



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 253 OF 2014**

**MARGARET MUTHONI KARIUKI.....1<sup>ST</sup> PLAINTIFF**

**SIPPORAH WAIRIMU KIBUCHI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NELSON KIBUCHI MURAGE.....1<sup>ST</sup> DEFENDANT**

**WILLIAM MURIITHI MIGWI.....2<sup>ND</sup> DEFENDANT**

**EQUITY BANK LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

Land parcel No. L.R INOI/THUITA/975 (the suit land) was, until 21st March 2014, registered in the names of the 1st defendant before he sold it to the 2nd defendant at a consideration of Ksh. 4 million. The 2nd defendant then charged it to the 3rd defendant as security for a loan of Ksh. 2 million.

That action prompted the 1st defendant's daughter **MARGARET MUTHONI KARIUKI** (as 1st plaintiff) and her mother **SIPPORAH WAIRIMU KIBUCHI** (as 2nd plaintiff) to file this suit on 10th September 2014 seeking various orders including a declaration that the sale of the suit land by the 1st defendant to the

2nd defendant was null and void for failure to seek consent from the 2nd plaintiff and a permanent injunction to restrain the 2nd defendant from interfering with the 1st plaintiff's peaceful occupation and enjoyment of the suit land and General and special damages.

The basis of the claim was that the 1st defendant failed to consult his wife the 2nd plaintiff before selling the said property and further, that in or about the year 1998, the 1st defendant, with the consent of the 2nd plaintiff had agreed to give the suit land as a gift inter-vivos to the 1st plaintiff and even allowed her to put up a permanent and semi-permanent house on the same including planting tea, trees, coffee and other crops valued at Ksh. 2 million. It was also the 2nd plaintiff's case that she contributed towards the acquisition of the suit land through her income and marital services to the 1st defendant.

On 10th October 2014, the 2nd plaintiff withdrew her claim and this necessitated the amendment of the plaint on 7th April 2015 in which her name was deleted leaving only **MARGARET MUTHONI KARIUKI** as the plaintiff. Other than some amendments to state that the 1st defendant had told her that the suit land was given to him by his grandfather to be given as a gift to his grandchildren and that while she was in Paris, she instructed her daughter to place a caution on the suit land and also that in July 2014 the 2nd defendant entered the suit property, demolished her properties and chased away her employees,

the prayers remain substantially the same.

On 26th March 2015 the plaintiff filed a Notice of Motion under **Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules and Sections 1A, 1B and 3A and 63(e) of the Civil Procedure Act** as well as **Article 21, 22 and 159 of the Constitution International good practice** and enabling provisions seeking the following orders:-

1. *Spent.*
2. *Spent.*
3. *That the respondents be restrained whether by themselves, their agents, servants or howsoever from tampering, interfering, constructing, excavating, trespassing, plucking tea leaves, the 3rd respondent be restrained from demanding for loan repayment since they financed the tea improvement for the applicant and at the same time financed the purchase of the same land and tea to the 2nd respondent and/or doing anything prejudicial on land Reference No. INOI/THUITA/975 and the applicant be allowed to pluck her tea leaves until the suit is heard and determined.*
4. *That the Officer Commanding Kerugoya Police Station be directed to assist and ensure compliance by the respondents with any orders issued by this Court.*
5. *That the Honourable Court be pleased to issue any such further orders it deems fit and expedite taking all the exceptional circumstances of this case.*

That application which is the subject of this ruling was based on the grounds set out therein and supported by the plaintiff's affidavit the salient features of which are that sometime in 1996, the 1st defendant visited her and gave her the title to the suit land saying it had been given to her as a gift by her grandfather. She therefore kept the title and meanwhile started developing the land as it had poor quality tea which she up-rooted and planted others. Meanwhile while she was in Mombasa, her sister and mother went to the house and took away the title deed but her father assured her that the land was hers and so she embarked on developing it by planting 4,000 tea bushes, installed water and bought timber and stones to put up a house, kitchen and pig shelter. She even helped her father install electricity at his house at a cost of Ksh. 70,000 which he is yet to pay. In 2013, while in Paris, she learnt that the suit land was being sold so she came back to Kenya and her father agreed to sell her the suit land for Ksh. 2,000,000 but that did not happen as her father refused to take the money. She then instructed her daughter to put a caution on the suit land only to learn that the same had been removed and the suit land sold for Ksh. 3,500,000. She said she has been plucking tea leaves from the suit land since 1999 to June 2014 when the 2nd defendant entered it and demolished a section of her property after chasing away her employees. That in selling the suit land, the 1st defendant did not consider the tea that she had planted on the suit land.

The application is opposed.

The 1st defendant confirmed that the suit land was given to him in the 1970's by his late father and that the plaintiff is his daughter. He added that he planted bushes, trees and other crops and only gave the plaintiff a limited license to cultivate. That on 12th May 2014 he sold the suit land to the 2nd defendant together with all the developments thereon at a cost of Ksh. 3,500,000 with vacant possession with the consent of his wife and children and the transaction was over-board. He denied having given the suit land to the plaintiff adding that she has not come to Court with clean hands as she has previously attempted to defraud him by preparing a sale agreement dated 30th December 2013 and the matter was reported to Kerugoya Police Station vide OB/NO 26/17/01/2013.

The 2nd defendant in opposition to the application deponed that he bought the suit land from the 1st defendant on 12th May 2014 at a cost of Ksh. 3,500,000 and thereafter obtained a loan of Ksh. 2,000,000 from the 3rd defendant by securing a charge over the title. That the sale was with vacant possession and was done in conformity with all statutory provisions including spousal consent and therefore the orders sought are not available.

The 3rd defendant filed grounds of opposition to the application stating that the same is in-competent and bad in law and should be dismissed.

I have considered the application, the rival affidavits and annexures thereto and the submissions by counsel.

I must state that the drafting of the application could have been more elegant. I have broken it down as seeking the following remedies:-

1. ***A temporary injunction restraining the respondents by themselves, their agents, servants or howsoever from tampering, interfering, constructing, excavating, trespassing and plucking tea leaves.***
2. ***The 3rd respondent be restrained from demanding for loan repayment since they financed the purchase of the same land and tea to the 2nd respondent and/or doing anything prejudicial on the suit land.***
3. ***The applicant be allowed to pluck her tea leaves until this suit is heard and determined.***
4. ***That the Officer Commanding Kerugoya Police Station be directed to assist and ensure compliance with any orders issued by this Court.***

An application for temporary injunction has to be determined in line with the principles set out in the case of **GIELLA VS CASSMAN BROWN & COMPANY LTD 1973 E.A 358** which are:-

1. ***The applicant must show a prima facie case with a probability of success.***
2. ***A interlocutory injunction will not normally be granted unless it is demonstrated that the applicant will suffer irreparable injury that cannot be compensated by an award of damages, and***
3. ***If in doubt, the Court will determine the application on a balance of convenience.***

A prima facie case on the other hand was defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LIMITED & OTHERS 2003 K.L.R 125** 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”***

And as was held in the case of **FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALES LTD 1986 3 ALL E.R 772**, the Court should aim at taking the course that appears to carry the lower risk of injustice should it turn out to be wrong. Finally, being an equitable remedy, a temporary injunction will not be granted to a party who has approached the Court with un-clean hands.

It is clear from the pleadings herein that the suit land, though previously registered in the names of the 1st defendant, is now registered in the names of the 2nd defendant and held by the 3rd defendant as security for a loan of Ksh. 2,000,000 advanced to the 2nd defendant. At no time has the said land ever been registered in the names of the plaintiff and it has not been suggested in pleadings that the 1st defendant held it in trust for her or for anyone else for that matter. Indeed this Court is satisfied that the only thing the plaintiff has done on the suit land is develop it as there is evidence that she has been selling tea to the KTDA (see her annexures **MMK 5**). What is clear is that at some point, the 1st defendant said he wanted to give her the suit land and there was even an attempt to sell it to the plaintiff at Ksh. 2,000,000 in December 2013 but the 1st defendant reneged from that offer. By her own supporting affidavit in paragraph 20, she admits that the 1st defendant “**betrayed**” and “**mis-used**” her. The truth of the matter however is that if the 1st defendant really wanted to gift her the suit land, he had to comply with both the substantive law and statutory procedures relating to transfer of agricultural land which clearly the suit land is. That would of course require the necessary Land Control Board consent and thereafter the disposition would have to be effected by a transfer in the prescribed form as provided under **Section 43(2) of the Land Act** which provides:-

***“A proprietor may transfer land, a lease or a charge to any person (including himself or***

***herself) with or without consideration, by an instrument in the prescribed form”***

The 1st defendant merely made an oral promise and when the plaintiff tried to get him to sign an agreement and even went with him to a Bank in Nyahururu so she could pay him Ksh. 1,500,000, he, to quote her own amended plaint at paragraph 5L, “***disappeared without informing her***”. Clearly the 1st defendant had no intention of gifting the plaintiff the suit land. In **HALSBURY’S LAW OF ENGLAND 3rd EDITION VOLUME 18 at page 396**, it is stated as follows:-

***“Where a gift vests merely in a promise (written or verbal) or unfulfilled intention, it is incompetent and imperfect and the Court will not compel the intending donor, or those claiming under him, to complete and perfect it”***

It is also further stated in the same publication as follows:-

***“An incomplete gift can be revoked at any time. No question of conscience enters into the matter for there is no consideration and there is nothing dishonest on the part of an intending donor who chooses to change his mind at any time before the gift is complete”***

The above was cited with approval by the Court of Appeal in the case of **THE REGISTERED TRUSTEES ANGLICAN CHURCH OF KENYA MBEERE DIOCESE VS THE REV DAVID WAWERU NJOROGE C.A CIVIL APPEAL NO. 108 OF 2002**. I am of course alive to the fact that at this point, I cannot make definitive findings of fact as to the ownership of the suit land. However, in determining whether the plaintiff has a prima facie case with a probability of success at the trial, this Court must examine the basis of her claim. All that remains of her case is that she did some development thereon including planting tea. But developing another person’s land does not in itself grant one any right in the said land. Having been on the suit land with the consent of the 1st defendant, she was a mere licensee whose license was extinguished upon the purchase of the land by the 2nd defendant. In the circumstances, I am un-able to find that the plaintiff has established any prima facie case to warrant the orders sought.

It must also be noted that the 2nd defendant bought the suit land from the 1st defendant vide an agreement dated 12th May 2014 (2nd defendant’s annexure **WMM 2**). By that agreement, the 2nd defendant bought the suit land “***together with the developments thereon (if any)***”. That would of course include the tea and other crops thereon and to restrain the 2nd defendant from plucking the said tea would amount to restraining the 2nd defendant from accessing his own property at least by the sale agreement entered into between him and the 1st defendant. The plaintiff has of course pleaded that she had planted some 300 trees and tea all worth a total of Ksh. 900,000 (see paragraphs 23 and 24 of her replying affidavit) but which were not part of the sale agreement. Unfortunately her father the 1st defendant sold all that to the 2nd defendant which she can recover from him in damages should she succeed in her case. A greater injustice would ensue if this Court were to grant her access to that tea as it would amount to allowing her to trespass on the suit land.

And with regard to the prayer that the 3rd respondent be restrained from demanding for the loan repayment, it is not clear how this Court can restrain a financial institution from recovering a loan property secured by a charge in the absence of any evidence of impropriety on its part. It must be realized that throughout her pleadings, the plaintiff has not made any allegation that the suit land was fraudulently transferred to the 2nd defendant and in the circumstances, he was at liberty to charge it to secure a loan with the 3rd respondent.

The plaintiff not having established a prima facie case against the defendants with a probability of success at the trial, the application can only be dismissed because once an applicant is un-able to surmount the first hurdle in the **GIELLA** case (supra), I need not examine the two other grounds – see **NGURUMAN LTD VS JAN BONDE NELSON & TWO OTHERS C.A CIVIL APPEAL NO. 21 OF 2014**. In that case, the Court of Appeal stated that the three conditions set out in the **GIELLA** case (supra) must be considered sequentially and that if the applicant establishes a prima facie case, that alone is not sufficient basis upon which to grant an interlocutory injunction. The Court must further be satisfied

that the injury that the applicant will suffer in the event that no injunction is granted will be irreparable. The Court then went on to state as follows:-

***“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration”***

See also **KENYA COMMERCIAL FINANCIAL CO. LTD VS AFRAHA EDUCATION SOCIETY (2001) 1 E.A 86 (CAK).**

That notwithstanding, I have considered whether damages would be adequate compensation to the plaintiff should she succeed at the trial and the answer to that is in the affirmative. By her own pleadings, she has quantified her loss as follows in paragraphs 9, 10 and 11 of her plaint:-

- **Ksh. 2,000,000 – value of the developments on the land**
- **Ksh. 300,000 – value of her trees**
- **Ksh. 600,000 – value of her coffee**

She also seeks general damages. Clearly, her loss can be quantified should she succeed at the trial. The applicant has therefore not surmounted the second condition in the **GIELLA** case (supra) and is not therefore deserving of the orders of injunction sought.

No doubt the plaintiff appears to have been ***“betrayed”*** and ***“mis-used”*** by her own father after spending money to develop the suit land. This Court also has a conscience but it is bound by the law and nothing else. While I have the discretion to grant interlocutory reliefs in appropriate cases, to do so in the circumstances of this case would amount to an extravagant and injudicious exercise of discretion. I must not do so.

Ultimately therefore and upon considering all the matters herein, I find that the plaintiff’s Notice of Motion dated 24th March 2015 and filed on 26th March 2015 is devoid of merit. It is accordingly dismissed. Costs shall be in the cause.

**B.N. OLAO**

**JUDGE**

**22<sup>ND</sup> APRIL, 2016**

Ruling dated, delivered and signed in open Court this 22<sup>nd</sup> day of April 2016

Mr. Macharia for Mr. Ngigi for 1<sup>st</sup> and 2<sup>nd</sup> Defendants present

Mr. Ongegu for Plaintiff present

Mr. Muchira for Mr. Munene for 3<sup>rd</sup> Defendant present.

**B.N. OLAO**

**JUDGE**

**22<sup>ND</sup> APRIL, 2016**

MR. ONGEGU

My client is travelling out of the country. Is it possible to give us a date for hearing?

MR. MUCHIRA - My instructions were only to take a ruling.

MR. MACHARIA – I am not familiar with the file.

COURT – Let the plaintiff take a date for mention to confirm compliance before date is fixed for hearing.

**B.N. OLAO**

**JUDGE**

**22<sup>ND</sup> APRIL, 2016**