



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 136 OF 2011**

**STEPHEN KORIO GICHUHI.....PLAINTIFF**

**VERSUS**

**THE BOARD OF GOVERNORS,**

**GATHIRIMU GIRLS TECHNICAL HIGH SCHOOL.....DEFENDANT**

**RULING**

The Plaintiff filed an application dated 29<sup>th</sup> March 2011 in which orders were sought from this Court to restrain the Defendant, its agents, servants from selling, disposing, leasing, transferring, developing or erecting any structures and/or in any way whatsoever interfering with the title to the parcel of land known as L.R Githunguri/Kimathi/T.214 (hereinafter referred to as the suit property), pending the hearing and final determination of this suit.

The grounds for the application are detailed in the supporting affidavit sworn by the Plaintiff on 29<sup>th</sup> March 2011, wherein he states that on 9<sup>th</sup> August 1972 he was registered as owner of the suit property measuring 0.088 Hectares, and has been in possession of the land since then. The Plaintiff also states that the Defendant in the year 2005 filed Kiambu SPMC Civil Suit Number 48 of 2005 against the Plaintiff. The Defendant was seeking an order in the said suit that the Plaintiff be ordered to transfer the parcel of land to itself together with costs. Further, that the said suit was dismissed as the Defendant was not able to prove that there was a contract of sale between itself and the Plaintiff. The Plaintiff states that the Defendant has not filed any appeal against the said judgment of the court.

The Plaintiff further states that the County Council of Kiambu thereafter filed High Court Civil Suit Number 1519 of 2005 (now ELC NO. 1738 of 2007) against him, seeking for a declaration that the suit property belongs to the said Council, on the grounds that it had been acquired by the Council for the sole purpose of being taken over for extension of the Defendant's school. The Plaintiff states that this second suit is pending before the High Court for hearing and final determination, but that the Defendant nevertheless proceeded to fraudulently transfer the suit property to itself on 2<sup>nd</sup> February 2011, and was fraudulently issued with a title deed for the said land as absolute owner. The Plaintiff attached as evidence copies of the judgment in Kiambu SPMC Civil Suit Number 48 of 2005, and the pleadings in High Court ELC No. 1738 of 2007

The Defendant's response is contained in a replying affidavit sworn by the Chairman of the Board of

Governors' Gathirimu Girls Technical High School, one John Edward Thuku, on 1<sup>st</sup> November 2011. The Defendant state that the Plaintiff in 1976 requested to exchange two of his land parcels namely Githunguri/Kimathi/T214 and Githunguri/Kimathi/T15 for one belonging to the County Council of Kiambu namely Githunguri/Kimathi/T206. Further, that the County Council of Kiambu entered into the said agreement so that the Defendant's school could benefit from the Plaintiff's former land parcels, and that the Defendant's school subsequently acquired the title to the suit property after intervention by the County Council of Kiambu, the Commissioner of Lands and the District Lands Registrar Kiambu.

The Defendant further states it requires the suit property for its own use and that the suit property is currently being utilized by the school. The Defendant also claims that the Plaintiff was adequately compensated according to the exchange transaction, and he is therefore not likely to suffer irreparable loss. Further, that it is not aware of any plans to sell or in any way dispose, waste or damage the suit property as alleged in the application. The Defendant also stated that the prior civil cases namely SPMCC No. 48 of 2005 and HCCC No. 1519 of 2005 (High Court ELC No. 1738 of 2007) were founded on different and distinct causes of action from this current suit.

The Plaintiff in a Further Affidavit sworn on 24<sup>th</sup> November 2011 stated that the Defendants statements on the agreement entered into in 1976 should be expunged from the record as the Defendant was not privy to the said agreement and the same are therefore hearsay. He further states that the County Council of Kiambu, Commissioner of Lands and the District Lands Registrar Kiambu had no *locus standi* to interfere with the title to the said land since the Defendant and the County Council of Kiambu had instituted civil proceedings to determine their right to the suit property, and as there has been no determination of this issue by any court of law the said transfer of the suit property to the Defendant was illegal and fraudulent.

The Plaintiff's Advocate filed written submissions dated 21<sup>st</sup> November 2011 and reply Submissions dated 20<sup>th</sup> January 2012. The Advocate contended that the Plaintiff had shown a *prima facie* case as he was the registered owner of the land and also in possession of the suit property since the 1970's, and by showing that the Defendant had unlawfully and illegally seized possession and ownership of the suit property. The Advocate relied on the judicial authorities of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others (2003) KLR 125** and **Aikman v Muchoki (1984) KLR 153** in this respect. The Plaintiff also submitted that damages would not adequately compensate the destruction of his property by the Defendant, and that for the same reason the balance of convenience tilts in his favour.

The Defendant's Advocate filed written submissions dated 5<sup>th</sup> December 2011 and argued that no *prima facie* case has been shown by the Plaintiff, since the Defendant school has been in possession of the suit property since the 1970s and was registered proprietor on 28<sup>th</sup> January 2011, and that it was only in 2011 that the Plaintiff made a complaint to the Criminal Investigations Department. The Defendant relied on the decision in **Peter Nchebere v M'Inanga M'Akwalu & 3 others (2011) eKLR**. The Defendant also submitted that the Plaintiff has not demonstrated how he stands to suffer irreparable loss, and the balance of convenience is in the Defendant's favour as it is in dire need of the suit property for expansion.

Finally, the Defendant's Advocate also contended that an injunction cannot issue against the Defendants as they are Government agents and relied in this respect on section 16 of the Government Proceedings Act (Cap 40) and the decision in **Maua Methodist Hospital Sacco v Commissioner, Kenya Revenue Authority (2011) eKLR**, wherein it was held that an injunction could not issue against the Commissioner, Kenya Revenue Authority.

I have read and carefully considered the pleadings, evidence and written submissions by the parties to this application. I need to first address the issue as to whether an injunction can lie against the Defendant. The reason why it was held in **Maua Methodist Hospital Sacco v Commissioner, Kenya Revenue Authority (2011) eKLR** that an injunction could not lie against the Commissioner of the Kenya Revenue Authority, was because section 3(2) (a) of the Kenya Revenue Authority Act specifically provides that proceedings against the Kenya Revenue Authority in relation to the performance of functions and the exercise of its powers, shall be deemed to be legal proceedings against the Government.

There is no similar provision in the Education Act under which Board of Governors for schools are established under section 10 of the said Act. In addition Board of Governors are granted corporate personality to sue or be sued in their corporate name under the said section, and indeed, the reason the Defendant has been sued in the present suit in its capacity as Board of Governors. I therefore find that the Government Proceedings Act is inapplicable to this suit.

I will now proceed with the determination of the application on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358**, as to the grant of an injunction. There is evidence on the court file of the Plaintiffs title to the suit property. The Plaintiff has also produced as evidence the judgment delivered in Kiambu SPMC Civil Suit Number 48 of 2005 on 1<sup>st</sup> December 2005 dismissing the Defendant's suit seeking the Plaintiff to transfer the suit property to it. There is no evidence produced by the Defendant of a subsequent transfer of the said property to it by the Plaintiff. After a perusal of the pleadings provided as evidence by the Plaintiff, it is my view that the arguments presented by the Defendant as to the agreement entered into between the Plaintiff and the County Council of Kiambu are the subject of High Court ELC No. 1738 of 2007, which is pending before this Court for determination. In addition the Defendant has also not provided evidence of the said agreement and its conferment to it of proprietary interest in the suit property.

It is my finding therefore that the Plaintiff has established a *prima facie* case, and that damages will not be an appropriate and adequate remedy, as the suit property is the subject matter of another suit involving the Plaintiff in High Court ELC No. 1738 of 2007. In light of the reasons given in the foregoing, I hereby order as follows:

1. That the Defendant, its agents, and/or servants are restrained from selling, disposing, leasing, transferring, developing or erecting any structures and/or in any way whatsoever interfering with the title to the parcel of land known as L.R Githunguri/Kimathi/T.214 pending the hearing and final determination of this suit.
2. That the suit filed herein be consolidated together with High Court ELC Suit No. 1738 of 2007 (previously HC.C.C No. 1519 of 2005) for purposes of hearing and final determination of the issues raised therein.

The Plaintiff is awarded the costs of this application

Dated, signed and delivered in open court at Nairobi this \_\_\_\_8<sup>th</sup> \_\_\_\_ day of \_\_\_\_March\_\_\_\_, 2012.

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