



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 704 OF 2011**

**EDCO AFRICA LIMITED .....1<sup>ST</sup>**  
**PLAINTIFF**

**DR MWANIKI DINGURI NICK.....2<sup>ND</sup>**  
**PLAINTIFF**

**VERSUS**

**BONIFACE NDEGE KIRIGIA .....1<sup>ST</sup>**  
**RESPONDENT**

**SPERANZA MUTHONI NDEGE.....2<sup>ND</sup>**  
**RESPONDENT**

**REGISTRAR OF TITLES.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Plaintiffs have brought a suit against the Defendants basing their cause of action on fraud and misrepresentation leading to the fraudulent transfer of the 1<sup>st</sup> Plaintiff’s parcels of land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiffs seek rectification of the Register and orders cancelling the transfers effected therein and for special damages and costs of the suit and interests. Contemporaneously with that suit the Plaintiffs took out a Notice of Motion praying for orders of injunction restraining the Defendants, inter alia, from in any way dealing with the suit properties known as LR No. 7741/348 and 7741/349 pending the hearing and determination of the suit.

2. That motion is based on the grounds that the Plaintiffs never executed any Sale Agreement or Transfer/Conveyance over the suit lands and they did neither seal nor authorize or witness the sealing of those documents, and further all the acts of the defendants are fraudulent. The 2<sup>nd</sup> Plaintiff could neither have signed, sealed, authorized nor witnessed any such actions as at the time of the alleged signing and sealing of the relevant documents he was away in the USA’s Dallas Transplant Institute, Texas with kidney failure which later led to his undergoing a kidney transplant. There was no resolution to sell the

suit lands and so what happened was a fraud actuated by the acts of the 1<sup>st</sup> Defendant who was an employee of the Plaintiffs and also the 2<sup>nd</sup> Plaintiff's assistant with the knowledge that the 2<sup>nd</sup> Plaintiff was ailing in the USA at the material times. There was no compliance with the 1<sup>st</sup> Plaintiff's Articles and the provisions of the Companies Act before the purported Sale and Transfer and what the Defendants did was to appropriate to themselves the Plaintiffs' properties at a throw away price or for no consideration at all due to the 1<sup>st</sup> Defendant's abuse of the trust and confidence placed on him and indeed some Ksh. 6,500,000/= was paid into the 1<sup>st</sup> Plaintiff's account during March 2007 when the Defendants realized that the 2<sup>nd</sup> Plaintiff had returned into the country from USA although the Transfer had been effected during December 2006. This was seen as due to the 1<sup>st</sup> Defendant's hope that the 2<sup>nd</sup> Plaintiff would not have survived his kidney ailment and so the 1<sup>st</sup> Defendant's wish to appropriate the suit lands to himself for free. That the plaintiffs became aware of these frauds during November 2011 when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants purported to enter into the suit lands, cut down trees and deliver building materials thereon. In the supporting affidavit the 2<sup>nd</sup> Plaintiff re-emphasized the grounds on which the motion is based.

3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their separate affidavits in opposition to the application. Grounds of opposition were also filed. Their positions were similar and they stated that there was no fraud and misrepresentation in their dealings with the Plaintiffs and that the Sale and Transfer were regular and complied with the law. That there is no actual or legal basis to impeach their titles. The allegations of impropriety, misconduct and fraud are untrue to hide the real reason which is that the Plaintiffs wish to hike the purchase price. They added that they took possession of the suit lands upon transfer in 2006 and that they have been paying rates since 2007 and have been in quiet possession since. The 2<sup>nd</sup> Plaintiff lives next door to them and has never raised a complaint.

The 1<sup>st</sup> Defendant added that he had served the Plaintiffs for a period of 26 years since 1981 and no complaint about him was ever raised and he saw what was being done now as an after thought orchestrated by malice, ill-will and professional jealousy. He stated that he knew the 2<sup>nd</sup> Plaintiff very well and described him as a man who had a personalized management style and controlled the plaintiffs' businesses so closely that nothing would possibly have been done without his knowledge. They averred further that there was no merit whatsoever in the application and that the same should be dismissed with costs.

4. Parties filed written submissions and highlighted the same before court. I have borne those in mind together with authorities and the relevant law in the determination of this matter.

5. In all matters interlocutory injunctions, the conditions precedent to granting favourable orders were set out in the celebrated case of **GIELLA –VS- CASSMAN BROWN & CO LTD (1973) E.A. 358** as being that a successful party will have shown that he has a prima facie case with a probability of success at trial, he would suffer loss as cannot be adequately compensated by an award of damages and where the court be in doubt the matter would be decided on the basis of the balance of convenience.

6. The Defendants in their affidavits, grounds of opposition and in their counsel's Submissions have repeatedly averred that there was no iota of evidence of fraud and misrepresentation shown by the Plaintiffs and in any event the standard of proof of fraud is higher than that of a balance of probability and the Plaintiffs have failed to discharge that burden. They have made reference to the provisions of the Evidence Act more particularly Sections 107 through to Section 116. With profound respect that cannot possibly help the Defendants at this interlocutory stage where no hard evidence is called for for the assessment of the court. That is the duty of the trial court **see CUT TOBACCO KENYA LTD –VS- BRITISH AMERICAN TOBACCO (K) LTD Nairobi Civil Appeal No. 126/2000**. On that authority it is totally premature for this court to venture into the assessment of evidence and it is not the duty of any party at this stage of the case to adduce any such evidence. All that the Plaintiffs need show is that they have an arguable case, that is to say, a case that raises triable issues and that their case is not frivolous or vexatious. In the **AMERICAN CYNAMID CO. VS ETHICON LTD (1975) IALL ER 504** the following passage was given to clearly show the task of the court at this interlocutory stage:-

**“.....It is not the court's function at this stage of the litigation to try to resolve conflicts of**

**evidence on affidavit as to facts on which the status of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”**

7. And so it is my duty at this stage to establish whether or not any triable issues have been raised. Admittedly Section 23 of the Registration of Titles Act acknowledges fraud as a ground upon which a title to land can be challenged. The 2nd Plaintiff denied that the signatures in the Sale Agreement and Transfer were his. He added that at the material times of the execution of those documents he was away in the USA ailing from kidney failure and he possibly could not therefore have signed the said documents in Kenya. It is instructive that in all their pleadings and submissions the Defendants loudly and studiously avoided any mention of whether or not the 2<sup>nd</sup> Plaintiff was out of jurisdiction at the times material to the execution of the offending documents. There were the allegations that there was no compliance with requirements of company law before the 1<sup>st</sup> Plaintiff could dispose of property. There is no doubting that the 1<sup>st</sup> Defendant due to his long association with the Plaintiffs knew that the suit lands were owned by the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Plaintiff was a main shareholder thereof. He (1<sup>st</sup> Defendant) would therefore show that compliance was made as he was a player in the Plaintiffs’ business affairs and these are matters for the trial court. He would similarly show, as he alleges, that price is the reason for the suit. I am satisfied that the material presented to court discloses sufficient bona fide serious issues to be investigated at a trial.

8. The purpose of an interlocutory injunction is to preserve the status Quo until the dispute to be investigated in the suit can be finally disposed of **see** the Ugandan Supreme Court case of **ROBERT KAVUMA VS HOTEL INTERNATIONAL LTD, SC Civil Appeal No. 8 of 1990 (1973) 11 KALR 73.**

The substratum of the suit should be preserved **see NOOR MOHAMED HANMOHAMED VS KASSAMALI VIRLI MADHANI (1953) 20 EACA 8.** And the issues of fraud and misrepresentation which are central in this case can only be properly discussed at a trial and therefore the more reason why the subject matter of the suit must be preserved.

I do not find that there is delay in bringing the suit and the application as the former is of course brought within the duration of cause of action and the latter as well, as fraud is alleged to have been discovered during a similar period.

9. Granting of an interlocutory injunction is an exercise of judicial discretion which is guided by the principles set out in the **Giella** case, (**supra**) and many others that have followed it. The totality of the facts and submissions herein show a prima facie case in my considered view. The Plaintiffs’ legal rights over the suit lands should be protected until trial when evidence from all the warring parties would be assessed. For me the balance of convenience tilts towards maintaining the present status Quo and preserving the suit lands until hearing of the suit. In the result I grant prayer 3 of the Notice of Motion under consideration. Costs will be borne by the Respondents.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30<sup>TH</sup> DAY OF MAY 2012.**

**P.M. MWILU**  
**JUDGE**

In the presence of:-

..... Advocate for Plaintiffs/Applicants

..... Advocate for Defendants/Respondents

..... Court Clerk

**P.M. MWILU**  
**JUDGE**