



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

**ELC CASE NO. 702 OF 2013**

**KINUTHIA WAMWANGI Alias KINUTHIA MWANGI WAMWANGI.....PLAINTIFF**

**VERSUS**

**ZAKARIA FUNDI KARIUKI.....1<sup>ST</sup> DEFENDANT**

**ROSEMARY MARIGU KARIUKI.....2<sup>ND</sup> DEFENDANT**

**JUSTA RWAMBA NJAGI.....3<sup>RD</sup> DEFENDANT**

**NJIRU KIVUTI NJUE.....4<sup>TH</sup> DEFENDANT**

**JOHN PAUL NJUE.....5<sup>TH</sup> DEFENDANT**

**NJERU MBOGO JOSEPH.....6<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiff/applicant filed this suit against the six (6) defendants seeking the following remedies:-

*a. A declaration that he is the sole registered owner of a parcel of land known as GATURI/WERU/222 situated at Ruingaci area in Embu County (hereinafter referred to as the suit land)*

*b. An order of vacant possession of the suit land to plaintiff*

*c. An order of eviction from the suit land evicting the defendants or anybody claiming any interest through them including their relatives, agents, servants and employees*

*d. An order of permanent injunction restraining the defendant and or their relatives or anybody claiming any beneficial interest through them or any interest of any nature whatsoever, their agents, servants/employees from trespassing, encroaching excavating/mining building stones/occupying or alienating or dealing in any way whatsoever with the said suit land*

*e. General damages*

*f. Costs of this suit*

***g. Any other or further relief that this Court may deem fit to grant***

The suit is premised on a claim that whereas the plaintiff is the registered owner of the suit land, the defendants sometime in the year 2005 and 2010 trespassed onto the same.

The 1<sup>st</sup> to 5<sup>th</sup> defendants have filed a defence in which they aver that the plaintiff obtained registration of the said suit land through fraudulent means particulars of which have been pleaded. They add that they have been in occupation of the suit land since 1961 and did not move therein in 2005 or 2010 as pleaded and further, the said defendants plead that the said illegal transfer of the land to the plaintiff has been reported to the Criminal Investigation offices in Embu which investigated the matter and confirmed that indeed the said transfer of the suit land to the plaintiff was illegal.

Simultaneously with the filing of the plaint, the plaintiff/applicant filed a Notice of Motion seeking a temporary injunction restraining the defendants/respondents and/or their relatives or anybody claiming any beneficial interest through them or any interest of whatsoever nature whatsoever, their agents, servants/employees from trespassing, encroaching excavating/mining building stones, occupying or alienating or dealing in any way whatsoever with the suit land pending hearing of the suit.

The application is founded on the grounds on the face of the same and supported by the plaintiff/applicant's affidavit in which he depones, inter alia, that he is the registered owner of the suit land having purchased it in 1976 from one GEORGE THUO WAMURUKU after which he took possession of it. Sometime in 2005 and 2010, the defendants/respondents trespassed onto the same and put up structures and although he has asked them to vacate, they have not done so thus giving rise to this application.

The 1<sup>st</sup> to 5<sup>th</sup> defendant/respondent filed a defence alleging that the plaintiff/applicant obtained title to the land through fraud and that infact they have been in occupation of the land since 1961 and did not put up structures thereon in 2005 or 2010 as alleged.

In response to the application for injunction, the 4<sup>th</sup> respondent swore a replying affidavit on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents saying that they have been in occupation since 1961 and that the plaintiff/applicant connived with GEORGE THUO to have the land illegally transferred to him from their late father and that that matter is still being investigated by the police who established that the alleged thumb print of their late father on the transfer document did not infact belong to their late father. That the suit land belonged to their late father and it was only after they finished the EMBU SUCCESSION CAUSE NO. 183 of 1991 that they realized that the land had been fraudulently transferred to GEORGE THUO WAMURUKU and thereafter to the plaintiff/applicant.

Counsels for both parties have filed their submissions which I have considered together with the rival affidavits and the annexures thereto.

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

- 1. The applicant must show that he has a prima facie case with reasonable chances of success***
- 2. The applicant must show that if the injunction is not granted, he will suffer irreparable loss that may not be compensated in damages and***
- 3. If in doubt, the Court will decide the issue on a balance of convenience***

It is further important to observe that being an equitable remedy, an injunction will not be granted to a party that has not come to Court with hands. Finally, as was noted in ***FILMS ROVER INTERNATIONAL 1986 3 ALL E.R. 772***, the Court should take the course that appears to carry the lower risk of injustice.

I have therefore considered this application in light of the above broad principles. It is not in dispute that the suit land is registered in the names of the plaintiff/applicant. A land certificate issued under the repealed **Registered Land Act** and dated 6<sup>th</sup> April 1976 has been shown to the Court. On the face of it therefore, the plaintiff/applicant would be entitled to the rights of absolute ownership of the suit land. However, such rights can be challenged where it is demonstrated that the registration was obtained fraudulently or that the registered proprietor in fact holds the suit land in trust.

It is clear from a perusal of the annexures provided by the respondents herein that the issue of the transfer of the suit land from the 1<sup>st</sup> to 5<sup>th</sup> respondents' father PAUL NJUE KIGAMBA to GEORGE THUO and thereafter to the plaintiff is with the police pending investigations. Indeed the Court has been shown an exhibit memo form (annexture ***JPN 5***) which is a report of a Document Examiner dated 10<sup>th</sup> August 2007 and which suggests that the thumb print on the old generation Identity Card of one NJUE KIGAMBO and that appearing on the transfer document in relation to the suit land were not made by one and the same person. That of course will be a matter to be determined at the trial and hopefully the officer who prepared the said document will be an important witness. Nonetheless, that document suggests that the transfer of the suit land which was originally registered in the names of PAUL NJUE in 1961 before being transferred to GEORGE THUO WAMURUKU in 1972 may not have been above board. Should it turn out that in fact that transfer was fraudulent, then that finding would have consequences on the subsequent transfer from GEORGE THUO WAMURUKU to the applicant herein which was done in 1976. That being the position, I am not persuaded at this stage that the applicant has established a prima facie case as set out in the ***GIELLA*** case (supra). The validity of his title appears to be in doubt.

Secondly, the applicant has not established what irreparable loss he will suffer that cannot be adequately compensated in damages should the injunction not be granted.

Lastly, should the Court consider the issue of convenience, the respondents are on the suit land and there was no reply to their affidavit that they have been on the said land since 1961. The balance of convenience would tilt in their favour.

In the circumstances, the plaintiff/applicant's Notice of Motion dated 6<sup>th</sup> September 2013 is dismissed with costs.

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> JULY, 2014**

31/7/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Gichong'i for Plaintiff – absent

Mr. Kiama for Momanyi for Defendant – present

COURT: Ruling delivered this 31<sup>st</sup> day of July 2014 in open Court

Mr. Gichong'i for Applicant – absent

Mr. Kiama for Momanyi for Respondent – present.

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> JULY, 2014**