



CIVIL PRACTICE AND PROCEDURE

- *Can an injunction issue over property held in the name of a person not a party?*
- *Any disposition in land ought to be in writing.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 85 OF 2010

MICHECK MAINGI MUTHURI.....1ST

PLAINTIFF

CYPRIAN IBURI NGARURO.....2ND

PLAINTIFF

VERSUS

MWONGERA MUGAMBI

RINTURI.....DEFENDANT

RULING

The plaintiff filed this claim against the defendant seeking orders for specific performance and claiming for damages. In their plaint, the plaintiffs pleaded that the defendant entered into a sale agreement with them for the sale of 3 acres of parcel *Ntima/Igoki/943*. That land was by then in the name of Perminus M'Mugambi, deceased. Following the succession cause of the estate of M'Mugambi deceased, the defendant was only allocated 1 ½ acres of the parcel number 943. The plaintiffs have filed a defence against the plaintiffs' claim. The plaintiffs moved this court by a Chamber Summons dated 11th November 2010. The plaintiffs seek to restrain the defendant until the final determination of this case from alienating or disposing the following parcels of land.

- *Buuri/Kiirua/206*
- *Ntima/Igoki/943*

- **Meru Municipality Block 11/149**
- **Meru County Council Kiirua B IIA.**
- **Isiolo County Council Plot No. 36 Bula Pesa**

The defendant when the grant of the estate of M’Mugambi was confirmed did not get the 3 acres he allegedly sold to the plaintiffs. He only got 1 ½ acres. The plaintiffs estimate that the value of the 1 ½ acres they will not get from the defendant is over Kshs. 12million. It was deponed in the plaintiffs’ affidavit in support of the application that the defendant is an employed and would therefore be unable to satisfy a judgment that would be entered against him in this matter. The application was opposed on the basis that the properties which the plaintiffs seek to injunct the defendant were not properties in this cause.

The plaintiffs in seeking injunction orders needs to satisfy the court that they have a *prima facie* case with probability of success. See the case of **Giella vs. Cassman Brown & Co. Ltd** [1973] E.A. On a *prima facie* basis, I find that plaintiffs’ case would need to meet certain hurdles for it to succeed. One such hurdle is the issue whether the defendant had a land capable of sell to the plaintiffs in parcel number 943. That parcel of land was and still in the name of M’Mugambi deceased. Undoubtedly, the legal term *Nemo dat quod non habet* will apply which term means, no one can give what he does not have. The defendant had no ownership in parcel number 943 capable of selling to the plaintiffs. The 2nd hurdle is that the parcels that the plaintiffs seek injunction over were distributed to the defendant together with other people. In other words, the defendant only got a portion of those parcels. An injunction cannot then issue in such circumstances because those other beneficiaries are not parties to this suit. The third hurdle is that the plaintiffs did not provide a written agreement for the purchase of the three acres of parcel number 943. Section 3 (3) of the Law of Contract Act Cap 23 provides as follows:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless –

(a) The contract upon which the suit is founded –

(i) Is in writing;

(ii) Is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

With those issues highlighted in this ruling, I find that the plaintiff has not shown a *prima facie* case with the probability of success. I therefore grant the following orders:-

1. **The plaintiffs’ application dated 11th November 2010 is dismissed with costs to the defendant.**
2. **The order of inhibition issued by this court on 23rd May 2011 over parcels number:- Buuri/Kiirua/206, Ntima/Igoki/943, Meru Municipality Block 11/149, Meru County Council Kiirua B 11A and Isiolo County Council Plot No. 36 Bula Pesais hereby vacated and discharged.**

Dated, signed and delivered at Meru this 16th June 2011.

MARY KASANGO
JUDGE