



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 287 OF 2010**

**CECILIA GAKUI KINYUA.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ANNE MUTHONI KANYEKI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**NYAGA GICHENGA .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**VIRGINIA NJOKI NYAGA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ANN MARGARET WAMAITHA MURIITHI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**REGISTRAR OF TITLES, KIRINYAGA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The Applicants in an application dated 10<sup>th</sup> June 2010 and as amended on 16<sup>th</sup> July 2010 are seeking orders that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be restrained from interfering, trespassing upon, entering, developing alienating and or disposing of the suit property known as LR. No. INOI/KARIKO/930, and that the 4<sup>th</sup> Respondent be restrained from transferring the said premises. The Applicants are also seeking orders that the 4<sup>th</sup> Respondent reinstates the *status quo* prevailing in the suit premises as at 21<sup>st</sup> April 2010.

The grounds for the application are that the 1<sup>st</sup> Respondent fraudulently obtained a court order purported to have been issued by Aganyanya J. on 22<sup>nd</sup> April 2010 in High Court (Nairobi) Miscellaneous Application Number 782 of 2001, and which purports to determine the said suit in his favour. The Applicants further states that the 1<sup>st</sup> Respondent used the said court orders to remove a caution that had been placed by the Applicants against the suit property at the Kirinyaga Land Registry, and to transfer the suit property by way of gift to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Applicants are now apprehensive that unless the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents are restrained, they stand to be evicted from their land and homes of many years. The Applicants in the supporting affidavit sworn by the Cecilia Gakui Kinyua on 16<sup>th</sup> July 2010 give a detailed account of the facts giving rise of the dispute between the parties in the suit herein and of the facts in the dispute in High Court (Nairobi) Miscellaneous Application Number 782 of 2001,

(O.S.) involving the Applicants and the 1<sup>st</sup> Respondent.

The Applicants also state that the Respondent's have as a result of their actions been charged with the offence of conspiracy to defraud contrary to section 317 of the Penal Code at the Principal Magistrates Court in Kerugoya. The Applicants have attached a copy of the charge sheet as evidence, and their Advocate in his written submissions dated 4<sup>th</sup> July 2011 also attached a judgment given by the E.M Nyaga R.M on 17<sup>th</sup> March 2011 in SPMC Kerugoya Criminal Case No. 594 of 2010. In the said judgment, the 1<sup>st</sup> Respondent herein who was the 2<sup>nd</sup> Accused person in the said criminal case, was found guilty and convicted of conspiring and transferring land parcel no INOI/KARIKO/930 to the names of Virginia Njoki Nyaga and Ann Margeret Wamaitha Mureithi with the intent to defraud contrary to section 317 of the Penal Code, and with forging a Nairobi High Court Order in Misc. Application 782/2001 purporting it to have been issued by Justice Aganyanya contrary to section 349 of the Penal Code.

The Applicant's evidence also include pleadings in High Court (Nairobi) Miscellaneous Application No. 782 of 2001 (O.S.), and a ruling delivered by Ojwang Ag. J. (as he then was) on 6<sup>th</sup> February 2004 in the said application, as well as copies of an extract from the register of the suit property showing *inter alia* that on 23<sup>rd</sup> April 2010 there was the removal of a prohibitory order registered on 16<sup>th</sup> July 2004 and of all cautions and restrictions, pursuant to a court order in High Court case No. 782 of 2001 purportedly issued on 22<sup>nd</sup> April 2010.

The 1<sup>st</sup> to 3<sup>rd</sup> Respondents have responded in a Replying Affidavit sworn on 7<sup>th</sup> February 2011 on their behalf by the 1<sup>st</sup> Respondent, and in grounds of opposition filed on the same date, as well as in written submissions by their Advocate dated 25<sup>th</sup> July 2011. The said Respondents state that the Plaintiffs application and suit is bad in law, vexatious and frivolous, and is an abuse of the court process as it is a multiplicity of another suit namely High Court (Nairobi) Misc. Application No. 782 of 2001. The said Respondents further state that the application is based on allegations that have not proved before the court and particularly that the alleged forged order has not been annexed as an exhibit. The 1<sup>st</sup> Respondent in his replying affidavit admits to have transferred the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in his capacity as the registered owner of the same.

The 1<sup>st</sup> to 3<sup>rd</sup> Respondents' Advocate in addition submitted that the judgment given in SPMC Kerugoya Criminal Case No. 594 of 2010 at Kerugoya cannot be relied upon to prove allegations in a civil matter. The Respondents further submit that the Applicants have failed to comply with the mandatory provisions of the Government Proceedings Act (Cap 40) with regard of service of statutory notice of intention to sue and summons on the 4<sup>th</sup> Respondent, and of the Civil Procedure Rules 2010 Order 29 Rule 2(2) (a) with regards to issue of injunctions against the Government.

I have read and carefully considered the pleadings, evidence and written submissions by the respective parties to this application. The first issue I will address is that raised by the Respondents as to whether the suit filed herein and application is an abuse of the process of court. Section 6 of the Civil Procedure Act (Cap 21) which deals with multiplicity of suits applies when there is a suit on the same subject matter between the same parties pending in another court. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents in this suit and application are not parties to High Court (Nairobi) Misc. Application No. 782 of 2001, and the remedies sought by the Applicants are as against these Respondents. This Court therefore finds that section 6 of the Civil Procedure Act is not applicable to the suit filed herein, and that the suit and application be allowed to proceed for the just determination of the issues raised by the Applicants as provided for under Article 159(2) of the Constitution and the overriding objectives in sections 1A and 1B of the Civil Procedure Act.

The second issue I will address is whether orders can issue against the 4<sup>th</sup> Respondent in light of the provisions of the Government Proceedings Act. The 4<sup>th</sup> Respondent is the Registrar of Titles in Kirinyaga District, having been so appointed under the Registration of Titles Act (Cap 281). Even though the Plaintiffs in the Plaint filed herein on 14<sup>th</sup> June 2010 have sued the 4<sup>th</sup> Respondent as a corporate body with power to sue and be sued under the Government Proceedings Act, under section 19(3) of the

Government Proceedings Act it is provided that Part III of the Act which details out jurisdiction of courts and procedures in proceedings by or against the Government, does not apply to proceedings by or against a Registrar of Titles under [the Registration of Titles Act](#).

The Plaintiffs in the application herein have relied on rules 1, 2, 3 and 9 of Order XXXIX of the revoked Civil Procedure Rules, and which are now in Order 40 of the Civil Procedure Rules of 2010, and on section 3A of the Civil Procedure Act, as well as all other enabling provisions of the law. The orders sought can only be given in the context of the powers and duties of a Registrar of Titles as provided for under the Registration of Titles Act and the said Act is consequently one of the enabling provisions of the law. I therefore find that the provisions of section 12 and 13 of the Government Proceedings Act which require suits against Government officials to be brought against the Attorney General, and service of all documents on the Attorney-General are therefore inapplicable in the present case. Likewise, the requirements of section 13A of service of notice of a period of thirty days on the Government before institution of suits against it, is also inapplicable.

From a perusal of the court file the Plaintiffs appear to have complied with the provisions of service of the pleadings upon the 4<sup>th</sup> Respondent. This is the finding of the Court after perusing the affidavit of service sworn by Japheth Mutua Kililyo on 23<sup>rd</sup> September 2010 and filed in court on 24<sup>th</sup> September 2010. There was also service of the hearing notice of the application on the 4<sup>th</sup> Respondent as indicated in the affidavit of service sworn by Pauline Nyawira on 27<sup>th</sup> May 2011 and filed in court on 30<sup>th</sup> May 2011. This suit is therefore properly brought against the 4<sup>th</sup> Respondent.

The third issue for determination by this Court is whether an injunction can issue as against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents' Advocate has argued that an injunction cannot lie against the Government by virtue of Order 29 Rule 2(2) (d) of the Civil Procedure Rules. I must however point out that Order 29 Rule 1 specifically exempts the proceedings in section 19(3) of the said Act, including proceedings against a Registrar of Titles, from the operations of Order 29. My interpretation of the Order 29 as read in its totality and in conjunction with section 19(3) of the Government Proceedings Act is that injunctions can issue against a Registrar of Titles. I must add in this respect that section 16(1) (i) of the of the Government Proceedings Act which restricts orders of injunctions against the Government is also inapplicable to proceedings against a Registrar of Titles by virtue of section 19(3) of the said Act.

The only question then left for me to address on this issue is whether the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** have been met for the injunctions sought to issue. The Plaintiffs have produced evidence to show that the 1<sup>st</sup> Respondent has been convicted of an offence of forging an order of this court, and have also produced evidence to show that this forged court order was used to remove prohibition and cautions placed on the suit property and to subsequently transfer the said suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. I find that the judgment in is admissible under section 44 and 45 of the Evidence Act as it is a judgment touching on entitlement to the suit property, and is also a judgment relating to a matter of a public nature.

The Plaintiffs have therefore satisfied the requirement as to establishment of a *prima facie* case. Damages would not be an adequate remedy for the Plaintiffs in the present case taking into consideration the fact that the suit property is the subject of another court case between the Plaintiffs and the 1<sup>st</sup> Respondent, which is still pending. A remedy of damages would also be tantamount to allowing the 1<sup>st</sup> Respondent to benefit from his wrongdoing of fraudulently dealing with the suit property as was also stated by Nambuye J (as she then was) in **Agnes Wanjiku Kamweti vs Thamia Investment & 2 others HCCC (Nairobi) No 227 of 2009** .

An injunction is therefore granted against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in terms of prayer 2 of the application dated 10<sup>th</sup> June 2010 and as amended on 16<sup>th</sup> July 2010 and as against the 4<sup>th</sup> Respondent in terms of prayer 3 of the said application.

The final outstanding issue is whether this court can order the 4<sup>th</sup> Respondent to reinstate the *status quo* prevailing in the suit property as at 21<sup>st</sup> April 2010 by cancelling the titles issued to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and reinstating the caution previously lodged by the Applicants. This prayer cannot be granted in its totality, as it will in certain respects amount to the granting of a final order before the suit filed herein is determined.

I will therefore allow Prayer 4 of the application dated 10<sup>th</sup> June 2010 as amended on 16th July 2010 only to the extent of ordering the reinstatement of the prohibitory order in entry No. 7 in the Proprietorship section on the Register of the land parcel known as INOI/KARIKO/930 until the suit filed herein is heard and determined, or until further orders. This order is to be served forthwith on the Registrar of Titles, Kirinyaga District.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 19th day of January, 2012.

**P. NYAMWEYA**  
**JUDGE**