



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 618 OF 2011**

**SAMUEL MBUGUA MWAI.....1<sup>ST</sup> PLAINTIFF**

**NAOMI MUTHONI MWAI.....2<sup>ND</sup> PLAINTIFF**

**JOSIAH MUYA MWAI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**JOSIAH WANDIBA.....1<sup>ST</sup> DEFENDANT**

**JOSIAH MWAI MUYA.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiffs are seeking injunction orders from this court against the Defendants restraining them from transferring, taking possession, constructing on and/or interfering with Title No. Githunguri/Githunguri/T776 (hereinafter referred to as the suit property), pending the hearing and determination of this suit. This prayer is in a Notice of Motion dated 7<sup>th</sup> November 2011 which is supported by affidavits sworn by 1<sup>st</sup> Plaintiff on 7<sup>th</sup> November 2011, 31<sup>st</sup> January 2012 and 10<sup>th</sup> June 2012. The Plaintiffs are the step-siblings and children of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant respectively. They claim that the suit property is their ancestral home having been acquired by their deceased mother and 2<sup>nd</sup> Defendant, and is where they were born and have lived all their lives.

They further claim that the suit property has been fraudulently transferred by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant to defeat their claims to it, and to punish them for testifying against their father, who is serving death sentence for murdering their deceased mother. They attached an affidavit from an Advocate who allegedly drew and attested the said transfer of the suit property, wherein he has stated that his signature was forged and denied ever meeting the 2<sup>nd</sup> Defendant. They further claim that the 1<sup>st</sup> Defendant has never resided on the suit property, and that they only knew of his title when they received summons from the District Land Registrar of Kiambu District to resolve a boundary dispute concerning the suit property, which summons were attached.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants opposed the Notice of Motion in replying affidavits sworn on 29<sup>th</sup> November 2011 and 1<sup>st</sup> October 2012 respectively. They stated that the Plaintiffs were registered as the owners of Title No. Githunguri/Githunguri/T776 which belonged to their deceased mother, and that the suit property was registered in the name of the 2<sup>nd</sup> Defendant who passed a good title to the 1<sup>st</sup> Defendant as a gift. Further, that the 2<sup>nd</sup> Defendant willingly signed the transfer which was annexed. Also annexed were copies of the application for the consent of the land control board, the letter of consent dated 18<sup>th</sup>

June 2008, and of the title deed issued to the 1<sup>st</sup> Defendant on 1<sup>st</sup> July 2008.

The parties were directed to file written submissions, which they relied upon for the ruling herein. The Plaintiffs' counsel in submissions dated 10<sup>th</sup> June 2013 argued that they had shown that the transfer of the suit property to the 1<sup>st</sup> Defendant was forged, and that they have shown a *prima facie* case as they are being deprived of their mother's share of the ancestral home. The counsel relied on the decision in **Mrao vs First American Bank (2003) KLR 125** in this respect. Further, that they will suffer irreparable loss as the 1<sup>st</sup> Defendant has another land on which he lives. Lastly, that the balance of convenience is in the Plaintiffs' favour as they have lived on the suit property since they were born, and there is a real threat that they could be evicted by the 1<sup>st</sup> Defendant.

The Defendants' counsel filed submissions dated 24<sup>th</sup> June 2013 in which he argued that the 2<sup>nd</sup> Defendant had the right, legally and constitutionally, to transfer the suit property to the 1<sup>st</sup> Defendant as he did. Further, that the 2<sup>nd</sup> Defendant as the rightful owner has not alleged any fraud, neither has he been convicted of any fraud. Lastly, the counsel submitted that the Plaintiffs had not established a *prima facie* case as their prayers have been overtaken by events given that the suit property has been already transferred to the 1<sup>st</sup> Defendant who is in possession. It was also argued that their prayer in the Plaint filed herein for rectification of the title to the suit property cannot stand without a prayer for nullification of the same.

I have carefully read and considered the pleadings, evidence and arguments made by the parties herein. The issue for determination is whether the Plaintiffs have met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

In determining whether the Plaintiffs have established a *prima facie* case I have considered the Plaint filed herein dated 7<sup>th</sup> November 2011, in which they seek to be declared owners of the suit property. The 1<sup>st</sup> Defendant has produced a title to the suit property in his name and claims it was gifted to him by the 2<sup>nd</sup> Defendant. The Plaintiff's ownership claim is based on the suit land being ancestral land, and it is not disputed that they are in possession of the suit property as shown by the summons they annexed dated 30<sup>th</sup> August 2011 on the boundary dispute over the suit property, in which it is claimed they have encroached on the said land. The family relationship between the Plaintiff and Defendants is also not disputed, and raises the possibility of a trust relationship.

It is thus my view that arising from the circumstances of this case, the Plaintiff's Notice of Motion needs to be decided on the basis of a balance of convenience. The factor that tilts the balance in favour of the Plaintiffs is that they are currently in possession and occupation of the suit property. However, I am in this regard alive to the fact that while it may be necessary to preserve the suit property pending the hearing of the suit herein, it is also important that such hearing proceeds expeditiously as the 1<sup>st</sup> Defendant is the registered owner of the same, so that the respective rights of the parties to the suit property if any, are determined with finality.

The Plaintiff's Notice of Motion dated 7<sup>th</sup> November 2011 is accordingly allowed only to the extent of the following orders:

1. That the *status quo* to be maintained pending the hearing and determination of the suit filed herein or until further orders shall be as follows:
  - a. The Plaintiffs and the Defendants either by themselves, or through their servants, agents and/or employees, shall not sell, transfer, and/or in any manner dispose of or alienate, or undertake any further construction or development on property known as Githunguri/Githunguri/T776.
  - b. The Defendants shall not in any manner interfere with the Plaintiffs' occupation and possession of

the property known as Githunguri/Githunguri/T776

2. The Plaintiffs shall take the necessary steps to set the suit herein for hearing within one year of the date of this ruling, and in default the status quo orders hereinabove shall lapse.
3. The costs of the Plaintiffs' Notice of Motion dated 7<sup>th</sup> November 2011 shall be in the cause.

Orders accordingly.

Dated signed and delivered in open court at Nairobi this \_\_\_\_17<sup>th</sup>\_\_ day of \_\_\_\_October\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**