



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

**ELC CASE NO. 7 OF 2015**

JAMES GATHITU MWAURA.....1<sup>ST</sup> PLAINTIFF/APPLICANT

LUCY WANJIRU MUTURI.....2<sup>ND</sup> PLAINTIFF/APPLICANT

VERSUS

PETER NJOROGE MWANGI Alias

NJOROGE MWANGI.....1<sup>ST</sup> DEFENDANT/RESPONDENT

THE DISTRICT LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

Before me is the plaintiffs/applicants' Notice of Motion dated 28<sup>th</sup> January 2015 but filed herein on 5<sup>th</sup> February 2015 seeking the following orders:-

1. *That the Honourable Court be pleased to issue an order restraining the first defendant/respondent from in any way sub-dividing, selling, transferring, leasing out or in any other way interfering with the quiet and peaceful possession of the parcel number LOC 2/KANGARI/323 and the title be protected by a Court inhibition order.*
2. *That the Honourable Court be pleased to issue an order restraining the 1<sup>st</sup> defendant/respondent by himself, his agents, employees, servants or any persons claiming under him from in any way interfering with the quiet and peaceful possession of land parcel No. LOC 2/KANGARI/323 thus maintaining status quo until this matter is heard and determined.*
3. *The costs of this application be awarded to the applicants.*

The application which is premised under the provisions of **Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules** is based on the general ground that the applicants are the son and daughter in law respectively of one CHEGE MUTURI (deceased) who died on 19<sup>th</sup> August 1975 while being the registered owner of the said land parcel number LOC 2/KANGARI/323 (hereinafter the suit property). Following his death, however, the applicants discovered that although they had taken out Muranga Senior Resident Magistrate's Succession Cause No. 215 of 1989 as the dependants of the deceased, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had through connivance registered themselves as the owners of the suit property and obtained title thereto in 1994.

The application is supported by the applicants' affidavit in which they depone, inter alia, that the deceased died in 1975 and so there is no way he could have transferred the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in 1994. Further, that the 1<sup>st</sup> Respondent has been using illegal means to harass and

intimate them including filing a Criminal Case No. 103 of 2015 at Kigumo Court yet the applicants are the true and legal owners and have had exclusive occupation of the suit property. It is also deponed that the 1<sup>st</sup> respondent is neither their kin, relative nor dependant of the deceased.

In response to that application the 1<sup>st</sup> Respondent has filed a replying affidavit in which he had deponed, inter alia, that the late

EDWARD MUTURI sold two acres of the suit property to his (1<sup>st</sup> Respondent's) late father MWANGI GACHINGIRI following the completion of MURANGA SENIOR RESIDENT MAGISTRATE SUCCESSION CAUSE NO. 215 of 1989 which had been filed by Francis Njoroge Muturi, James Gathitu, the 1<sup>st</sup> applicant herein and the late EDWARD MUTURI. He added that 2<sup>nd</sup> applicant herein misled the Court in Muranga that the deceased's Estate had not been distributed as at the time EDWARD MUTURI who was her husband died on 22<sup>nd</sup> May 2012 and her name was substituted in the place of her late husband's name and that is how a grant bearing her name was issued on 28<sup>th</sup> April 2014. He denied having acquired the land illegally and fraudulently adding that the applicants are well aware that the late EDWARD MUTURI had entered into various agreements both oral and written with the 1<sup>st</sup> Respondent's late father for two acres out of the suit property and that infact the 2<sup>nd</sup> applicant was a witness to some of those agreements. It is further deponed by the 1<sup>st</sup> Respondent that his late father had requested the late EDWARD MUTURI to transfer the land into his (1<sup>st</sup> Respondent's) names and even signed the transfer form and a title deed was subsequently issued in the three names including his name and that the late EDWARD MUTURI even pointed out to the 1<sup>st</sup> Respondent's father his portion of the land and that the 1<sup>st</sup> Respondent has been in possession of that portion to-date and disputes only started after the 2<sup>nd</sup> applicant made an application at Muranga Court some twenty (20) years after the title had been issued. Following the 1<sup>st</sup> applicant's acts of trespass onto the land, the 1<sup>st</sup> Respondent reported to the Police and charges were preferred against him and others. There is therefore no basis in law for the orders sought as the 1<sup>st</sup> applicant sold his whole interest in the suit property to FRANCIS NJOROGE MWAURA on 15<sup>th</sup> December 2003 but refused to transfer the same thus culminating in Civil Case No. 116 of 2014 at Kigumo Court.

Submissions have been filed by counsels for both parties.

I have considered the application, the rival affidavits and annextures thereto and the submissions by counsels.

This being an application for injunction, it has to be determined in line with the principles laid down in the case of GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A. 358 and which are:-

1. ***The applicant must show a prima facie case with a probability of success.***
2. ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, and***
3. ***When in doubt, the Court will determine the application on the balance of convenience.***

What is a prima facie case? This was defined by the Court of Appeal in the case of MRAO VS FIRST AMERICAN BANK OF KENYA LTD 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”***

It must also be remembered that being an equitable remedy, an injunction will not be granted where it is demonstrated that the applicant has not approached the Court with clean hands. Finally, as was held in the case of FILMS ROVER INTERNATIONAL 1980 3 ALL. E.R. 772, the Court in considering such an application will take the course that appears to carry the lower risk of injustice. This Court will therefore

be guided by the above broad principles in determining this application.

From the affidavits and annexures available in this matter, it is not in dispute that the suit property was registered in the names of the deceased CHEGE MUTURI who died on 19<sup>th</sup> August 1975 as per the death certificate herein (see applicant's annexure **JG 1b**). It would appear that following his death, two certificates of confirmation of grant were issued in respect of his Estate. These are:-

1. Certificate of confirmation of grant issued in Muranga Senior Resident Magistrate's Court Succession Cause No. 215 of 1989 and dated 4<sup>th</sup> May 1994 (1<sup>st</sup> Respondent's annexure **NM 1**). This certificate of confirmation of grant was issued to the following:-

- a. FRANCIS NJOROGE MUTURI
- b. JAMES GATHITU and
- c. EDWARD MUTURI

All the above three beneficiaries shared the suit property with FRANCIS NJOROGE MUTURI getting three acres. JAMES GATHITU MWAURA (1<sup>st</sup> applicant) one acre and EDWARD MUTURI two acres.

2. Certificate of confirmation of grant issued in Muranga Senior Resident Magistrate's Court Succession Cause No. 215 of 1989 dated 5<sup>th</sup> May 2014 (applicant's annexure **JG 2**). The certificate of confirmation of grant was issued to the following:-

- a. FRANCIS NJOROGE MUTURI
- b. JAMES GATHIGU and
- c. LUCY WANJIRU MUTURI (2<sup>nd</sup> applicant).

In this later certificate of confirmation of grant, the suit property is distributed as follows:-

1. FRANCIS NJOROGE MUTURI – three acres
2. JAMES GATHITU (1<sup>st</sup> applicant) – one acre
3. LUCY WANJIRU MUTURI (2<sup>nd</sup> applicant) – two acres

It is therefore clear that there are two certificates of confirmation of grant in respect of the deceased herein both bearing the names of JAMES GATHITU (1<sup>st</sup> applicant) and FRANCIS NJOROGE MUTURI and that while one certificate of confirmation (1<sup>st</sup> Respondent's annexure **NM 1**) bears the name of EDWARD MUTURI as a beneficiary of two acres out of the suit property, the other certificate of confirmation of grant (1<sup>st</sup> applicant's annexure **JG 2**) bears the names of LUCY WANJIRU MUTURI (2<sup>nd</sup> applicant) in place of EDWARD MUTURI. It is admitted by both sides that the 2<sup>nd</sup> applicant is the wife of the late EDWARD MUTURI.

The applicant's case is that the 1<sup>st</sup> Respondent is not a member of the family of the deceased CHEGE MUTURI and therefore has no right over the suit property. The said 1<sup>st</sup> Respondent has deponed that infact the late EDWARD MUTURI sold his two acres of the suit property to the 1<sup>st</sup> Respondent's late father MWANGI GACHINGIRI and that infact the 2<sup>nd</sup> applicant was a witness. I have had a look at the various agreements annexed to the 1<sup>st</sup> Respondent's replying affidavit and which are in Kikuyu language but duly translated and it is clear that on 30<sup>th</sup> December 1996, the 2<sup>nd</sup> applicant was a witness when EDWARD MUTURI received Ksh. 10,000/= as part payment of a portion of the suit property. Apart from that, there is also an agreement dated 3<sup>rd</sup> February 2000 in which EDWARD MUTURI sold his two acres out of the suit land to MWANGI GACHINGIRI for the agreed purchase price of Ksh. 200,000/= and it was further agreed that the said MWANGI GACHINGIRI would pay the late EDWARD MUTURI a total sum of Ksh. 150,000/= as good will as follows:-

1. Ksh. 50,000/= on or before June 2000

2. Ksh. 50,000/= on or before December 2000
3. Ksh. 50,000/= on or before April 2000

Paragraph 4 of the said agreement which is signed by both parties is crucial. It says:-

***“Physical location of the said land already shown on ground and the purchaser has been put into physical possession of the aforesaid land”***

The contents and authenticity of the various agreements have not been rebutted. The applicants’ case, as is gleaned from paragraph 6 of their affidavit is that their deceased father could not have sold the two acres to the 1<sup>st</sup> respondent in 1994 or at all since he died in 1975. That is correct. However, it is clear from the agreements herein that the 1<sup>st</sup> Respondent’s late father in fact bought two acres out of the suit property from the late EDWARD MUTURI and not from the applicants’ late father CHEGE MUTURI. It is also clear from the agreement herein that the 1<sup>st</sup> Respondent’s late father took possession of the two acres and that explain why the 1<sup>st</sup> Respondent is in possession of the same and also why the title deed to the suit property is now in the joint names of the 1<sup>st</sup> applicant, FRANCIS NJOROGE MWANGI and the 1<sup>st</sup> Respondent herein - see 1<sup>st</sup> Respondent’s annexure **NM 5**. Once that title was issued, this Court is entitled to presume that it is a valid document until the contrary is proved – see **Section 37 (1) of the Registered Land Act** (now repealed) under which the suit property is registered. The applicants plead fraud on the part of the Respondents. That is a matter that will be determined at the trial by viva voce evidence. For now, the applicants are required to meet the threshold set out in the **GIELLA** case (supra).

On the material before me, the applicants have not satisfied this Court that they have a prima facie case with a probability of success. It is clear that the 1<sup>st</sup> Respondent is in possession of the suit property (at least two acres of the same) following an agreement between the late EDWARD MUTURI and the 1<sup>st</sup> Respondent’s late father. Secondly, the 1<sup>st</sup> Respondent is registered as a joint owner of the suit property together with the 1<sup>st</sup> applicant and one FRANCIS NJOROGE MUTURI and it would be a rare case indeed for an owner of property to be enjoined. The applicants have failed to surmount the first hurdle of showing a prima facie case with a probability of success and their Notice of Motion cannot succeed and there is no need to consider the other requirements as set out in the **GIELLA** case (supra).

With regard to the prayer for an inhibition, it is obvious that no dealings can be registered on the suit property without the consent of all the parties whose names appear on the title deed. There is no need for such an order.

Ultimately therefore, and having considered all the matters herein, I am not persuaded that the applicants merit the order sought in their Notice of Motion dated 28<sup>th</sup> January 2015 and filed herein on 5<sup>th</sup> February 2015. The same is accordingly dismissed with costs to the 1<sup>st</sup> Respondent.

**B.N. OLAO**

**JUDGE**

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

27/11/2015

Before

B.N. Olao – Judge

Mwangi – CC

Appellants – absent

1<sup>st</sup> Respondent – present

2<sup>nd</sup> Respondent – absent

COURT: Ruling dated, delivered and signed this 27<sup>th</sup> day of November, 2015 in open Court.

**B.N. OLAO**

**JUDGE**

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