of Motion dated 12<sup>th</sup> February 2013 brought under **Order 40 Rule 1 (a), 2(1) and (2), 3, 4 and 10 (1) and Order 51** of the **Civil Procedure Rules, Sections 1A, B, 3A & 63 (c) and (e)** of the **Civil Procedure Act** in which the Plaintiffs/Applicants are seeking for orders that this court be pleased to issue an order for temporary injunction restraining the defendant from locking, interfering with the free ingress and egress out of, trespassing, transiting, alienating or in other way dealing with the land parcel known as Kikuyu/Kikuyu/Block 1/903 situated in Kikuyu town (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit. The applicant is also seeking for an inhibition order prohibiting the transfer, assignment, sub-division, charge or encumbrance and/or any dealing with the suit property.

This application is based on the grounds that appear on the face of the application and the supporting affidavits of Dr. Martin Njogu Mbugua sworn on 12<sup>th</sup> February 2013 and Nduwimana Egide sworn on 12<sup>th</sup> February 2013. Dr. Martin Njogu Mbugua stated that he was the director and chairman of the 1<sup>st</sup> plaintiff. He averred that sometimes in August 2011, he learnt through a land agent that the suit property was on sale. He stated that he commenced due diligence by undertaking a search at the Kiambu Lands Registry after which he convened a meeting of the members of the 1<sup>st</sup> plaintiff. He stated that he was authorized to proceed with the purchase of the suit property. He further stated that on 14<sup>th</sup> November 2011, he had a meeting with the 2<sup>nd</sup> plaintiff who is the registered owner of the suit property through his agent Mr. Gerald. He further stated that on 16<sup>th</sup> November 2011, the directors of the 1<sup>st</sup> plaintiff signed a written agreement for the purchase of the suit property. He further confirmed that the advocates of the 1<sup>st</sup> Plaintiff also signed all transfer documents to vest the suit property in the 1<sup>st</sup> Plaintiff. He further stated that the entire purchase price was paid to the 2<sup>nd</sup> Plaintiff’s authorized account belonging to one Modeste Bizabigomba-Ndikumana as per the terms in the sale agreement. He further stated that the seller handed over possession of the suit property to them and introduced them to one Nduwimana Egide who has his

caretaker and whom they requested to continue occupying and taking care of the suit property. He stated further that since the 1<sup>st</sup> Plaintiff did not have funds at the time, the transfer of the suit property commenced in May 2012. He further stated that while the transfer process was underway, he was informed by the Registrar for Lands, Kiambu, that there had been another transfer presented and that the suit property had been transferred to the Defendant. He stated that this surprised him as he had the original title documents with him. He stated that upon presenting all his transfer documents and original certificate of lease to the land registrar, he was advised to report the matter to the police for further investigations. He stated that he also contacted the 2<sup>nd</sup> Plaintiff who informed him that he never sold or transferred the suit property to the Defendant and that the Defendant had tried to purchase the same but he did not have the money and the sale was cancelled. He further stated that he had obtained copies of the documents used to transfer the suit property to the Defendant and that they indicate that the Defendant's title to the suit property was obtained fraudulently. He further stated that he is apprehensive that unless restrained, the Defendant may transfer or alienate the suit property thereby putting it out of reach of the Plaintiffs. He also stated that the defendant had threatened to evict the 1<sup>st</sup> Plaintiff's agent and unless restrained, he may carry the threat to fruition. In his Affidavit, Nduwimana Egide gave a narration of how he was being threatened with eviction by the defendant and his agents.

This application is contested. The Defendant, Kahozi Nyembo Theophile, filed his replying affidavit sworn on 23<sup>rd</sup> April 2013 wherein he stated that he is the registered proprietor of the suit property. He exhibited a copy of his title deed. He stated further that the agreed sale price for the suit property between him and the 1<sup>st</sup> Plaintiff was US\$ 70,000 which translated to Kshs. 6 million. He stated that both he and the 2<sup>nd</sup> Plaintiff signed a sale agreement. He produced a copy of that sale agreement. He stated further that he applied for a loan at Middle East Bank for Kshs. 3,500,000/= to finance part of the purchase price for the suit property. He further stated that he authorised the said bank to pay the borrowed amount to A/c No 1110558678 with Kenya Commercial Bank Ltd belonging to Modeste Bizabigomba. He also stated that the 2<sup>nd</sup> plaintiff also executed all the documents for conveyancing including the transfer forms but did not supply the title deed which he said he had misplaced. He further stated that when he made a further payment of Kshs. 1,900,000/- to the stated account belonging to Mr. Bizabigomba, he was informed that the bank account had been closed therefore the money was returned to him. He then stated that his advocate informed him that the transfer of the suit property was completed. He then stated that following the loss of the title deed, the Land Registrar, Kiambu, gazetted the loss of the original title and there being no objection he was given the title to the suit property. He also stated that following the report by the 1<sup>st</sup> Plaintiff to the police about the claim of fraud, an investigation was done and he was not found to have committed any crime therefore the police removed the restriction they had placed on the suit property. He states that he is in possession of the suit property and that if the 1<sup>st</sup> Plaintiff has a claim it should direct it to the 2<sup>nd</sup> Plaintiff.

In reply thereto the 2<sup>nd</sup> Plaintiff swore a Supplementary Affidavit on 3<sup>rd</sup> June 2013 where he stated that the Defendant had himself registered as the owner of the suit property through means of fraud without paying any consideration and that in any event, he rescinded the sale agreement between himself and the Defendant before selling the property to the 1<sup>st</sup> Plaintiff. He also disputed the sale agreement that was purportedly signed in Burundi before Modeste Bizabigomba. He further stated that the fact that the Defendant was applying for a loan from Middle East Bank was evidence of his impecunious state. He further stated that he was duped into signing documents to transfer the suit property without receiving any consideration. He also stated that he has always had his title deed and has never misplaced the same so the gazettelement done by the Registrar of Lands Kiambu was the making of the Defendant. He further stated that he had not committed any fraud but the Defendant should be charged for fraud since he has caused the suit property to be registered in his name while he has not paid any consideration for it.

The 1<sup>st</sup> Plaintiff's director, Dr. Martin Njogu Mbugua also filed a Supplementary Affidavit on 18<sup>th</sup> June 2013 stating that the 2<sup>nd</sup> Plaintiff had already rescinded the sale agreement between the Defendant and the 2<sup>nd</sup> Plaintiff therefore he believed that the Defendant procured the title deed by fraudulent means. He reiterated the contents of the 2<sup>nd</sup> Plaintiff's supplementary affidavit.

Both the Plaintiffs and the Defendant filed their written submissions all of which have been read and taken into consideration by this court.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the Applicant might otherwise suffer irreparable injury which would 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.”***

Have the Plaintiffs made out a *prima facie* case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a *prima facie* case was described 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 issue I need to determine is whether the Plaintiffs have satisfied the three conditions for the grant of a temporary injunction as prayed. The 1<sup>st</sup> Plaintiff claims that it is entitled to the suit property by virtue of having bought the same from the 2<sup>nd</sup> Plaintiff for valuable consideration, which has been paid in full. The 1<sup>st</sup> Plaintiff has shown this court that it has all the necessary documentation required for the transfer of the suit property into its name. There is, however, a rival claim to the suit property by the Defendant who holds a title deed to it. The validity of the Defendant’s title deed has, however, been challenged by both Plaintiffs on the ground of fraud. The applicable law is section 26(1) of the Land Registration Act which provides as follows:

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-***

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The question is, have the Plaintiffs succeeded to establish fraud on a *prima facie* basis? I have studied the Defendant’s statements and documents. One issue stood out prominently which caused this court to question the Defendant’s claim over the suit property. This has to do with the original title deed to the suit property in the name of the 2<sup>nd</sup> Plaintiff. The Defendant stated that the 2<sup>nd</sup> Plaintiff told him that the original title deed to the suit property was lost. However, this loss notwithstanding, the Defendant stated that the transfer of the suit property into his name was effected. No transfer can be effected in the absence of the original title deed of the existing registered proprietor. Besides that, it appears that the Defendant colluded with the land registrar in Kiambu to post a notice in the Kenya Gazette publishing the loss of the original title deed of the suit property to pave way for the issuance of a new title deed. This is supported by the fact that the 2<sup>nd</sup> Plaintiff, who was the registered proprietor of the suit property at that time, was not involved in this exercise. The applicable law was **section 35(1)** of the now repealed **Registered Land Act** which provides as follows:

***“if a land certificate or certificate of lease is lost or destroyed, the proprietor may apply to the***

***Registrar for the issue of a new certificate, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate.”***

Contrary to this law, without the involvement of the 2<sup>nd</sup> Plaintiff, the Defendant, who was not the proprietor of the suit property at that time, colluded with the Registrar to have a new title deed issued. The 2<sup>nd</sup> Plaintiff has all along stated that the title deed to the suit property has never been lost. The Defendant then used the fraudulently reissued title deed to transfer the suit property into his own name. While a final finding on this issue has to await the main trial and determination of this suit, I am satisfied that the Plaintiffs have on a *prima facie* basis proved that there was indeed fraud in the manner in which the Defendant obtained title to the suit property. On that basis therefore, I find that the Plaintiffs have established a *prima facie* case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiffs? Land is unique and no one parcel can be equated in value to another. The value of the suit property can be ascertained. However, it would not be right to say that the Plaintiffs can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiffs have established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application with costs to the Plaintiffs.

**SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER 2013.**

**MARY M. GITUMBI**

**JUDGE**