



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE NO. 349 OF 2009**

- 1. SAITOTI LESHAN KAROKIA
2. MARTHA KAROKIA (a minor suing through her mother and next friend AGNES
KAROKIA
3. GOSHUMU KAROKIA (a minor suing through her mother and next friend AGNES
KAROKIA
4. AGNES KAROKIAPLAINTIFFS**

VERSUS

MOSES ISACK OLE RAKITARESPONDENT

RULING

1. The application before the Court is the Chamber Summons Application dated **24/11/2009** (“*Application*”). It is brought under **Order 39, Rules 1 and 2** of the **Old Civil Procedure Rules**. It is supported by the Supporting Affidavit of **Agnes Karokia** sworn on the same day.
2. In essence, the Application seeks for orders injuncting the Defendant/Respondent, **Moses Isack Ole Rakita** (“*Respondent*”) from selling, alienating, transferring, evicting or in any other way interfering with the plaintiffs – **Agnes Karokia** and her three children (“*Applicants*”)–from land parcels numbers **Kajiado/Kaputiei North/29440; 29441; 29442; and 29443** (“*Suit Properties*”).
3. The Application is predicated on the (undated) *Plaint* filed on **24/11/2009**. In the main, the *Plaint* seeks the above order, in permanent fashion – and, in addition, seeks a declaration that the Respondent is registered and holds the *Suit Properties* in trust for the Applicants.
4. It is the Applicants’ case that when one Karokia Ole Njoke (“*Deceased*”) was about to pass on sometime in 1999, he verbally appointed his nephew, the Respondent, to be a trustee to manage his estate for the benefit of the *Deceased*’s family. That family is, of course, the Applicants in the present case. That estate, according to the Applicants; consisted originally of land then known as **Kajiado/Kaputiei North/1059** measuring **31.5 acres**.
5. It is the Applicants’ case that in breach of that oral trust, the Respondent proceeded to subdivide and sell off portions of the *Deceased*’s estate without the consultation or consent of the Applicants. He has neither accounted for nor submitted the amounts realized from these sales. In fact, the 4th Applicant, the mother of the first three Applicants, says she has been struggling to pay school fees.
6. The Applicants further say that the only remaining property from the *Deceased*’s estate are the *Suit Properties*. Yet, the Respondent is hell-bent on selling these as well. They therefore want the court to issue a temporary injunction to preserve the *Suit Properties* until the final determination of the case.
7. On his part, the Respondent denies that the Applicants have any interest in the *Suit Properties* and has

produced a copy of the titles to the Suit Properties showing that he is the sole registered owner. He argues that by virtue of **section 27** of the **Registered Lands Act (Chapter 300, Laws of Kenya)**, he is the absolute owner of the land with all the rights and privileges belonging or appurtenant thereto. He wants the court to dismiss the Application. The Respondent filed a Replying Affidavit and Grounds of Opposition but although the order of *Justice Lenaola* of **11/02/2010** provided that the parties should canvass the Application by way of written submissions and although on 23/11/2011 when the matter came before me I granted further leave for the Respondent to file their written submissions, the Respondent has not filed any Written Submissions.

8. 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* 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.

9. 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. [Emphasis his]

10. The first question to ask, therefore, is whether the Applicants have shown a *prima facie* case with a likelihood of success on the merits in the substantive suit. As pointed out above, the main suit is one for a declaration of trust. The Respondent's case is one of denial: he holds the Suit Properties in no such trust for the Applicants. Yet, in various places in his affidavit, the Respondent seems to admit that, indeed, there was such trust. In **paragraph 10** of the **Replying Affidavit**, for example, the Respondent obliquely admits to have sold land although he says it was with the full consent of the Deceased. More tellingly, in the next paragraph he basically admits to a fiduciary relationship with the Applicants but claims he has "*faithfully and honestly executed the mandate conferred*" on him by the Deceased. The very next paragraph implies that he holds or held land on behalf of the Applicants when the Respondent admits without explanation that some time back the 3rd Applicant had requested him to sell four acres of land. In what capacity did she make that request? Finally, **paragraph 20** of the Affidavit all but admits that the Suit Properties are held in trust for the children of the Deceased. The Respondent complains that granting the orders sought will be contrary to the "*best interests of [the] children.*" The assumption is that the Respondent is talking of the Deceased's children. Why would granting orders respecting the Suit Premises prejudice the children unless they have a proprietary interest therein?

11. In addition, the Court notes that it remains uncontroverted that the Applicants are in possession and have been in possession of the Suit Properties for a long time, and at least since the demise of the Deceased's. They have founded their homestead thereon. The Respondent does not contest these facts and neither does he explain their presence in the Suit Premises if the trust whose declaration they now seek does not exist. In the Court's view, the many oblique allegations strewn all over the Respondent's affidavit that it is the Applicants who have been selling "*their*" land militate in favor of the presumption of a trust relationship rather than against it.

12. The legal argument raised by the Respondent is that **section 27** of the **Registered Lands Act** confers on him absolute title to that land. As I understand it, the argument is that **section 27** as read together with **sections 28** and **30** of the **Registered Lands Act** renders the Applicant's claim unsustainable to the extent that the oral trust they allege is unrecognized in the **Registered Lands Act**. Unfortunately for the Respondent that position has long been repudiated by our cases. There is a long line of cases including

Gatimu Kinguru v. Muya Gathangi [1976] KLR 253; **Mwangi Muguthu v. Maina Muguthu**, Civil Case No. 377 of 1963; **Muthuita v. Wanoe** [1982] KLR 167; **Limuli v. Marko Sabayi** [1979] KLR 251; and **Musa Misango v. Eria Musigire & Others** [1966] E.A. 390 which have enunciated the principle that the existence of a trust in land, even where it is not registered, is not compromised by the registration of title for such land in the name of a particular person.

13. The reasoning in these cases is exemplified in the following paragraph in the decision of *Justice Cotran* in the *Limuli Case*:

It is now generally accepted by the Courts of Kenya that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration; and there is nothing to prevent giving effect to such a trust by requiring the trustee to do his duty by executing transfer documents.

14. In the end, therefore, I am persuaded that the Applicants have a high likelihood of succeeding in their claim against the Respondent and have satisfied the first *Giella* principle. If I were in doubt about this and had to consider the third *Giella* principle – the balance of convenience and equities – I would still hold they both tilt in favor of the Applicants. They have demonstrated that they live on the Suit Premises and that if they are sold, they are likely to be left destitute. The Respondent has not claimed that he will be injured in any way by the grant of injunction. Under this reasoning, it also follows that the Applicants have demonstrated that they would suffer irreparable injury if provisional relief is not granted given that they have established their homestead on the Suit Properties. The Applicants have, therefore, satisfied the second *Giella* principle as well.

15. In the specific circumstances of this case, I hereby conclude that the Applicants have satisfied the requisite standard for the issuance of an interlocutory injunction and I hereby grant the following orders:

a. **THAT** an order of temporary injunction be issued to restrain the Respondent either by himself, his agent and/or servants from selling, alienating, transferring, building, evicting the Applicants and/or in any other way interfering with the Applicants' quiet occupation of the parcels known as Kajiado/Kaputiei-North/29440; Kajiado/Kaputiae-North/29441; Kajiado/Kaputiei-North/29442; and Kajiado/Kaputiei-North/29443 until the hearing and determination of this suit.

b. **THAT** cost of this Application be in the cause.

DATED, SIGNED and DELIVERED at MACHAKOS this day 15TH day of FEBRUARY 2012.

J.M. NGUGI
JUDGE