



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CASE NO. 209 OF 2013**

**SAMUEL MUCIRI W'NJUGUNA.....PLAINTIFF**

**(Suing as the Power of Attorney Holder for and on behalf of ARTHUR NJUGUNA MUHENIA)**

**-VERSUS-**

**FRANCIS MWANIKA NJUGUNA.....1<sup>ST</sup> DEFENDANT**

**WINFRED MUMBI MAINA.....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff by a Notice of Motion dated 11<sup>th</sup> February, 2013 brought under Order 40 Rule 1, 2 and Sections 1A, 1B, 3 and 3A of the civil Procedure Act inter alia seeks the following orders:

- i. That this Honourable Court be pleased to issue restraining order directed to the Defendants stopping them from interfering howsoever with the sub division of the suit land and the plaintiff's exercise of his powers to effect the subdivision and subsequent transfers pending the hearing and determination of this suit.
- ii. That this Honourable court be pleased to grant a temporary injunction restraining the Defendants by themselves, their servants or agents or any one claiming through them from trespassing, intermeddling and wasting any crop, trees or movables on the suit property pending the hearing and determination of this suit.
- iii. That this Honourable Court be pleased to grant any other orders it may deem just.

The application is premised on the grounds set out on the face of the application and on the further grounds contained in the supporting affidavit of **Samuel Muciri W'Njuguna** sworn on 11<sup>th</sup> February, 2013 annexed to the said application. The grounds inter alia include the following:-

1. That the Defendants are interfering with the plaintiff's exercise of powers and authority granted to him under the power of attorney.
2. That the defendants have taken to trespassing intermeddling and deliberately threatening the other family members residing in the suit land.
3. That on 16<sup>th</sup> February, 2013 the Defendants hired goons and unleashed them on the suit land

thereby occasioning a breach of peace.

4. That the plaintiff is desirous to execute the powers granted to him under the power of Attorney.

The Defendants filed separate replying affidavits both sworn on 25<sup>th</sup> February, 2013 in opposition to the plaintiffs application. The defendants also on 22<sup>nd</sup> February, 2013 filed a separate Notice of Motion application stated to be brought under Order 40 Rules 4(3) and 7, Order 26 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, Article 40 (2) of the constitution and inter sought the following orders:-

- i. That this honourable court be pleased to set aside and/or discharge the injunction order it gave against the 1<sup>st</sup> and 2<sup>nd</sup> defendant/applicants on 11<sup>th</sup> February, 2013.
- ii. That the Honourable Court be further pleased to order the plaintiff/applicant to deposit in court Kshs. 500,000/= (Kenya Shillings Five Hundred Thousand) being security deposit towards the defendants/applicants costs herein.
- iii. That this Honourable Court do dismiss this suit should the defendants costs not be secured by the plaintiff/applicant as prayed for herein.

The defendants have set out the grounds on which the application is based on the face of the application and among other grounds they claim, the plaintiff concealed material facts from court to obtain the interim order and thus it will unjust and inequitable to let the order remain in place. The defendants claim they are beneficial owners of part of the suit property and will be irreparably prejudiced if the said order is sustained. The defendants contend to have tendered their tea plants/bushes for three decades and would be denied a source of livelihood if the order is allowed to stand.

The plaintiff filed a replying affidavit sworn on 8<sup>th</sup> March, 2013 in opposition to the Defendants application while James Komo Njuguna and Monica Gathoni Njuguna swore further supporting affidavits on 6<sup>th</sup> March, 2013 in support of the plaintiff's application.

Following directions by the court the parties filed their respective submissions and counsel for both parties attended before the court on 1<sup>st</sup> July, 2013 when they highlighted their submissions.

The facts of this matter are fairly straight forward and briefly can be summarised as follows:-

That one **Arthur Njuguna Muhenia** who is the father of both the plaintiff and the defendants is stated to have donated a power of attorney to the plaintiff **Samuel Muciri W'Njuguna** his eldest son in regard to property known as **NDARUGU/KAMUNYAKA/102** which power of attorney was registered on 12<sup>th</sup> November, 2012. The plaintiff was following several family meetings handed over the title of the said property and bestowed with authority to deal with it howsoever he pleased. From the recorded minutes of the various meetings of the family annexed to the plaintiff's supporting affidavit and marked '**SMW2**' which minutes were signed by all the family members with the exception of the plaintiff, the wishes of Arthur Njuguna Muhenia were clearly communicated.

The plaintiff following the registration of the power of attorney elected to cause the subject parcel of land subdivided amongst all the siblings including the defendants and in this regard prepared a subdivision scheme attached and marked as '**SMW3**' in the supporting affidavit which showed that the late Maina Njuguna's family (Brother to the plaintiff) represented by Winfred Mumbi Maina the 2<sup>nd</sup> Defendant herein be allocated 5 acres whereas Francis Mwanika Njuguna was to be allocated 6½ acres: This schedule showing the subdivision was signed by all the siblings. In furtherance of the subdivision scheme all the parties joined hands to apply for the relevant Land Control Board consent for transfer after the necessary subdivision and mutation of the land had been done. The duly completed mutation form and the consent to subdivide are included in the plaintiff's list and bundle of documents.

The plaintiff avers that all was going very well until the stage of effecting transfer of the respective portions to the beneficiaries when the defendants caused an uproar at the Land Board offices with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants insisting the transfer of the portion to the 2<sup>nd</sup> defendants family should be effected to

her directly. The plaintiff had insisted that the 2<sup>nd</sup> defendant's family should consent as to who was to be registered. The Defendants further wanted access to the tea bushes that had fallen in other person's parcels resulting from the subdivision. The plaintiff's response is that all the tea in the parcel of land was planted by their father and the siblings were only permitted to pick/pluck for their own use.

The Defendants have contended that there was material non disclosure of facts by the plaintiff when he approached the court and obtained an *ex parte* interim order of injunction; the defendants contended that the plaintiff did not disclose that there were tea bushes on the parcel of land and that the 2<sup>nd</sup> defendant depended on the earnings from the tea for her livelihood and further the deceased husband, Charles Maina Njuguna was a brother to the plaintiff and the 1<sup>st</sup> defendant. It is further contended that the plaintiff did not disclose that the 2<sup>nd</sup> defendant had for nearly three decades tendered the tea bushes and was therefore a beneficiary and that a trust had been created in her favour over the subject land.

In the present matter there is no dispute that land parcel No. **Ndarugu/Kamunyaka/102** was family land registered in the name of **Arthur Njuguna Muhenia**. There is evidence that there were family meetings at which the said Arthur Njuguna Muhenia clearly and unequivocally allowed the plaintiff to take charge of the suit property. The power of attorney alleged to have been donated by the registered owner to the plaintiff has to be viewed against this background. The plaintiff could only take full charge of the property if he had a valid power of attorney over the subject land. The defendants have raised concerns as to the validity of the power of attorney arguing that the power of attorney was registered under the Registered land Act, Cap 300 Laws of Kenya which as repealed following the enactment of the Land Registration Act No. 3 of 2012. On the face of it the power of attorney dated 8<sup>th</sup> September, 2012 and registered on 12<sup>th</sup> November, 2012 as No. 070/11/12 is valid and entitles the plaintiff to deal with the suit property in any manner as the registered owner would have dealt with it.

It is common knowledge that as at 8<sup>th</sup> November, 2012 when the power of attorney was drawn no cabinet secretary for Lands had been appointed and hence no regulations and/or forms had been formulated as envisaged under the provisions of Section 110 of the Land Registration Act and would hold the form used for registration of the power of attorney to be valid under the provisions of Section 108 of the Land Registration Act. Section 108 provides thus:-

**108. Until the Cabinet Secretary makes the regulations contemplated under Section 110 any rules, orders, regulations, directions, notices, forms, notifications or other administrative acts made, given, issued or undertaken before the commencement of this Act under any of the Acts of parliament repealed by this Act or any other law, shall continue in force and shall be construed with the alterations, adaptations, qualifications and exceptions to bring them into conformity with this Act.**

In the instant case the Registrar accepted the form as drawn and there is no ambiguity about the purport of the form. I hold the power of attorney to be validly registered and hence the plaintiff had authority to deal with the suit land. On the basis of evidence placed before the court the decision by the plaintiff to have the suit land subdivided was supported by the family members including the defendants. All the family members completed and signed the Land Control Board application forms for their respective parcels of land as per the mutation form. The decision by the defendants at the last minute object to the subdivision can only have been an afterthought. The issue of the tea bushes that the defendants claim to have been denied access to apparently was not an issue during all the discussions and even at the time all the parties agreed to the subdivision.

The plaintiff in my view by virtue of the power of attorney was in the same position as the registered owner and I cannot see any basis on which his decision to subdivide the land and distribute to would be beneficiaries can be challenged.

Having regard to the advanced age of the plaintiff's and the defendants father, the plaintiff was perhaps endeavouring to have the property distributed during the lifetime of their father to obviate the necessity of going through succession, which has its own hurdles, in the event of their father's death.

I have considered the defendants claim that there was material non disclosure and I have considered the authorities referred to me by the defendants and the plaintiffs on this point and I have come to the decision that there was no material non disclosure on the part of the plaintiff. The relevant fact is that all the parties were agreed on the subdivision of the suit land and that all the parties are in agreement that the plaintiff was entrusted the title to the suit property by their father, the registered owner, the fact that some of the tea bushes the defendant were previously plucking fall into other persons parcels in my view is not good enough reason to bar the plaintiff from carrying through the subdivision and transfer process. All the siblings of the plaintiff were provided for including the defendants.

The defendants in their application dated 22<sup>nd</sup> February, 2013 sought security for costs in the sum of Kshs. 500,000/=. As I have held the plaintiff holds a valid power of attorney and that the acts he sought to execute were acts that the defendants were indeed privy to, I see no basis upon which I can exercise my discretion under Order 26 of the Civil Procedure Rules to order for security for costs. In the premises I will decline to make an order for provision of security for costs.

Having regard to all the facts and circumstances of this matter I am satisfied that the plaintiff has established and demonstrated that there is a prima facie case with a probability of success. Considering that the Plaintiff was carrying out the entire exercise (subdivision & Transfer) for the benefit of the entire family members who include the defendants I would hold that damages may not be an adequate remedy in case the injunction is denied and the defendants are unsuccessful finally. In the circumstances of this case the balance of convenience would be in favour of granting the injunction to enable the process of subdivision and transfer to be completed for the benefit of all the members of the family. In the event the defendants are successful at the trial damages would be an adequate remedy. Indeed the defendants by their counterclaim are claiming both special and general damages which are no doubt computable.

I therefore find and hold that the plaintiff's Notice of Motion has merit but I decline to grant the order of injunction sought under prayer 4 as it seeks to restrain the defendants from the trespassing intermeddling and wasting any crop, trees or movables on the suit land pending the hearing and determination of this suit. The plaintiff has confirmed both defendants are entitled to portions of the suit land and in that respect they would be entitled to access the specific portions that they are entitled to. I however grant the injunction as sought under prayer number (5) of the Notice of Motion.

I award the costs of the application to the plaintiff.

Order accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2013.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... **for the Plaintiff**

..... **for the Defendants**