



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC. 1666 OF 2007

ELIZABETH NJERI

**KAMAU.....PLAINTIFF (suing as
personal representative of the Estate of WAINAINA MBUTHIA GACHOKA (DECEASED))**

V E R S U S

**CYRUS JOSEPH KARANJA.....1ST
DEFENDANT**

**DISTRICT LAND REGISTRAR KIAMBU.....2ND
DEFENDANT**

R U L I N G

It does not appear to be in dispute that land parcel Ndumberi/Ting'ang'a/448 was registered in the name of the deceased Wainaina Mbuthia Ranji in 1958. The Plaintiff is the personal representative of the deceased's estate and claims that on or about 10th July 1995 the 1st Defendant fraudulently had the suit land subdivided, on paper and not on the ground, into three portions as follows:-

- a) Ndumberi/Ting'ang'a/1937 registered in the name of the Plaintiff;
- b) Ndumberi/Ting'ang'a/1938 registered in joint names of the Plaintiff and the 1st Defendant; and
- c) Ndumberi/Ting'ang'a/1939 registered in the name of the 1st Defendant.

Up to the time the deceased died on 10th January 2002, the Plaintiff claims, the family did not know about the subdivision. Subsequently, the 1st Defendant transferred parcel 1938 to himself and has been threatening to forcefully take possession of the suit lands, it was alleged. This suit was brought for these registrations to be nullified and cancelled and the deceased to be reinstated as the owner of original title.

The 1st Defendant filed a defence and counterclaim and stated that the original title was wilfully subdivided by the deceased during his lifetime; that the 1st Defendant took possession of his portion; that in 1995 the Plaintiff sold him her share in 1938 and then attended the Land Control Board that gave consent. He states that, to show that he was allowed possession by the deceased in July 2001, his brother died and was buried here. His case is that it is the Plaintiff who is infact interfering with his ownership

and possession of the suit land. In the counterclaim he sought the Plaintiff to be restrained.

On 31st May 2010 the Plaintiff sought a temporary injunction to restrain the 1st Defendant and all those acting under him from leasing, selling, charging and or obtaining any Land Control Board consent in relation to 1938 and 1939 until the suit is heard and finalized. The application was prosecuted for her by Mr. Kinyanjui. The Defendant was represented by Mr. Wamwayi.

The principles governing the grant of an interlocutory injunction have been settled since the decision in **Giella –Vs- Cassman & Co. Ltd [1973] EA 358**. The applicant has to demonstrate a *prima facie* case with a probability of success; that he stands to suffer irreparable damage if the application is not granted; and that, if the court is in doubt, it will decide the matter on the balance of convenience. It should also be remembered that an injunction is a discretionary and equitable remedy that should only be granted to a deserving party.

It is clear that parcels 1938 and 1939 are presently registered in the name of the 1st Defendant. Under sections 27 and 28 of the Registered Land Act (Cap. 300) such registration provides him a *prima facie* absolute and indefeasible claim to the parcels.

Regarding the allegations of fraud against the 1st Defendant, it is material that the transfers happened during the lifetime of the deceased who was the original owner. The 1st Defendant swore that it was the deceased who effected these transfers. He then swore that in regard to 1938, it was the Plaintiff who transferred it to him after they had even been to the Board. He stated that over this parcel, the Plaintiff made a report to CID Kiambu that he had defrauded her of it. The CID investigated and found the report to be false because she was the one who had transferred it. She was successfully prosecuted in **Kiambu Cr. Case No. 2532 of 2004**. The 1st Defendant provided documentary evidence for all these averments. My preliminary finding is that the allegations of fraud against the 1st Defendant have not been substantiated.

After the criminal court has found the Plaintiff to be untruthful, a court of equity cannot grant her an injunction, especially when all these facts were not disclosed in the supporting affidavit.

I dismiss the application with costs.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF APRIL 2011

A. O. MUCHELULE

J U D G E