



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

**ELC CASE NO. 789 OF 2013**

MARGARET WAIRIMU GATOGO .....1<sup>ST</sup> PLAINTIFF

VERSUS

AINSWORTH GITHINJI KARANI ..... 1<sup>ST</sup> DEFENDANT

SIMON WARUI GATOGO .....2<sup>ND</sup> DEFENDANT

THE LAND REGISTRAR KIRINYAGA

Suing through THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT

TABITHA NJERI MUHORO .....4<sup>TH</sup> DEFENDANT

CHARLES WANJOHI MUHORO .....5<sup>TH</sup> DEFENDANT

EDWIN WACIRA MWANGI .....6<sup>TH</sup> DEFENDANT

**RULING**

On 22<sup>nd</sup> January 2014, the Plaintiff/Applicant herein filed an amended Notice of Motion seeking the following prayers:-

***1. That TABITHA NJERI MUHORO, CHARLES WANJOHI MUHORO AND EDWIN WACIRA MWANGI be included in the case as the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents respectively.***

***2. That a Temporary Injunction be issued restraining the Defendants/Respondents whether acting by themselves or through their agents, servants or workmen from doing any of the following acts; disposing off, selling, altering, removing, parting with or transferring to other parties or in any other manner whatsoever dealing or affecting transforms (sic) over the land in issue inconsistent with the Applicant's interest till the case is heard and determined.***

***3. That costs be in the cause.***

The same was supported by the affidavit of the Plaintiff/Applicant and based on the ground that the land in dispute was illegally transferred to the Defendants/Respondents.

The application was opposed and the 1<sup>st</sup> Defendant/Respondent filed a replying affidavit in opposition to

the same.

However, on 16<sup>th</sup> July 2014, when that application came up for hearing in the presence of counsels for the Plaintiff/Applicant and counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents, it was agreed by consent that prayer 1 of that application be allowed and that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents be served.

It is clear however that notwithstanding the consent orders issued on 16<sup>th</sup> July 2014, the plaint has never been amended to include the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants in this suit and therefore they are not parties to this suit. In the circumstances, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents are really strangers to both the application and the suit and no orders adverse to them can be issued by this Court. The application for injunctive reliefs which is the prayer No. 2 in as far as it relates to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents is accordingly dismissed with costs to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents.

With regard to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents, the Plaintiffs/Applicants seek to injunct them from interfering with the parcel of land No. MWERUA/KAGIOINI/816 pending the hearing and determination of this suit. I have considered the application, the rival affidavits and submissions by counsels.

Being an application for injunction, it has to be considered in line with the principles set out in the case of **GIELLA VS CASSMAN BROWN LTD 1973 E.A 358** which are:-

***(a) Firstly, the applicant must make out a prima facie case with a probability of success at the trial***

***(b) Secondly, an injunction will not normally be granted unless it can be shown that the applicant is likely to suffer irreparable injury which cannot be compensated by an award of damages and***

***(c) If in doubt, the Court will determine the matter on a balance of convenience.***

What is a prima facie case? This was defined in the case of **MBAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL NO. 39 of 2002 (2003 e K.L.R)** 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”***

Has the Plaintiff/Applicant herein met the threshold set out in the case of **GIELLA** (supra)? It is clear from the record herein that the parcel of land No. MWERUA/KAGIOINI/816 has been registered in the names of the 2<sup>nd</sup> Defendant/Respondent since 2002 before its subsequent sub-division into MWERUA/KAGIOINI/1691 and 1692. MWERUA/KAGIOINI/1691 was also later sub-divided into MWERUA/KAGIOINI/1901 and 1902 while MWERUA/KAGIOINI/1692 was also sold to the 1<sup>st</sup> Defendant/Respondent. The Plaintiff/Applicant's claim is that the registration of the parcel No. MWERUA/KAGIOINI/816 in the names of the 2<sup>nd</sup> Defendant/Respondent was illegal and should be annulled (see paragraph 8 of her supporting affidavit). In her plaint filed herein on 12<sup>th</sup> February 2009 and later amended on 20<sup>th</sup> June 2013, no particulars of fraud or any illegality are set out against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Being the registered proprietors of the land in dispute, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents are entitled to the absolute ownership of those properties together with all the rights and privileges belonging or appurtenant thereto subject only to the other interests recognized in law. **Section 27 of the Registered Land Act** (now repealed) under which the suit property was registered gives the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents those rights and there is nothing on the record to

suggest that they hold the properties in trust for the Plaintiff/Applicant or any other party.

Further, it is also clear from the replying affidavit of the 1<sup>st</sup> Defendant/Respondent that he and the 2<sup>nd</sup> Defendant/Respondent are in occupation of the properties subject of this suit and which they have fully developed. This has not been disputed. Therefore, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents are not only the registered proprietors of the properties in dispute, but they are also in occupation of the same. Given those circumstances, it would be a travesty of justice for this Court to injunct them against using the land as they so wish. The Plaintiff/Applicant has not surmounted the first hurdle in the **GIELLA** case (supra).

What about adequacy of damages should the Plaintiff/Applicant succeed in her claim? In her suit, the Plaintiff/Applicant has not only sought the cancellation of the registration of the land in dispute in the names of the Defendants/Respondents but she also seeks compensation which is really damages. From her own pleading therefore, she concedes that her injury, if any, can be quantified in damages. It is therefore not irreparable. Clearly therefore, there would be no basis upon which to issue injunctive orders against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents with regard to the properties subject of this suit.

In the circumstances, the Plaintiff/Applicant's application dated 22<sup>nd</sup> January 2014 seeking injunctive remedies against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents lacks merit and is also dismissed with costs.

Ultimately therefore, the Plaintiff/Applicant's application against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents is hereby dismissed with costs.

**B.N. OLAO**

**JUDGE**

**27<sup>TH</sup> JULY, 2015**

27/7/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Kanyi for Kariuki for Plaintiff – present

Mr. Ngugi for 1<sup>st</sup> Defendant – present

Attorney General for 3<sup>rd</sup> Defendant – absent

Mr. Munene for Maina for 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants – present

COURT: Ruling delivered this 27<sup>th</sup> day of 2015 in open Court.

Mr. Kanyi for Mr. Kariithi for Plaintiff/Applicant present

Mr. Ngugi for 1<sup>st</sup> Defendant/Respondent present

Mr. Munene for Mr. Maina for 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents present

Attorney General for 3<sup>rd</sup> Defendant absent

**B.N. OLAO**

**JUDGE**

**27<sup>TH</sup> JULY, 2015**