



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 464 of 2009**

**PAUL KIBINDU KAMAU**

**GEORGE NJUGUNA KAMAU .....PLAINTIFFS/RESPONDENTS**

**VERSUS**

**IBRAHIM KAMAU NJENGA.....DEFENDANT/APPLICANT**

**RULING**

1. The matter coming before me for determination is a Notice of Motion dated **22<sup>nd</sup> November, 2011** brought under Certificate of Urgency under Order 40 Rule 7 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. It prays for an order from the Honourable Court to discharge, vary or set aside the orders of injunction given by Honourable Mr. Justice Mbogholi on 11<sup>th</sup> November, 2010.
2. The application is supported by the Supporting Affidavit of Ibrahim Kamau Njenga sworn on 22<sup>nd</sup> November, 2011 in which he averred as follows:
  - That the Plaintiff obtained an injunction against him from Justice Mbogholi restraining him from selling, disposing or alienating any of the properties described in Paragraph 4 of the plaint, (the “suit properties”) until the suit is determined.
  - That the said order was obtained by misrepresentation and non-disclosure of material facts
  - That he is the registered proprietor of the suit properties and he does not hold them in trust for the Plaintiffs.
  - That the Plaintiffs did not produce any evidence to show that the property was held in trust by him on their behalf.
  - That most of the parcels of land comprising the suit properties were purchased as far back as 1968 when the Plaintiffs were not yet born.
  - That he has already allotted to the Plaintiffs various properties which are not part of the suit properties.
  - That the said order was obtained in his absence as his Advocate did not inform him of the date.
  - That he was never served with the order and therefore as per order 40 Rule 4 of the Civil Procedure

Rules the order has lapsed.

- That it is unjust to visit upon him his Advocates failure to attend Court.
- That he only found out about the order when he sought to transfer one of the suit properties which transfer did not go through.
- That the said order was obtained unfairly as he was not given an opportunity to be heard.

3. The application is contested by the Plaintiff vide the Replying Affidavit of George Njuguna Kamau in which he states as follows:-

- That the application dated 16<sup>th</sup> September, 2009 which gave rise to the injunctive orders was opposed vide a Replying Affidavit sworn by the Respondent on 2<sup>nd</sup> November, 2009 which was considered by the Judge hence the Respondent was given an opportunity to be heard.
- That since the suit involves ownership of land, it is only just and fair that none of the litigants should be allowed to dispose of the same pending the determination of the suit.
- That the Respondent should not raise the issue of ownership of the suit properties as they are basing their claim on the doctrine of constructive trust.
- That no compelling reasons were tendered to explain why the Defendant's Counsel failed to attend Court at the hearing of the application that gave rise to the injunction orders.

4. I have studied the Defendant/Applicants submissions filed herein.

5. The Court is called upon to determine whether the injunction granted herein by Mr. Justice Mbogholi should be allowed to stand or be discharged, varied or set aside.

6. After due consideration of all the rival arguments in this matter, I have established that the injunction issued by Mr. Justice Mbogholi should be let to stand for the following reasons:-

(i) The injunctive order does not in any way interfere with the legal ownership of the suit properties. Having produced title documents relating to the suit properties, the Defendant has established on a prima facie basis, that he is the legal owner of the suit premises. This is not in any way affected by the issue of the injunctive order against him.

(ii) This takes me to the second and core reason why the injunction must be allowed to stand. In the absence of this injunctive order, the Defendant would have been at liberty to dispose off the suit properties as indeed he has attempted to do in blatant disregard of this suit that has been filed against him, thereby rendering this suit and any Judgment emanating from this Court as nugatory. The injunctive order therefore serves the crucial role of preserving the subject matter of this case up until this Court issues its final Judgment herein.

7. That said, the application dated 22<sup>nd</sup> November, 2011 is hereby dismissed with costs to the Respondents.

**SIGNED & DELIVERED THIS 15<sup>TH</sup> DAY OF MARCH 2013.**

**MARY M. GITUMBI**

**JUDGE**