



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

**AT EMBU**

**CIVIL CASE NO. 57 OF 2011**

<b>PLAINTIFF</b>	<b>RWERU CLAN suing through</b>	
	<b>DIONISIO NGUNGI NGUYU.....</b>	<b>1<sup>ST</sup></b>
<b>PLAINTIFF</b>	<b>NELSON MBOGO.....</b>	<b>2<sup>ND</sup></b>
<b>PLAINTIFF</b>	<b>ANDREW NYAGA MINIGI.....</b>	<b>3<sup>RD</sup></b>
<b>PLAINTIFF</b>	<b>JAMES MBOGO MACHIBU.....</b>	<b>4<sup>TH</sup></b>
<b>PLAINTIFF</b>	<b>DANSON IRERI MUGO.....</b>	<b>5<sup>TH</sup></b>
<b>PLAINTIFF</b>	<b>JAMES NJERU MUBOTHI.....</b>	<b>6<sup>TH</sup></b>

**VERSUS**

**DAUDI N. NJIRU**

<b>Representing Ikandi Clan.....</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>IRERI MURANGA.....</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**R U L I N G**

Land parcel **MBEERE/KIRIMA/2975** measuring about 25.424 hectares was on 13<sup>th</sup> October 2009 registered in the name of Rweru Clan. This was a first registration and it followed an adjudication process. Ikandi Clan was laying claim to the suit land but the matter was resolved in favour of Rweru Clan. Rweru Clan has brought this suit (through the Plaintiffs who are the beneficiaries of the suit land) against the Defendants. The 1<sup>st</sup> Defendant represents Ikandi Clan whereas the 2<sup>nd</sup> Defendant is one of the members of Rweru Clan and a beneficiary of the suit land.

What happened was that on 16<sup>th</sup> March 2010 Ikandi Clan and the 1<sup>st</sup> Defendant filed **HCCC No. 41B of 2010 at Embu** against the 2<sup>nd</sup> Defendant, as the representative of Rweru Clan claiming the suit land. They were seeking a declaration that the registration of the land in the name of Rweru Clan was fraudulent as the land belonged to them. They sought the rectification of the register to cancel Rweru Clan as the registered owner and in its place reflect the 1<sup>st</sup> Defendant as the registered owner to be able to share it to the members of his clan. On 13<sup>th</sup> April 2011 the parties to the suit recorded a consent judgment by which it was declared that the registration of the suit land in the name of Rweru Clan was fraudulent, and an order issues nullifying that registration. It was directed that the register be rectified to ultimately

reflect the 1<sup>st</sup> Defendant as the owner to distribute the land to the members of Ikandi Clan. There was also an order of permanent injunction against Rweru Clan and all its members restraining it from claiming the suit land or interfering with it.

The Plaintiffs claim that the suit above was a fraud and a conspiracy by the parties thereto to defraud them of this clan land. It is alleged that the 1<sup>st</sup> Defendant and the Land Registrar Mbeere are in the process of giving effect to the orders in the consent judgment and this is why this suit seeks that they be permanently restrained from interfering in any manner with the suit land. It is also sought that the court declares that the proceedings in **HCCC NO. 41B of 2010 at Embu** were fraudulent and a misrepresentation which should be reviewed and set aside.

The suit was accompanied by a motion under Order 40 rules 1 & 4 of the Civil Procedure Rules and Sections 3A and 95 of the Civil Procedure Act for a temporary injunction to restrain the Defendants, and all those acting under them, from disposing, transferring, alienating, distributing, pledging, sub-dividing, altering, selling or advertising for sale, parting with or in any other manner dealing or interfering with the land until the suit is heard and finalized.

The application was served but elicited no response from the Defendants. It follows that the matters deponed to in the supporting affidavit have not been controverted. Mr. Mungai prosecuted the application for the Plaintiffs.

The Plaintiffs appear to have a legitimate grievance against the Defendants. This is because the Defendants knew that, following a protracted adjudication process, the suit land was registered in the name of Rweru Clan of whom the 2<sup>nd</sup> Defendant is a member. Without notice to the Clan, the Defendants went to court and agreed to have the land declared to belong to the 1<sup>st</sup> Defendant on behalf of Ikandi Clan which had lost in the adjudication contest. However, this court has no jurisdiction to question, review or set aside a consent judgment of a court of concurrent powers in another case. What is open to the Plaintiffs is to proceed under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules to seek the review and setting aside of the orders and decree in case above. Such application has to be made in the same file before the Judge who made the orders that have aggrieved the Plaintiffs. (**JOHN AGINA VS ABDULSWAMAD SHARIF ALWI, Civil Appeal No. 83 of 1992**).

It should please the Plaintiffs to know that a consent judgment may be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement. (**BROOKE BOND LIEBIG (T) LTD VS MALLYA [1975] EA 266**).

Quite unfortunately, therefore, the present suit is incompetent. When one considers the principles governing the grant of interlocutory injunction as enunciated in **GIELLA VS CASSMAN BROWN & CO. LTD. [1973] EA 358**, it must be found that the Plaintiffs do not have a *prima facie* case with a probability of success. The result is that this application is dismissed. However, considering what I have observed in the foregoing regarding the conduct of the Defendants, it is ordered that they pay the costs of the application to the Plaintiffs.

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

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