



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**Civil Case 129 of 2000**

**SABINA NYANOKWE GATIMWA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**SIMION MASABU NCHAMA.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**JOSEPH MATINDE GATIMWA.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**JULIUS GATIMWA CHACHA.....4<sup>TH</sup> PLAINTIFF/RESPONDENT**

**THOMAS GENTARO GATIMWA.....5<sup>TH</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**MAROA WAMBURA GATIMWA.....DEFENDANT/APPLICANT**

**RULING**

The defendant/applicant has filed a Notice of Motion dated 9<sup>th</sup> May, 2011. The Application is brought under Order 51 Rule 1 of the **Civil Procedure Rules**, Sections 1A, B, 3A, & 63 of the **Civil Procedure Act**, and Sections 128 and 129 of the **Registered Land Act**. The applicant seeks orders that:-

- 1. Pending the hearing inter-parties, the Honorable Court be pleased to grant an order inhibiting the registration of the transfer and or any dealing with the land known as L.R. Bugumbe/Masaba/579 in favour of the respondents.*
- 2. The Honorable Court be pleased to grant an order inhibiting the registration of the transfer and or any dealing with the land known as L.R. Bugumbe/Masaba/579 in favour of the respondents pending the payment by the respondents to the Applicant of such sums as shall be certified by this court to be lawfully due to the Applicant on account of the expenses incurred towards the subdivision of the land known as L.R. Bugumbe/Masaba/106 as well as the costs of the application dated 18<sup>th</sup> October, 2010.*
- 3. Costs of this application be provided for.*

The applicant, **Maroa Wambura Gatimwa** has sworn a supporting affidavit dated 9<sup>th</sup> May, 2011. The applicant avers that there is a Court of Appeal judgment that specifically ordered, *inter-alia*, that the costs of subdivision and transfer of 12 acres from his land, **L.R. Bugumbe/Masaba/106** (original), to the respondents, shall be shared equally amongst the parties. That he has taken all the requisite steps giving rise to the subdivision of the original parcel of land to **L.R. Bugumbe/Masaba/578** and **L.R. Bugumbe/Masaba/579** which are still registered in his name. That he has incurred subdivision costs

amounting to more than Kshs. 52,000 and the respondents, in disregard to the Court of Appeal order, have refused to share in the costs.

The applicant has further averred that the title of **L.R. Bugumbe/Masaba/579** which is supposed to be registered in the name of the respondents is ready, and that there is a likelihood that the respondents will mislead the land registrar to issue them with the said title based on material representation and distortion of facts, and without refunding the money to him. That it is therefore necessary that his interests be protected by the Court by issuing an order prohibiting and/or inhibiting any registration of **L.R. Bugumbe/Masaba/579** in favour of the respondents, until they refund the expenses so far incurred by himself for the subdivision and/or of this application.

The application is opposed. The respondents filed statement of grounds of opposition dated 3<sup>rd</sup> June, 2011. The respondents aver that the application herein is mischievous, misconceived and otherwise legally untenable. That the subdivision of the original parcel was decreed pursuant to the judgment of this Court, and confirmed by the judgment by the Court of Appeal, and therefore the applicant has no legal interest and/or rights over the resultant portion that lawfully belongs to them.

The respondents have further deposed this Court is devoid of jurisdiction to order and/or decree an order of inhibition and/or prohibition in the manner sought. That the application is calculated to obstruct and/or delay the realization of the fruits of the judgment, and that it amounts to an abuse of the due process of the Court.

The parties elected to canvass the application by way of written submissions, which were filed on 12<sup>th</sup> and 13<sup>th</sup> December 2011, respectively. I have carefully read and considered them alongside the authority cited by the respondents.

At the heart of this application is the issue of expenses incurred by the applicant pursuant to his efforts to comply with an earlier order of this court to transfer a portion of the suit land to the respondents. To my mind therefore this court is not being called upon to revisit the case but rather to safeguard the interests of the applicant which interest is not the land but the money owed to the applicant by the respondents.

I note from perusing this file that the Court (**Makhandia, J.**) analyzed the judgment of this court and which was confirmed by the Court of Appeal in detail in his ruling on the application dated 18<sup>th</sup> October, 2010. I also note, of importance to this application, that the Court of Appeal ordered that:

*“The parties shall equally bear the costs of subdivision and transfer of the 12 acres to the Respondents. In default of compliance with this order by the appellant within sixty days from the date hereof, we direct that all necessary subdivision and transfer documents shall be executed by the Deputy Registrar of the superior court on behalf of the appellant at the appellant’s costs.” (Emphasis mine)*

The applicant has demonstrated that he has made efforts to comply with the Court of Appeal’s order by taking all requisite steps towards the survey, subdivision and mutation of the original parcel of land to **L.R. Bugumbe/Masaba/578 & 579**, and that **L.R. Bugumbe/Masaba/579** which measures 12 acres is reserved to be transferred to the respondents.

This Court was further satisfied that, the applicant, in taking the aforementioned steps so as to comply with the Court of Appeal order, he notified the respondents at the material times, and that they were therefore aware of the process of excision of the 12 acres from the original land. As a result of lack of co-operation by the respondents, the applicant has solely, incurred costs amounting to Kshs. 52,000/-, which was meant to be shared equally among both parties as per the decision of the Court of Appeal.

The respondents do not refute the averments of the applicant. They do not contest that the excision process had been commenced by the applicant, and that the costs thereto have been borne solely by the applicant. The respondents contend that once the subdivision has been done, the applicant has no legal interests/rights over the resultant portion of that lawfully belong to them. Further that this Court has no

jurisdiction to order/decreed on order of inhibition/prohibition in the manner sought or at all.

There is no doubt that the 12 acres hived off from the applicant’s original parcel lawfully belongs to the respondents. However the decree envisaged that the costs of the subdivision would be met by the parties equally. It is evident that applicant is not holding on to the land unjustifiably, it is indeed the respondents who want to get away with acquiring the land without meeting the costs, as decreed by the Court of Appeal. It is also apparent that the respondents have been uncooperative with the applicant. But having so observed, does this court have jurisdiction to issue an inhibition order on the parcel?

This Court has the discretion, under Section 128 (1) of the **Registered Land Act** to make an order inhibiting the registration of any dealing with any land, lease or charge. Such inhibition shall be for a particular time, the occurrence of a particular event, or until further orders of the Court. For as long as the inhibition remains registered, no instrument which is inconsistent with it shall be registered. Section 128(1) reads:

*“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge.”*

There is ample authority that an order of inhibition under section 128 of the **Registered Land Act** is akin to an order of prohibitory injunction for it restricts the registered owner and any other person from having their transaction regarding the land in question registered against the title. Before the court can issue such an order however it must be satisfied that the person moving the court for such orders has good grounds for requesting such an inhibition, such grounds would normally be in the form of sustainable claim over the suit land. See **Philip Mwangi Githinji – Vs – Grace Wakarima Githinji (2004) eKLR**.

In the circumstances of the present application, I find that the applicant has no sustainable claim over the portion of suit parcel which the Court of Appeal ordered him to transfer to the respondents. Rather, I find that he has a claim over reimbursement of expenses incurred pursuant to his efforts to comply with the decree of the Court of Appeal. In the premises therefore, I find that to issue an inhibition would be tantamount to denying the respondents the fruits of the decree. I therefore decline to grant the order as prayed.

I would however, having found that the applicant is owed money by the respondents, and in order to bring litigation in this case to an expeditious end, order that the applicant files his monetary claim with the Deputy Registrar of this court for assessment and execution as a money decree. With respect to costs of the application dated 18<sup>th</sup> October, 2010, the applicant can access the same through the process of taxation by the Deputy Registrar of the court.

Each party shall meet their costs in this application. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 21<sup>st</sup> day of September, 2012.**

**R. LAGAT-KORIR**  
**JUDGE**

**In the presence of:**

..... for applicant

..... for respondent

..... court clerk

**R. LAGAT-KORIR**

**JUDGE**