



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Suit 12 of 2010

THOMAS MUNGIRIA.....1ST PLAINTIFF

LICHORO KAIGA.....2ND PLAINTIFF

KAMAU GITHONGO.....3RD PLAINTIFF

STEPHEN M'AMURU.....4TH PLAINTIFF

JOHN THINKANYI.....5TH PLAINTIFF

JAPAHET MARANGU.....6TH PLAINTIFF

SAMWEL LIBURU.....7TH PLAINTIFF

NCHEBERE ARUAKI.....8TH PLAINTIFF

KIRAGU KAMUIRU.....9TH PLAINTIFF

MWANGI MARATHI.....10TH PLAINTIFF

VERSUS

JOSEPH MUTUMA.....1ST DEFENDANT

THE DISTRICT LAND ADJUDICATION OFFICER.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JOANINA GITURA.....4TH DEFENDANT

JOHN KATHIARI.....5TH DEFENDANT

R U L I N G.

The Application under consideration is the one dated 22nd September, 2010. It is a Chamber Summons brought under O.XXXIX R. 1, 2 and 2A of the Civil Procedure Rules and S.3 and S.3A of CPA. The Applicant seeks Order 2 in which he seeks;

“That this honourable court be pleased to issue an order of injunction restraining the 1st defendant either by himself, his servants and/or agents from entering, trespassing, demarcating, alienating, selling or in any way interfering with Land parcels Nos.1507,1209,626,1716,1662,1787,2167,1157, 1452,1582 and 1767 Antuamburi Adjudication Section until this suit is heard and determined.”

The application is supported by grounds on the face of the application which are:-

- (a) The Plaintiffs are the registered owners of their respective parcels of land.**
- (b) That the Plaintiffs are and have been in actual possession and occupation of their respective parcels of land since 1974/1975 and have carried out extensive development.**
- (c) That the 1st Defendant is unlawfully interfering with the Plaintiffs’ quite use and possession of their respective parcels of land.**
- (d) That the 1st Defendant is visiting the suit land with prospective buyer which is a clear indication of his intentions to sell portions of the suit land.**
- (e) That it is fair and just to preserve the suit property to protect the Plaintiffs/Applicants until this suit is fully determined.**

The application is supported by an affidavit sworn by the 1st plaintiff. The gist of the affidavit is that the Applicants are the registered owners of land parcels No. 1507, 1209, 626, 1716, 1662, 1787, 2167, 1157, 1452, 1582 and 1787 Antuamburi Adjudication Section respectively, and that they are all in occupation of their respective land. It is averred that the 1st defendant obtained portions of each of the Plaintiffs parcels of land through fraud facilitated by the 2nd defendant. That the 1st Defendant has since then taken prospective buyers to the said parcels of land.

The application is opposed. The 1st Defendant has filed a replying affidavit dated 2nd February, 2011 and has annexed a ruling of the 2nd Defendant District Land Adjudication Officer dated 19th November, 2009. The gist of the affidavit is that the Applicants do not reside on the suit land and did not annex any

document to show they are registered owners. The 1st defendant deposes that the 2nd and 11th Plaintiffs are deceased thus rendering the suit incompetent. He deposes further that the decision of the 2nd defendant in November 2009, was effected and that he subsequently disposed of the suit lands derived from the suit properties to other people.

Mr. Nyenyire for the applicant in his submissions merely reiterated the grounds and facts as deposed in the in annexed supporting affidavit to the application.

Mr. Arimba for the Respondents reiterated the replying affidavit by the 1st defendant. In addition counsel urged that for reason two of the Plaintiffs are deceased, the suit was a non starter. Further that the Applicants did not show that they stood to suffer irreparable damage. Counsel urged the court to find that application should be dismissed as issues raised in the replying affidavit had not been controverted.

I have carefully considered the application.

The Applicants seek injunctive relief which is within the courts discretionary powers to grant. The Applicants must meet the threshold required for the granting of injunctions as were set out in the celebrated case of **GEILLA VS CASSMAN BROWN & CO LTD [1973] E.A. 358**. In that case, the Court of Appeal for East Africa laid down the following principles for grant of injunction.

- (1) A court's discretion to grant an injunction will not be interfered with unless it has not be exercised judicially.**
- (2) An applicant must show a prima facie case with a probability of success;**
- (3) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury or loss and**
- (4) When the court is in doubt it will decide on the balance of convenience.**

The applicant must satisfy the court that he has a *prima facie* case with a probability of success at the trial. If the applicant is unable to establish a *prima facie* case, he can still obtain the order if he shows that he stands to suffer irreparable damage or loss which it cannot be compensated by an award of damages if the order is not granted.

The case can also be determined in a balance of convenience. This being an interlocutory application, I have cautioned myself that I should not make conclusive findings. See the case of **Simiyu vs. Housing Finance Company of Kenya Ltd** [2001] 2 E.A. 540 at page 546:-

“In answering that question the court is to remember that it is not required – indeed it is forbidden – to make definitive findings of fact or law at the interlocutory stage particularly where the affidavits are contradictory and the legal propositions are hotly contested as is the case here.”

The Plaintiffs suit is a claim in land. The Plaintiffs have deposed that they are in possession of their respective parcels of land and the Defendants have not controverted that fact. What the 1st Defendant has challenged is the competence of the suit for reason two of the Plaintiffs has since died. That point cannot be raised to defeat the application for injunction as the position can be regularized. The 1st Defendant has raised issue with the fact he sold certain portions of the land claimed in this case by the Plaintiffs and so argues that the Plaintiffs have no case.

The Plaintiffs seek specific orders in the plaint affecting the “*sales*” and have challenged the 1st and 2nd Defendants exercise of selling of the said land parcels to third parties. That ground is the precise reason why any further dealings in the lands in question should be halted or prevented in order to give the parties in the suit to be heard on the merits.

The issues of land are very sensitive. Any person claiming an interest in land should be given a chance to be heard. The duty of the court at this interlocutory stage is to ensure that the suit is not rendered nugatory. Disposal of the suit land will affect the subject matter of the suit and distort the very substratum of the case. That cannot be allowed.

The land in question is not commercial. The Plaintiffs have pleaded that they have lived on the land with their families all their lives. In terms of whether damages can be an adequate remedy it is trite law in Kenya that family land or ancestral land cannot be adequately compensated by an award of damages as the true value of the land cannot be measured in monetary terms. It has a sentimental value which is priceless.

Having carefully considered the application I have come to the conclusion that the injunction sought should be granted in order to do justice to all the parties in the case. I therefore allow the application dated 22nd September, 2010 in the following terms:

1. That an order of injunction be and is hereby issued restraining the 1st defendant either by himself, his servants and/or agents from entering, trespassing, demarcating, alienating, selling or in any way interfering with Land parcels Nos. 1507, 1209, 626, 1716, 1662, 1787, 2167, 1157, 1452, 1582 and 1767 Antuamburi Adjudication Section until this suit is heard and determined.

2. Costs of the application be in the cause.

DATED, SIGNED AND DELIVERED THIS 7th DAY OF JUNE, 2012

**LESIIT, J
JUDGE**