



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAKURU**

**Petition 12 of 2011**

**KOLU NGOLANIA.....PLAINTIFF/APPLICANT**

**VERSUS**

**PETER IREGI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**STEPHEN KIGURU MACHARIA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of the notice of motion dated 5<sup>th</sup> July, 2012 brought under **Section 2** of the **Land Registration Act, Act No.3 of 2012**, **Section 63(c)** of the **Civil Procedure Act, Order 40 Rule 1** and **Order 51 Rule 1** and **3** of the **Civil Procedure Rules**. The applicant is seeking orders of a temporary injunction to restrain the respondents from entering into, remaining upon, selling, disposing, alienating, accumulating building or other materials, constructing permanent or temporary structures upon or otherwise committing acts of waste, equitable or otherwise, or in any manner howsoever

interfering with the applicant's quiet enjoyment, use and possession of parcel of land known as LR NO. 26415 (ORIGINAL NO. 404/53) situated at KWA MUHIA TRADING CENTRE along MOI SOUTH LAKE ROAD, pending the hearing and determination of the suit herein.

The application is premised on the grounds that the applicant is the legal and beneficial owner of the suit property which he bought from the late Muhia Thuku; that the respondents are interfering with the same by undertaking construction works; that the applicants have no colour of right over the property; that their actions are illegal, wrongful and injurious to the applicant and that it is only fair that the injunction sought be issued to protect the land pending the hearing and determination of the suit.

When the application came up for hearing on 17<sup>th</sup> July, 2012, there was no appearance for the defendants, even though served. The application was therefore heard *ex parte*.

Even though the application is undefended, the burden remains upon the applicant to prove his case by showing that it meets the conditions for granting an interlocutory injunction as set down in **Giella V, Cassman Brown & Co. Ltd (1973) E.A 358**, namely that he has a *prima facie* case with a probability of success; that he might otherwise suffer irreparable injury, which cannot adequately be compensated by an award of damages unless the injunction is granted; and that the balance of convenience tilts in his favour.

From the pleadings filed in this suit it is alleged that the applicant is the legal and beneficial owner of the suit property. In support of this allegation, the applicant has annexed a copy of a document in Kiswahili constituting an agreement executed between one Muhia Thuku and himself, a deed plan in respect of the suit property and a letter from the administrator of Muhia Thuku, the alleged seller, to the Commissione

of Lands seeking to pay some money before the title deed is processed.

I have considered the pleadings as well as submissions in support of this application. It is clear that the applicant has no title to the suit property, but is relying on the aforesaid documents. Although under **Section 26(1)** of the **Land Registration Act** a certificate of title or a title deed issued by the Registrar is only a *prima facie* evidence of ownership of land, the agreement annexed to the application is certainly not evidence of ownership. It does not specify the parcel of land to which it relates. Moreover, the agreement offends the provisions of **Section 86** of the **Civil Procedure Act**, in that it has not been translated into the language of the court.

**Section 86(1)** provides-

**“ The language of the High Court and the Court of Appeal shall be English...”**

The agreement annexed to the applicant’s application being in Kiswahili language and the same having not been translated into the language of the court, is inadmissible as it violates the express provisions of the law.

The upshot of the foregoing is that the applicant has failed to demonstrate a *prima facie* case with probability of success. From annexure “KN3” there is no doubt that there are construction works on the suit property but the applicant having failed to demonstrate sufficient interest in the suit property, he cannot be heard to say that he will suffer irreparable injury if an order for injunction is not granted.

The application is, for those reasons dismissed with no orders as to costs.

**Dated, Signed and Delivered at Nakuru this 3<sup>rd</sup> day of August, 2012.**

**W. OUKO**  
**JUDGE**