



**ELIUD MWENDWA NGUI ..... PLAINTIFF/APPLICANT**

**VERSUS**

**1. KAVINYA NGUI MWETU**

**2. JOSPHAT MUTHI KYANGUU....DEFENDANTS/RESPONDENTS**

**RULING**

1. The Application before the Court is the Chamber Summons application dated **03/11/2011** and filed in Court on **05/11/2011** (hereinafter, “Application”). It has been filed by the plaintiff, **Eliud Mwendwa Ngui** (“Plaintiff”). In the main, it seeks to preliminarily enjoin **Kavinya Ngui Mwetu** and **Josphat Muthi Kyanguu** (1<sup>st</sup> and 2<sup>nd</sup> Defendants, and, collectively “Defendants”), their agents and/or legal representatives from “in any manner howsoever, interfering with the plaintiff’s quiet possession, use, enjoyment and/or occupation of land parcels numbers **Mutonguni/Nzala/279** (sic) and **Mutonguni/Nzala/1280** (hereinafter “Suit Properties”) until the disposal of the [A]pplication.”

2. The Application also seeks to preliminarily enjoin the Defendants from interfering with the Plaintiff’s quiet enjoyment or possession of the Suit Properties. Finally, the Application seeks an order to preliminarily prohibit the registration of any dealing with the Suit Properties.

3. The Application is supported by the Supporting Affidavit of the Plaintiff sworn on **04/11/2010** (“Supporting Affidavit”) and is predicated on the Plaint dated **29/10/2010** and filed in Court on the same day (“Plaint”).

4. The Defendants oppose this Application. In addition to their Statements of Defence, they have each filed a replying affidavit in opposition to the Application.

5. The gist of this suit is simple enough. It is, essentially, a land dispute between a mother and her son. The 2<sup>nd</sup> Defendant has been dragged into the dispute by the fact that he purchased part of the Suit Properties. The Plaintiff claims that the 2<sup>nd</sup> Defendant purchased the property with full knowledge of his claim over the Suit Properties.

6. The Plaintiff’s version of the story is that he owns the land formerly known as **Mutonguni/Nzala/681** by “virtue of first occupation.” He says that he solely “acquired” the land, fenced it off and established his home thereon in **1971** (see **Plaint** at **paragraphs 4** and **5**). As adjudication in the area began, the Plaintiff says he left for employment in Tanzania and left his wife and children in occupation of the land. He says that during the adjudication process, the land was demarcated in the name of his mother, the 1<sup>st</sup> Defendant, who agreed to hold it in trust for him (the Plaintiff). However, subsequently, the 1<sup>st</sup> Defendant refused to transfer the land to him despite repeated requests and, to defeat his claim on the land, caused it to be subdivided into two parcels -- **Mutonguni/Nzala/1279** and **Mutonguni/Nzala/1280** – and transferred the latter to the 2<sup>nd</sup> Defendant. He claims that the subdivision and subsequent transfer was unlawful and fraudulent because the 1<sup>st</sup> Defendant only held the land in trust for him.

7. The Defendants' version of the story, of course, controverts the Plaintiff's. The land had always belonged to the 1<sup>st</sup> Defendant; she allowed the Plaintiff to cultivate part of it but withdrew the permission when they had a misunderstanding; that since then the land has never been in the physical possession of the Plaintiff. The 1<sup>st</sup> Defendant insists that she held absolute title to **Mutonguni/Nzalae/681** at all times, not in trust for the Plaintiff, and that it was her absolute right to subdivide and transfer it as an incidence of her ownership.

8. The Plaintiff had filed an earlier suit being HCCC No. 98 of 2008 under which he had filed a similar application. The parties dispute what happened to that suit – with the Plaintiff averring that the case file disappeared and he could not prosecute the suit or application despite his best efforts and the Defendants saying the instant suit and Application are yet another testament to the Defendant's pattern of abusing the process of the Court. I will not say much about this aspect of the case because I have seen it fit, in the interests of justice, to decide the Application on its merits. However, I believe the correct procedure by the Plaintiff's advocate here should have been to re-create the file by first requesting the Deputy Registrar to construct a skeleton file in which he could have brought the application.

9. The legal principles for granting interlocutory injunctions are now well settled in Kenya. They are set out in the celebrated case of *Giella vs Cassman Brown* [1973] E.A. 358 in the words of Spry V.P.:

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

10. In his authoritative book on injunctions, Justice Kuloba (now retired) restated these legal principles thus:

[T]he right formulation of [the principles] would be this, that among other considerations a court takes into account in determining whether a temporary injunction should be issued, first, whether there is a significant likelihood that the applicant will prevail on the merits of the case at a full trial. Second, the court will ordinarily consider whether there is a threat of irreparable harm. Finally, there is the traditional consideration of whether harm to the respondent would outweigh the need for temporary relief. But there may be other matters, for example public interest, involved.

11. The main purpose of a preliminary injunction is to protect the Plaintiff from irreparable injury and to preserve the power of the Court to ultimately render a meaningful decision on the merits. The Court must be careful, in considering applications for preliminary injunctions, not to determine any controverted right. The aim is to prevent a threatened wrong or the doing, by one of the parties to a litigation, an act which might threaten or endanger the rights of the plaintiff.

12. Applying these established legal principles to the instant Application, I am inclined to deny the orders sought. The Plaintiff, relying on the case of *Lifico Trust Registered v Patel* [1985] KLR 538, argues that I do not need to decide on all the “weighty” issues at this stage in order to exercise the Court's discretion in favor of the Plaintiff. He is right in that respect: it is generally inappropriate for the Court to render a decision on the merits at the preliminary injunction stage. However, the Court must form a preliminary opinion on the likelihood of success on the merits. Unfortunately for the Plaintiff, I am persuaded by the extant and presented affidavit evidence that the Plaintiff is unlikely to succeed on the merits. I say so for at least two reasons. First, the Plaintiff's theory of relief, based on a doctrine of “first occupation”, is implausible and unlikely to succeed at trial. The process of ascertainment of rights to land referred to as “adjudication” as governed by the Land Adjudication Act did not comprehend the doctrine of “first occupation” as one of the basis for establishing an interest in land during the adjudication process. Instead, the Land Adjudication Act envisages the application of customary law (see **sections 13 and 20 of the Land Adjudication Act**). If we interpreted the Plaintiff's theory of “first occupation” charitably to refer to his rights to the parcel of land under customary law, his story is still implausible: on probability, it seems unlikely that he found some land *terra nullius* in **Kitui** district in **1971** over which he fenced and began cultivation. Yet, this is the critical hinge of his story: that in **1971**, exercising his right

of first occupation on land that was previously unoccupied, he fenced off the Suit Properties and established his home thereon.

13. There is nothing else to the Plaintiff's theory of the case other than the bald claim that the Suit Property was held in trust for him by the 1<sup>st</sup> Defendant. I am aware of judicial authorities holding that the nature of the "African trust" is that it does not need to be in writing for it to operate as an overriding interest under section 30 of the Registered Land Act (Chapter 300, Laws of Kenya). See, for example, *Gatimu Kingura v Muya Gathangi* [1976] KLR 253 and *Kanyi v Muthiora* (2008) KLR (G&F). However, not every instance of a person claiming "African trust" transforms itself into an overriding interest in land registered under the Registered Lands Act. At this stage, there is not enough on the record to make a *prima facie* case for the existence of such a trust.

14. I would be entitled based solely on my analysis of the first *Giella* factor above to dismiss this application since I have concluded that the Plaintiff is unlikely to succeed on the merits. I will however, briefly consider the other two *Giella* factors. Both factors go against the granting of interlocutory orders here and I analyze both together.

15. First, there is substantial doubt whether the Plaintiff is, in fact, in possession of the Suit Property. The dueling affidavit evidence suggests that the Plaintiff lost possession of at least part of the Suit Property some time back. Granting the orders sought would therefore be to do more than maintain the parties to their relative positions immediately before the suit. It would amount to a mandatory injunction restoring the Plaintiff back to the land. This is not an appropriate role for an interlocutory injunction.

16. Second, the Plaintiff has not been fully forthcoming with the Court. In his affidavit evidence, he says that he was charged with trespass respecting the Suit Properties but the case was withdrawn on **19/04/2010**. He does not disclose that he was, in fact, charged and convicted of arson relating to the Suit Properties (see **Annexure marked JMK 1** annexed to the Replying Affidavit of the 2<sup>nd</sup> Defendant). This, in itself, disentitles the Plaintiff from the relief he is seeking from the Court. The familiar maxim, "he who comes into Equity must come with clean hands," offers sufficient justification for the Court's attitudes here.

17. Third, with respect, I do not accept the reasoning of the Plaintiff when he says the existing order of prohibition has occasioned no injury to the Defendants and that, therefore, it should be extended since it demonstrates that the Defendants would suffer no prejudice if the orders are confirmed at this stage. An absolute owner of property has the right to enjoy all the incidences in the bundle of rights contained in her property without undue constraints. Any restraint on an owner's absolute power to deal with the property shackles her and minimizes her bundle of rights. As such, such restraint must be ordered with great circumspection and only in the extraordinary circumstances. The *Giella* tri-partite test is calibrated to achieve this. Yet, the Plaintiff has failed to satisfy this time-honored test.

18. I therefore dismiss the Application with costs. I discharge all and any interim orders granted in the case.

**DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.**

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**J.M. NGUGI**  
**JUDGE**