



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC NO. 189 OF 2012**

**HENRY GITHUKU GITHONGO.....PLAINTIFF**

**- VERSUS -**

**MARUBU MWANGI.....1<sup>ST</sup> DEFENDANT**

**JOHN NJUGUNA GATHEGU .....2<sup>ND</sup> DEFENDANT**

**WILLIAM KIMEMIA MWANGI .....3<sup>RD</sup> DEFENDANT**

**GIDEON KARIUKI NJONJO .....4<sup>TH</sup> DEFENDANT**

**FAITH NJERI GACHERU .....5<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the plaintiff's notice of motion dated 10<sup>th</sup> April 2012. The plaintiff prays for injunction to restrain the defendants from interfering with his quiet possession of the land known as LR Thika Municipality Block 30/3243 and its subdivisions. The motion is brought under order 40 of the Civil Procedure Rules 2010.
2. In a nutshell, the plaintiff avers that he is the registered proprietor of the suit land. He claims that the defendants, without any colour of right, have entered the property and removed building materials. This has prejudiced the plaintiff's right of ownership and quiet possession of the lands. The plaintiff also submitted that the defendants have not complied with the requirements of order 1 rule 8 of the Civil Procedure Rules.
3. The motion is contested. In a synopsis, the defendants assert that the land is set aside for use by the public. The defendants' case is that the plaintiff has no title or right to exclusive use or possession of the property. The defendants submitted that no formal title has been annexed to the affidavit of the plaintiff. They submitted that that is telling. In the end, the defendants' position is that the plaintiff has not met the threshold for grant of interlocutory prohibitive injunction.
4. I have heard the rival arguments. The principles for grant of injunction are well settled by the time honoured decision of *Giella Vs Cassman Brown & Company Limited* [1973] E.A. 358. The plaintiff must demonstrate a *prima facie* case with a probability of success; show that he stands to suffer irreparable

harm not compensable in damages; and lastly, if in doubt, the court must weigh the balance of convenience. Being a discretionary remedy, there is also ample authority that a person who has misconducted himself in the eyes of equity will be denied the remedy. See *Kenya Hotels Limited Vs Kenya Commercial Bank & another* [2004] 1 KLR 80.

5. When I juxtapose those principles of law against the facts, I find further as follows. The plaintiff placed reliance on his deposition sworn on 10<sup>th</sup> April 2012. At paragraph 2,3 and 4 he depones as follows;

2. **THAT** I am a shareholder of a land buying company called Kiganjo Ranching Company Limited and I was lawfully allocated land parcel No. THIKA Municipality Block 30/3243 and I were given a little deed for it.

3. **THAT** I later sub-divided the parcel of land into twelve (12) sub-plots and I sold some of the sub-plots to third parties.

*Annexed and marked "HGG1" is a copy of the land control Board Consent to sub-division of the suit land into 12 plots.*

4. **THAT** I also annex and mark "HGG2" a copy of the application form for consent of land control Board.

6. He has not annexed a copy of the title or the details of the subdivisions. It behoved him to provide cogent evidence of ownership. This could have been by way of an allotment letter or share certificate from Kiganjo Ranching Company or a formal title of lease. All that is now before the court are the application to and a letter of consent of the land control board authorizing the subdivision. No scheme of the subdivision or the details of the owners are provided. Faced with the defendant's allegation that the land is public property, the plaintiff should have endeavoured to assert a credible basis of ownership. I have thus come to the inescapable conclusion that either the plaintiff's claim of title is doubtful or he has deliberately sought to leave the court in a blind spot. The claim by the plaintiff that the respondents have colluded with councilors to dispossess him of the land is thus on quicksand. No dates are provided when the respondents "threatened his workers" or destroyed building materials on the land.

7. I have then paid regard to the averments in the replying affidavit of Marubu Mwangi sworn on 18<sup>th</sup> June 2012. He concedes at paragraph 10 that the plaintiff is a shareholder of Kiganjo Ranching Company Limited but states that the plaintiff is seeking to illegally acquire public land. A map is annexed marked "MM 1" that on the face of it shows that the suit land was set apart for public use. It is then the defendants' case that any transfer to the plaintiff for personal gain is illegal and fraudulent. It is the true province of the trial court to establish the truth on tested evidence. But from the available evidence and the failure by the plaintiff to provide cogent documentary evidence of ownership, I have entertained serious doubts about the plaintiff's claim to title. The defendants deny threatening the plaintiff. The annexed picture marked "MM 2" shows the land is bare. There are no developments on it. Some building materials or stones can be seen far in the background. I think the plaintiff may have genuine apprehensions but there is no evidence before me of a threat by the defendants.

8. Granted those circumstances and the evidence, I find that the plaintiff has not risen to the threshold for grant of interlocutory prohibitive injunction. The defendants may not have fully complied with the requirements of order 1 rule 8 of the Civil Procedure Rules 2010. As the defendants claim to act for a fluctuating group of members of the public, the rule requires them to notify other parties affected by the action. But rules of procedure are handmaidens and not mistresses of justice. They must give way to the overriding objective to do substantial justice to the parties laid out in article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act. In any event, the window to comply with the rule has not been completely shut at this stage. I would then focus more on the rights of the parties and close my eyes to technical rules of procedure. See *Harit Sheth T/a Harit Sheth Advocate Vs Shamas Charania* Nairobi, Court of Appeal, Civil Application No 68 of 2008 [2010] e KLR.

See also Kenya Commercial Finance Company Ltd Vs Richard Onditi Nairobi, Court of Appeal, Civil Appeal No Nai 329 of 2009 (unreported), Phoebe Wangui Vs James Kamore Njomo Nairobi, High Court Civil case 367 of 2010 [2012] e KLR.

9. As I am not in doubt about the failure by the plaintiff to establish a *prima facie* case, I need not consider the balance of convenience. But I would venture to add that in view of the claims that the land is public property, the balance would not tilt in favour of the plaintiff.

10. For all the above reasons I refuse to exercise my discretion in favour of the plaintiff. I order that the plaintiff's notice of motion dated 10<sup>th</sup> April 2012 be and is hereby dismissed. Costs shall abide the final judgment.

It is so ordered.

**DATED and DELIVERED at NAIROBI** this 18<sup>th</sup> day of January 2013.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Mr. Opande for Mr. Njoroge for the Plaintiff.

No appearance for the Defendants.

Mr. Collins Court Clerk.