



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL CASE NO. 38 OF 2011**

**MARY WAMBUI WARUI.....1<sup>ST</sup> PLAINTIFF**

**VERSUS**

**ELIUD WARUI.....1<sup>ST</sup> DEFENDANT**  
**JOHN NJIRU GATHIGI.....2<sup>ND</sup> DEFENDANT**  
**THE LAND REGISTRAR, KIRINYAGA.....3<sup>RD</sup> DEFENDANT**

**RULING**

It would appear not to be in dispute that land parcel No. **MUTITHI/CHUMBIRI/137** belongs to the deceased Muthigani Karumi. Following Succession Cause No. 253 of 1999 at Kerugoya Law Courts, a Grant of Letters of Administration was issued to Peterson Maina Karumi. On 11<sup>th</sup> February 2011 the Grant was confirmed and the 1<sup>st</sup> Defendant given 4 acres of the land. The land was sub-divided so that the 1<sup>st</sup> Defendant became the registered proprietor of **MUTITHI/CHUMBIRI/921**. The registration was on 17<sup>th</sup> March 2001 and title was issued on 8<sup>th</sup> March 2001. This parcel measures about 2 hectares.

The Plaintiff and the 1<sup>st</sup> Defendant are wife and husband. The case by the Plaintiff is that land parcel **MUTITHI/CHUMBIRI/921** is family land the two having jointly contributed to its purchase. She states that she has found out that, whereas she is holding the original title deed, the 2<sup>nd</sup> Defendant has somehow been registered by the 3<sup>rd</sup> Defendant as the proprietor thereby defeating her equitable interest. She has pleaded fraud against the Defendants who caused the alienation of the land to her detriment. The suit was filed seeking the cancellation of the transfer to the 2<sup>nd</sup> Defendant. She asked that the registration to the 1<sup>st</sup> Defendant be restored. She further sought for an order of permanent injunction against the 2<sup>nd</sup> Defendant.

With the suit was filed a motion under Order 40 rules 1, 2 and 3 of the Civil Procedure Rules seeking a temporary injunction restraining the 2<sup>nd</sup> Defendant, and those acting under him, from entering, remaining on, working, cultivating, alienating or in any other manner interfering with the suit land or the Plaintiff's vacant possession and enjoyment pending the hearing and determination of the suit. The Plaintiff further sought an order of inhibition against the title. She complained that the 2<sup>nd</sup> Defendant is threatening to forcibly take possession of the suit land from her and to alienate it to 3<sup>rd</sup> parties.

The 1<sup>st</sup> Defendant supported the motion, saying that he does not know how the 2<sup>nd</sup> Defendant became to be the registered owner. This is because he says he has never had any transaction over the land with the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant opposed the application. His case is that Peterson Maina Karumi had sold these 4 acres of land to the 1<sup>st</sup> Defendant for 300,000/= Sh. and he witnessed that

agreement on 5<sup>th</sup> of March 2002. On 28<sup>th</sup> January 2011 there was another agreement with which Karumi was to refund the money to the 1<sup>st</sup> Defendant and the land be instead sold to the 2<sup>nd</sup> Defendant by Karumi for KShs.1,750,000. The 2<sup>nd</sup> Defendant paid the money. The 1<sup>st</sup> Defendant applied to the Land Control Board which gave consent on 10<sup>th</sup> March 2011 and he signed a transfer on 2<sup>nd</sup> February 2011 in favour of the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant states that this is how he became registered proprietor of the land. The agreements, application to Land Control Board and the consent were all exhibited in the 2<sup>nd</sup> Defendant's replying affidavit. The 1<sup>st</sup> Defendant swore further affidavit in which he denied that he dealt with the 2<sup>nd</sup> Defendant as alleged or that he signed the application to the Board and transfer.

It would appear that by the time of the agreement dated 28<sup>th</sup> January 2011 the Grant to Karumi had been confirmed. This is because in paragraph 3 of the agreement it is stated as follows:-

*“ That the 2<sup>nd</sup> Party herein shall rectify the grant issued in Kerugoya Succession Cause No. 273 of 1998 and substitute the name Charles Githinji Gichuki with the name Eliud Warui”.*

The annexed certificate of Confirmation of Grant (MWWii) has been amended to reflect that position. Both the Plaintiff and the 1<sup>st</sup> Defendant were silent on this. Further, it does not appear that the 1<sup>st</sup> Defendant has complained to the police that either his signature has been forged or that his land has been transferred away. The complaint by the 2<sup>nd</sup> Defendant is that the 1<sup>st</sup> Defendant who validly transferred the land to him is having a change of mind and has conspired with his wife to bring this suit and application.

I have considered the facts of this application as revealed by the respective affidavits and annexures against the principles governing the grant of temporary injunction as enunciated in the decision of **GIELLA VS CASSMAN BROWN & COMPANY LIMITED [1973] EA 358**. My preliminary view is that the land in dispute was transferred by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant. If that is so, then the Plaintiff has not established a *prima facie* case.

Whether the Plaintiff will suffer such loss or injury that damages may not appropriately compensate, I consider that the parcel of land has known value and it has not been shown that the 2<sup>nd</sup> Defendant will not be in a position to raise the amount. I bear in mind that an injunction is an equitable remedy and a party seeking it must have clean hands (**JANE ACHIENG ONYANGO VS GIRO COMMERCIAL BANK Kisumu High Court Civil Case No. 339 of 1999**). I do not think that in the circumstances of this case the balance of convenience tilts in favour of the Plaintiff.

The result is that the application fails with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23<sup>RD</sup> DAY OF JUNE 2011.

**A. O. MUCHELULE**  
**JUDGE**