



**JOHN MUSYOKA MUSEMBI** (suing as the legal representatives of the estate of  
**NASON MUSEMBI MUSOMBA-**  
deceased.....**PLAINTIFF**

**VERSUS**

**HENRY MULI KISENGA**.....  
**DEFENDANT**

**RULING**

1. The Plaintiff in this suit is **John Musyoka Musembi** (“Plaintiff”). In his suit papers, he says he has come to Court as the legal representative of **Nason Musembi Musomba** (deceased), who was his father. He approached the Court by a Complaint dated **14/06/2011** brought against the defendant, **Henry Muli Kisenga** (“Defendant”). The complaint asks for various orders respecting land parcel No. **Machakos/Konza North Block 1/1125** (“Suit Property”).
2. Contemporaneously with the complaint, the Plaintiff filed a Notice of Motion expressed to be brought under **Order 40, Rules 1, 2 and 4** of the Civil Procedure Rules and sections **1A, 1B, and 3A** of the **Civil Procedure Act** (“Application”). In the main, that Application asks for injunctive relief against the Defendant respecting the Suit Property pending the hearing and determination of this suit. Its main prayer which is before the Court is that:  
  
An injunction be issued pending the hearing and determination of this suit restraining the Defendant, his agents and/or servants whether by himself or otherwise howsoever from entering all that parcel of land known as Machakos/Konza North Block 1/1125 or any part hereof and demolishing the plaintiff’s houses thereon, constructing structures thereon, cultivating, grazing, or in any other way interfering with the said parcel of land.
3. The Plaintiff’s Application is supported by the affidavit of the Plaintiff sworn on **14/06/2011**. He has also, with the leave of the Court, filed a Supplementary Affidavit.
4. The Defendant has vigorously opposed the Application and filed a Replying Affidavit. In the main suit, he has also filed a Statement of Defence and Counterclaim.
5. At its core, this is a dispute about land in the context of two wrinkles which complicate it namely succession and land control board consent. The agreed facts are as follows. On **09/06/1994**, the Plaintiff and his brother, **Eliud M. Musembi**, entered into an agreement for sale of the Suit Property to the Defendant (“Sale Agreement”). The agreed purchase price was **Kshs. 200,000/=**. The Sale Agreement indicates on its face, and the Plaintiff admits in his pleadings, a deposit of **Kshs. 50,000/=** was paid pursuant to the Sale Agreement.
6. The parties are all in agreement that the Suit Property was at all times registered in the name of **Nason Musembi Musomba** (deceased).
7. The Plaintiff makes two legal arguments to press for the invalidity of the Sale Agreement respecting

the Suit Property. First, he argues that the Sale Agreement was voided following the failure to obtain Land Control Board pursuant to the provisions of the Land Control Act. Specifically, the Plaintiff argues that the sale can no longer be consummated by virtue of **sections 6, 7 and 8 of the Land Control Act (Chapter 302, Laws of Kenya)**. Indubitably, the transaction between the Defendant and the two brothers comes within section 6 of the Act which would require consent of the **Land Control Board**. That section further provides that if no consent is obtained, the transaction will be void. Further, **section 8** instructs that an application for consent must be made within six months of the transaction. Lastly, there is **section 7** which stipulates:

If any money or other valuable consideration has been paid in the course of a controlled transaction, that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person whom it was paid, but without prejudice to section 22.

8. The Plaintiff's position is that since no consent was sought or obtained, the transaction was rendered void six months after it was entered into. The only remedy available to the Defendant, then, would be for him to recover his purchase price. The Plaintiff says that even the possibility of recovering that sale price is doubtful because of the law of limitations of actions.

9. Second, the Plaintiff argues that, in any case, neither he nor his brother had legal capacity to enter into the Sale Agreement when the purported to do so in **1994**. This is because, by then, neither of them had Letters of Administration entitling them to deal with the property of the deceased. Letters of administration were not obtained until **08/12/2008** and confirmed on **14/05/2010**. This means, the Plaintiff argues, the Sale Agreement or any dealing with the Suit Property is null and void.

10. On the other hand, the Defendant, while conceding that the two brothers had no Letters of Administration and that Land Control Board consent was not obtained, makes the following arguments. First, he says that he completed paying the purchase price of **Kshs. 200,000/=**. He complains that the Plaintiff failed to disclose this fact to the Court and annexed documents purporting to show a further payment of **Kshs. 150,000/=** including an addendum to the Sale Agreement. This addendum states:

Further to our sale agreement dated 9<sup>th</sup> June, 1994, we have today received cheque No. 437164/= for Kshs. 150,000/= being the balance of the purchase price of Plot No. Machakos/Konza/North Block 1/1125.

We are consequently giving **Mr. H. Kisenga** immediate occupation of the land pending transfer of the title deed which we undertake to do.

We have surrendered today the original title deed to Mr. **Henry Muli Kisenga** for his possession.

11. This addendum is signed by the Plaintiff, his brother and the Defendant. It is witnessed by one, **Peter Muoki Musyimi**, and is dated **26/10/1994**. The Defendant argues that he took possession of the Suit Property pursuant to this agreement and has been in such possession until **27/05/2011** when the Plaintiff purported to erect a temporary structure on the Suit Property. Not sure at first who the offending party was, he pulled down the structures only to be confronted with this suit. The Defendant says that he is the one entitled to possession of the Suit Property and notwithstanding the absence of Land Control Board consent, he shall rely on the doctrine of adverse possession to claim ownership of the land.

12. After perusing all the documents on record and listening to the submissions of both counsels, I have made the tentative finding that the Plaintiff entered into both the Sale Agreement and the addendum dated **26/10/1994**. I find the Plaintiff's explanation that the receipt of **Kshs. 150,000/=** may have been for some other purpose as spurious. The Plaintiff does not really deny that the signature on the addendum is his. He prevaricates when he says in his affidavit that: "[T]he purported further agreement alluded to in **paragraphs 6 and 7** of the defendant's [Replying Affidavit]... is highly suspect... The authenticity of this purported further agreement should be subjected to appropriate test at the trial." The Plaintiff merely refuses to acknowledge the addendum and will require strict proof of its authenticity. He does not

positively deny that the signature purported to be his in the document is in fact his.

13.The legal principles applicable here are well settled. They are set out in the celebrated case of *Giella vs Cassman Brown* [1957] 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.

14.The law, therefore, requires that I satisfy myself that the conditions for grant of interlocutory injunction are met. A party seeking the drastic remedy of an interlocutory injunction bears the burden of demonstrating that:

- a. He is likely to prevail on the merits;
- b. He will suffer imminent irreparable harm if the injunction is not granted; and
- c. The harm the Applicants are likely to suffer absent the injunction outweighs the harm the injunction would cause to the adverse party.

15.The first *Giella* factor requires me to determine if the Plaintiff has established a *prima facie* case and is likely to prevail on the merits. To do this, the Court has to provisionally come to tentative conclusions about his theory of the case. As outlined above, the Plaintiff's case is based on legal arguments arising from the provisions of the Land Control Act and the Law of Succession Act. The Defendant's case is based on our jurisprudence on the equitable right of one who has purchased land but failed to obtain Land Control Board consent to either rely on the doctrine of trust or adverse possession as against the seller. The Defendant's position is made a little more tenuous in this case because the sellers did not in fact hold title to the land. For all intents and purposes, the parties were intermeddling in the estate of the deceased. It is not clear who, between the Plaintiff and the Defendant, would hold sway in their respective legal arguments. I will bracket that consideration for now and consider the second *Giella* factor.

16.The second *Giella* factor instructs that I satisfy myself that the person seeking an injunction would suffer irreparable harm if the injunction is not granted. By his own admission, the Plaintiff has not been using the Suit Property over the last four years. The dam on the property which he says he built, has, deep siltation - signs of a long period of non-use. This is according to the report by the Deputy Registrar filed in court; A report which the Plaintiff approves. As for the structures on the Suit Property which the Plaintiff says the Defendant tore down, evidence shows that they were only recently put up. The receipts attached to the Plaintiff's affidavit are clear that they materials for their construction were bought on **27/05/2011**- just two weeks prior to the filing of the suit herein The report by the Deputy Registrar also indicates that the structures were half-complete and of a temporary nature. Hence, available evidence, therefore, shows that the Plaintiff will not suffer any irreparable harm if no injunction issues. On the contrary, granting an injunction in the circumstances is akin to incentivizing parties to attempt to obtain possession just before rushing Court to ask for status quo to be maintained. That defeats the purpose of the injunction which is to preserve the Suit Property in the status quo which obtained in the last peaceable state.

17.For the same reason, I am of the opinion that the balance of convenience is not in favour of the Plaintiff. Therefore, since I have doubts about the probability of the Plaintiff succeeding on the merits, I will untie the knot on this score.

18.Additionally, I would resolve the Application against the Plaintiff on applicable equitable principles. The famous and salutary maxim of equity says: He who comes to equity must come with clean hands. Here, the Plaintiff entered into a Sale Agreement and its addendum fully knowing that he had no capacity to sell the property. Further, the Sale Agreement and the addendum – both by implication and by its terms – envisaged that the Plaintiff would take steps to regularize the sale and transfer title to the

Defendant. The Plaintiff failed to do the latter, and now wishes to use that failure as well as the lack of capacity to transact to gain the property back. He might as well succeed at law: I make no concrete legal findings on that. His argument might well be plausible at the merit stage. What is clear, in addition to the balance of convenience tilting in favor of the Defendant, though, is that the Plaintiff does not deserve any equitable remedy. He has not come to Court with clean hands. He is barred from seeking equitable relief by the Clean Hands doctrine. He does not deserve the Court's favorable exercise of its discretion. The inequitable conduct of the Plaintiff relates directly to the obligation sought to be enforced. Hence the Clean Hands doctrine applies with particular force here.

19. For the above reasons, the Application dated **14/06/2011** is hereby dismissed in its entirety with costs to the Defendant. Any subsisting interim orders arising from that Application are hereby lifted.

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

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