



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 98 of 2010

- 1. PATRICIAH KABUI MANANGA**
- 2. JOHN MWITHIG A MWANGI MWAURA**
- 3. JOSEPH MWOLOLO MBINDYO**
- 4. REUEL KARIUKI MUTHUA**

PLAINTIFFS/APPLICANTS

VERSUS

- 1. GRACE MWITHI MAUNDU**
- 2. G.K. & D INVESTMENT CO. LTD.**

DEFENDANTS/RESPONDENTS

RULING

Before me is an amended **Chamber Summons** dated 20th December 2011 filed by the plaintiffs herein. Some of the prayers have been spent, as follows:-

1. (Spent).

2. (spent).

3. THAT there be a temporary injunction issued to restrain the defendants/respondents from interfering, trespassing and intruding into the suit property namely Lukenya Plot No. 1602 in Lukenya Ranching & Farming Co-operative Society Ltd – Athi River as is currently divided among the plaintiffs/applicants pending final determination of this suit.

3a. THAT there be a temporary injunction issued to restrain the defendants/respondents from disposing of, alienating or in any other way or manner whatsoever dealing in any way with suit premises formerly known as Plot No. 1602 in Lukenya Ranching and Farming Co-operative Society Limited Athi River which had been surveyed, delineated and sub divided as plot No. 6007 purchased by the 1st plaintiff/applicant, and plot No. 6006 purchased by the 2nd plaintiff/applicant, and plot No. 6009 purchased by the 3rd plaintiff/applicant and plot No. 6010 purchased by the 4th plaintiff/applicant which have during the pendency of this application have been irregularly, unlawfully and fraudulently registered and titles thereto without due process issued to the 1st Defendant/Respondent as Mavoko Block 3/6007, Mavoko Block 3/6006, Mavoko Block 3/6009 and Mavoko Block 3/6010 respectively.

4. THAT the costs of this application be provided for.

The amended application has several grounds on the face of the Chamber Summons. It was filed with an affidavit sworn by **Tim Mweseli Advocate** for the plaintiffs. This affidavit gives the history of the delay in hearing the application, which had initially been dated 24th May 2010 and filed in the same date.

The application dated 24th May 2010 was filed with affidavits sworn by the respective plaintiffs. In brief, the plaintiffs swore that they bought the subject plots from the defendants/respondents. However, the defendants had subsequently severally trespassed on the subject land and as result there were pending criminal proceedings at the **Machakos** Law Courts.

Replying affidavits were filed by **Grace Maundu** the 1st defendant/respondent. In essence she deponed that though there were sale agreements, there were disputes as to completion of the terms of sale as well as the sizes of the plots in question.

Answers to the replying affidavit were also filed, in the form of affidavits by the plaintiffs. Responses and counter responses were filed.

The plaintiffs'/applicants' counsel **Tim O.A. Mweseli** filed written submissions on 11/6/2011. Though the defendants' counsel **Andrew Makundi & Company** promised to file written submissions, I have seen none filed on the file.

I have considered the application, documents filed and submissions and the law. This is an application for interlocutory injunctive orders. In Kenya, the considerations to be taken by the court in such an application were clearly stated in the now famous case of **Giella –vs- Cassman Brown Ltd (1973) EA 358**. An applicant has to demonstrate a *prima facie* case with probability of success. Secondly, an injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss not

capable of being adequately compensated in damages if the injunction is not granted. Thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

The opposing parties herein agree that there were sale of land transactions. The transactions do not appear to have been completed with disputes arising as regards completion of the sales, as well as the sizes of the plots. These issues are yet to be resolved. A *prima facie* case is not one that must succeed but an arguable case which is likely to succeed. The court will ultimately decide substantively on the issues in dispute after hearing the parties on merit. At this preliminary stage, I am not required to delve into the actual merits of the claims of the parties. With the facts placed before me, I am of the view that the plaintiffs have demonstrated a *prima facie* case.

Will the plaintiffs suffer irreparable loss or damage if the interlocutory injunctive orders are not granted? The prayers in the plaint are for a permanent injunction against intruding or trespassing by the defendant and damages. The allegation is that the plots belong to the plaintiffs. It is clear to me that the issue of the actual sizes and ownership of the plots has yet to be determined. The sizes and ownership can only be determined after substantive evidence is received to the court on both sides. In my view, if the interests of plaintiffs, who appear to be in occupation, are not preserved by an interlocutory injunction, then they will suffer irreparable loss, which cannot be quantified in the form of damages. The injunctive orders sought herein in my view, will preserve the status quo as the main suit proceeds to full hearing. I find that the plaintiffs will suffer irreparable loss if injunctive orders are not granted.

The balance of convenience is also in favour of the plaintiffs as they appear to be in occupation, and have also carried out some activities in the process of development of the land.

With the above findings, I will allow the application.

Consequently, I allow the application dated 20th December 2011. I grant prayers 3 and 3a. therein. However, costs of the application are in the cause, as the main suit is still pending.

Dated and delivered at Machakos this 18th day of **December** 2012.

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George Dulu

Judge

In the presence of:

N/A for Plaintiff

Ms. Ngatia holding brief for Mr Makundi for Defendants

Mutinda – Court clerk