



**CIVIL**

*Prayers for inhibition are akin to injunction application.*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HIGH COURT CIVIL CASE NO. 133 OF 2010**

**JOSEPH KITHINJI MUKINDIA**

*(Suing as the Administrator of the estate of Johana M’Mukindia M’Itiri (DECEASED))*

..... **1<sup>ST</sup> PLAINTIFF**

**JOSEPH KITHINJI MUKINDIA**

*(Suing as the next friend of BENSON MUTHURI*

*aka*

*BEN MUTHURI aka E.N. MUTHURI*

*Being a person of unsound mind) ..... 2<sup>ND</sup> PLAINTIFF*

**VERSUS**

**E. MUTHURI KAMERU M’NJOGU AKA**

**ELIPHELET M’MUTHURI KAMERU M’NJOGU ..... 1<sup>ST</sup> DEFENDANT**

**MERU DISTRICT LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**KELVIN MWITI MUTHURI NJOGU ..... 3<sup>RD</sup> DEFENDANT**

**JOYCE KANYIRI MUTHURI ..... 4<sup>TH</sup> DEFENDANT**

**JOTHAM GAIKUMI MUTHURI ..... 5<sup>TH</sup> DEFENDANT**

**ONESMUS MURIIKI MUTHURI ..... 6<sup>TH</sup> DEFENDANT**

**ELIZABETH MUTHURI ..... 7<sup>TH</sup> DEFENDANT**

**PAMELA MWENDWA MUTHURI ..... 8<sup>TH</sup> DEFENDANT**

**ROSE MAKENA MUTHURI ..... 9<sup>TH</sup> DEFENDANT**

**RULING**

Joseph Kithinji Mukindia has sued the 9 defendants on behalf of his deceased father’s estate, the 1<sup>st</sup> plaintiff and on behalf of his brother who is of unsound mind Benson Muthuri the 2<sup>nd</sup> plaintiff. The claim is that the 1<sup>st</sup> defendant in collusion with the 2<sup>nd</sup> defendant fraudulently and by means of impersonation misrepresented himself as Benson Muthuri the 2<sup>nd</sup> plaintiff on 25<sup>th</sup> October 1967 and thereby collected the title documents of parcel No. *Nyaki/Mulathankari/278*. That parcel of land was stated in the plaint to be the plaintiff’s ancestral land. It is further alleged by the plaintiffs that the 1<sup>st</sup> defendant proceeded to subdivide that parcel of land into various portions which were transferred to the other defendants who are

family members of the 1<sup>st</sup> defendant. They are indeed his wife and his children. Although the plaintiff alleged that the 1<sup>st</sup> defendant evicted them from their family land, when he perpetrated that fraud, there were no particulars of such eviction. There was no date assigned to the claim that they were so evicted. What is before court is the Chamber Summons dated 22<sup>nd</sup> October 2010. It has a total of 22 prayers. The plaintiff however only proceeded with prayers number 4, 6, 8, 10, 14, 16, 18, 20, 21 and 22. In those prayers, the plaintiff seeks orders of prohibition to be issued in respect of the various subdivision of the original title and for orders that each of the defendants do deposit their respective title in court pending the hearing and the determination of this case. The prayers sought by the plaintiffs are akin to prayers for injunction. I am therefore guided by the holding of the case **Mbuthia vs. Jimba Credit Finance & Ano.** [1988] KLR pg. 1 where the Court of Appeal held:-

***“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits.”***

With that caution in mind, I will restrain myself from delving into the many issues that have been raised by the plaintiffs and by the defendants in opposition to that application. This is because to engage myself in those issues would interfere with the trial court’s discretion in respect of the issues in this case. Suffice it to say, that the plaintiffs in my view has not shown a *prima facie* case in terms of the case of **Giella vs. Cassman Brown & Co. Ltd** [1973] E.A. The material before court does not show how the 2<sup>nd</sup> plaintiff whose national identity card reflects his name as Benson M’Mungania changes to be Benson Muthuri to conform to the title in this case. I am aware that a chief wrote a letter but the substance of that letter shows clearly that the chief wrote the letter on information supplied to him. It was not from first hand knowledge. There is also the unexplained circumstances of how the 2<sup>nd</sup> plaintiff failed to claim his title earlier yet the fraud which is relied upon in this case is alleged to have taken place in the early 1960s. As correctly submitted by the defendants’ counsel, the medical report relied on to show that the 2<sup>nd</sup> plaintiff is mentally incapacitated states that the 2<sup>nd</sup> plaintiff suffers with failing memory which is caused by age and by use of illegal substance. If that is the case, then it means that in early 60s, the 2<sup>nd</sup> plaintiff was not as aged as he is now and he could not have suffered from substance abuse and was therefore capable mentally to decide to collect his title from the lands office. The medical report infers that the 2<sup>nd</sup> plaintiff did not become incapacitated if at all until he grew older. The 2<sup>nd</sup> plaintiff is now 72 years old. There are many other loose ends in the plaintiff’s claim which leads me to find that a *prima facie* case has not been made by the plaintiff. The second principle of **Giella vs. Cassman Brown Co. Ltd** (supra) is that an injunction will not be granted if damages can sufficiently compensate the claimant. The defendants stated, and it was not contradicted by the plaintiff, that they have occupied the land since the 1940s. If that is so, the loss the plaintiff may suffer if at all is loss that can be compensated by damages. The plaintiffs have, after all, been out of the land for a considerable period of time. I find that the plaintiffs are not deserving the prayers that are sought in the Chamber Summons dated 22<sup>nd</sup> October 2010. That Chamber Summons is hereby dismissed with costs being awarded to the defendant. The orders of inhibition issued in this case on 22<sup>nd</sup> December 2010 are hereby vacated and discharged.

***Dated, signed and delivered at Meru this 30<sup>th</sup> day of June 2011.***

**MARY KASANGO**  
**JUDGE**