



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE 146 OF 2010

1. **ONESMUS KINGOO NZOMO**
2. **JOHN M MUSYOKI**
3. **PETER WAMBUA NZOMO** **PLAINTIFFS/APPLICANTS**
VERSUS
1. **ALBERT KAU**
2. **REGISTRAR OF LANDS MAKUENI DISTRICT**..... **DEFENDANTS/RESPONDENTS**

R U L I N G

Before me is an application dated 21st July 2010 filed by Onesmus Kingoo Nzomo, John M Musyoki, and Peter Wambua Nzomo. The application was filed under Order XXXIX rule 1, 2, 3 and 9 of the Civil Procedure Rules, as well as section 3A, of the Civil Procedure Act (Cap 21) and section 143 of the Registered Land Act (Cap 300). It has four (4) prayers, two of which have been spent as follows:-

1. (Spent).
2. (Spent).
3. **THAT this Honourable court be pleased to grant an order restraining the defendants/respondents from transferring, selling or in any way adversely dealing in Land Reference Machakos/Ulu/551 and Machakos/Ulu/ 553 pending hearing and determination of the suit.**
4. **THAT the costs of this application be provided for.**

The application has grounds on the face of the Chamber Summons. The grounds are that the applicants are the beneficiaries of the late Jacob Nzomo Muindu. That pursuant to a certificate of confirmation of grant made on 14th January 2009, the 1st defendant was allocated 1.84 hectares of land but had fraudulently obtained a title deed for 2.15 hectares. That it was fair and just for the court to issue the restraining orders sought.

The application was filed with a supporting affidavit sworn by Onesmus Kingoo Nzomo, on 21st July 2010. The affidavit gives the surrounding facts relating to the complaint of the applicants.

The applicants also filed written submissions on 11th November 2011 through their advocates, B.N Kiptoo & Company. The division of the land assets among beneficiaries and the alleged illegal changes to the agreed subdivisions were given. It was emphasized that the grant of an injunction, in the

circumstances of the matter, was justified.

The application is opposed by the 1st respondent, Albert Kau, who filed a replying affidavit on 10th November 2010. In the affidavit, he avers that he is a grandson of the late Nzomo Muindu, and a son of Joseph Kau Nzomo. That the said Muindu Nzomo, divided his land to the three houses (wives). That the identification of the shares in the proposals for confirmed grant, did not take into account the portion of land sold to his father by his brother Christopher Kyengo Nzomo. That he did not conspire with the surveyor to increase his portion of the share of land. That the applicants were coming to court with unclean hands.

The 1st defendant also filed written submissions through his advocate, Chacha Mwita & Company. The facts were given in the submissions. It was contended that the Land Registrar could not be sued since he was an agent of the Government. The proper party to be sued herein should have been the Attorney General as required under section 12(1) of the Government Proceedings Act (Cap 40). Secondly, an injunction cannot be granted against the Government as this was prohibited by section 16(2) of the Act.

On the hearing date, Mr Chacha, highlighted the submissions on behalf of the 1st respondent. It was contended by Mr Chacha, that the deceased had three wives, and that the effect of this application was to restrain only one house, which was cruel.

On the other hand, Mr Kiptoo, who came a bit late, submitted that his client had satisfied the requirements for grant of interlocutory injunctions as enunciated in the case of **Giella –vs- Cassman Brown Ltd (1973) EA 358**.

Having considered the application, documents filed, and submissions of the parties, both written and oral, I am of the view that this is a matter in which the grant of an injunction is justified. It is clear that there is a dispute on the division of the land, which was the subject of succession proceedings. There is also a claim of fraud. The proof of the issues raised herein can only be determined substantively after the parties are heard. At this stage, I have no opportunity to determine the merits. However, in my view, the applicants have established a *prima facie* case with probability of success. The second consideration for the grant of injunctive orders is whether an award of damages will be an adequate remedy, if injunction is not granted. In my view, damages cannot be an adequate compensation if the land is disposed of. No valuation of the subject land has been done. I also think that it will be difficult to have an agreed valuation at this stage of the dispute.

The above, are the two main considerations for the grant of an interlocutory injunction as enunciated in the case of **Giella –vs- Cassman Brown Ltd** (supra). The third consideration is the balance of convenience, which only comes into play when the court is in doubt. I am not in doubt, as I think that an injunction against transfer of land is justified in order to preserve the subject matter of these proceedings. The joinder or non-joinder of the Attorney-General is a technical issue which has no relevance to the other parties' interests.

I observe that interim orders were granted pending the hearing of this application. The same were varied on 22nd March 2011 to allow the 1st respondent enter LR Machakos/Ulu/553 for cultivation and planting crops. I find no reason to change this position.

For the above reasons, I allow the application and grant prayer 3, subject to the variation dated 22nd March 2011, which will be operational until the determination of the suit.

Costs in the cause.

It is so ordered.

Dated and delivered this 26th day of **June** 2012.

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George Dulu

Judge

In the presence of:

N/A for Plaintiffs/Applicants

Albert Kau 1st respondent present in person

Mr Kiptoo enters court in the middle of the reading of the ruling

Nyalo – Court clerk.