



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL SUIT NUMBER 2908 OF 1987

G CRITICOS & COMPANY LIMITED.....1ST
PLAINTIFF/RESPONDENT
NENKA DEVELOPERS LTD.....2ND
PLAINTIFF/RESPONDENT

VERSUS

JOHN NJENGA KINUTHIA.....1ST
DEFENDANT/APPLICANT
NICHOLAS NJENGA KINUTHIA.....2ND
DEFENDANT/APPLICANT
STEPHEN MARUBU MWANGI.....3RD
DEFENDANT/APPLICANT

R U L I N G

This is an application dated 21st April 2010, filed by the defendants/applicants. It was filed under certificate of urgency. It was brought under Order 1 rule 10 (2) (4) and (22) as well as Order 39 rule 1, 2A (1) & (2), 7 (1),(a) and 9 of the Civil Procedure Rules, as well as Section 1A, 1B, 3A and 63 of the Civil Procedure Act (Cap 21) and Section 64 of the Registration of Titles Act (Cap 281) and Section 5(1) of the Judicature Act (Cap 8). The prayers are as follows: -

- 1) That this application be heard ex-parte in the first instance and be certified as urgent.**
- 2) That Nenka Developers be enjoined in this suit as the 2nd plaintiff in the main suit and as the 2nd defendant in the counter claim.**
- 3) That an interlocutory injunction do issue restraining the plaintiffs/respondents by themselves their servants and agents or themselves as agents or otherwise whatsoever, from in any manner transferring**

or alienating, sub-dividing, wasting, damaging or disposing or advertising for sale the whole or part of the suit property or in any manner interfering with the suit property, being the piece of land known as L.R. 10090/14 until final determination of this suit or until further orders.

4) That an order be issued directing the Registrar of Titles to register a restriction against title No. I R 17894 prohibiting the registration of any transfer to the 2nd plaintiff/2nd respondent or by the 2nd plaintiff/2nd respondent or to any other person or any other transactions or documents whatsoever until the final determination of this suit or until further orders.

5) That in the event of any transfer having already been registered an order do issue directing the Registrar of Titles to cancel any entry relating to any purported transfer or any other instrument intended to vest the title of the suit premises in any person other than the 1st plaintiff/respondent.

6) That the Directors of the 1st plaintiff/respondent company be committed in prison, for such period as this honourable court deems appropriate for disobedience and contempt of the orders of this honourable court given on 11th day of July 2008.

7) That the title of land reference No. 10090/14 be deposited in court and there to be held until the final determination of this suit.

8) That the defendants/applicants be at liberty to pray for such further or other orders as this honourable court may deem fit and just to grant.

9) That the costs of this application be provided for.

The application has grounds on the face of the Chamber Summons. The grounds are, inter alia, that despite the pendency of this suit, the 1st plaintiff has allegedly tried to transfer or was in an advanced process of transferring the suit property to the 2nd plaintiff. That the 1st plaintiff has purported to transfer the entire suit property in disobedience and disregard of the clear terms of the orders of this court given on 11th July, 2008. That unless restrained by an order of this court, the 2nd plaintiff intended to subdivide the suit property with the express intention of selling the resultant sub-plots to a 3rd party. That if the orders sought were not granted immediately, the suit property would be alienated to 3rd parties and removed beyond the reach of the defendant/applicants. That the applicants and the estate they were administering would thereby suffer irreparable loss and damage. That if the orders sought herein were not granted the plaintiffs/respondents herein would have stolen a march on the defendants/applicants. That the 1st plaintiff held the title to the suit property in trust for the defendants by reason of the defendants having acquired it by adverse possession and as such it acted in breach of that trust and had no right, title or interest to pass to the 2nd plaintiff. That the defendants had a prima facie case with probability of success.

The application was filed with an affidavit sworn on 21st April 2010 by the 2nd defendant/applicant Nicholas Njenga Kinuthia. In the said affidavit it was deponed, inter alia, that this suit was instituted in 1987 by the 1st plaintiff and a defence and counter claim was filed in the same year by James Kinuthia Kinyanjui now deceased. That the suit property was situated in Thika District and measured about 50 acres. That in the defence and counter claim it was stated that the defendant had acquired title to the suit property by adverse possession and that the 1st plaintiff at all material times held title in trust for him. That part of the evidence for witnesses had already been taken and that James Kinyanjui Kinuthia was allowed to give his oral evidence due to his advanced age and ill health. That the suit did not proceed to hearing on 31 July 2006 before Justice Ojwang because James Kinuthia Kinyanjui had died on 6th July 2006 and there was need for substitution by the executors of his will. That the application to substitute the deceased with the administrators of his estate was allowed on 6th June 2007 and 3 people were substituted thereat.

That the deponent of the affidavit was one of the three administrators. That, however, about May 2008 the

plaintiff began to adversely waste and damage the suit property which precipitated the application dated 27th May, 2008 filed by the defendants for injunctive orders. That Justice Ojwang delivered a ruling on 11th July, 2008 granting injunctive orders.

The court order was extracted from the ruling and served upon the 1st plaintiff's counsel on 19th August 2008 together with a penal notice and a covering letter. That the said order and the penal notice was also served upon the 1st plaintiff. That in January, 2010 the deponent was informed by one Grace Wanjiru that there were people trespassing on and taking measurements to the property. That the deponent proceeded to the suit property in the presence of the 3rd defendant and Mr. Charles Kithuka Advocate and found a man who introduced himself as a surveyor, who pointed three gentlemen who had been commissioned by him to do the survey work. That the three men came and informed the deponent that they had been commissioned by the owner to subdivide the whole of the suit property and procure buyers to buy those plots.

That the said men said that the current owner had recently bought the land from Mr. Criticos. That their advocate Mr. Charles Githuka tried to talk to the current new owner on his mobile telephone and he was informed that the transaction had been handled by Walker & Kontos Advocates. That the advocate of the administrator wrote to Walker and Kontos Advocates enquiring about the alleged sale. That Walker Kontos Advocates on the alleged instructions from the purchaser forwarded a letter to M. K. Chebii & co. Advocates for that firm to provide the information sought, but no information had been received by Ndungu, Githuka, Mwashimba Advocates despite a reminder.

That the deceased James Kinuthia Kinyanjui had caused a caveat to be registered on 9th January, 1985 as No. 151 against the title as well as another caveat registered on 28th November, 1988 as No. 1919 by Nyakio Ndwiga Registrar of Titles. That no notice has been given to the caveator by the Registrar requiring withdrawal of the caveat. That the deponent was apprehensive that the plaintiffs/respondents may have colluded to un-procedurally and unlawfully obtain the registration of the transfer with the 2nd plaintiff/ respondent. That the 2nd plaintiff/respondent had commissioned some people to sub-divide the suit property and to procure purchasers of sub-plots and the plots might soon be sold despite the court order. That the estate of the defendants/applicants/administrator was likely to suffer irreparable loss and damage if the plaintiffs were not restrained by an order of the court.

The applicants through their advocate filed written submissions on 2nd December, 2010. A background to the application was given. It was contended that plaintiffs have acted in utter disregard of the court order and that they should restore the status quo of the land as it was before they purported to sale the land to a 3rd party. It was contended that there was justification in joining Nenka Developers(2nd respondent) as 2nd plaintiff in the main suit as well as 2nd defendant in the counter claim. The intended 2nd plaintiff had purported to have the parcel of land surveyed and sub-divided into several subplots and advertised the sub-plots for sale. They filed a replying affidavit through their director Nelson Mwangi Kamau. That replying affidavit did not, however, disclose the date when it was sworn. However, the said Director admitted that the 2nd respondent was acting as an agent for an undisclosed principal. Since the 2nd respondent admitted its full participation in the alleged sale, it should be joined as a party because the 1st respondent appears to have not disclosed the existence of this suit. The 2nd respondent was therefore, a necessary party in this suit as it was completely conversant with the facts and circumstances attendant to the alleged sale or purchase. The 2nd respondent further admitted knowledge of the alleged purchase but failed to disclose the parties identity, thereby making it necessary that they be joined as a party to enable disclosure.

On the request for interlocutory injunction from alienating, subdividing, disposing or advertising for sale, it was contended that the 1st plaintiff through one of its directors Basil Criticos, filed a replying affidavit. It was deposed in the said affidavit, inter alia, that defendants had never sought any injunctive orders or restraining orders against transferring the suit parcel. This denial was made in spite of the fact that the 1st plaintiff brought this suit to recover possession of the suit property. The 1st plaintiff was thus aware that the defendant was in possession. The law was also very clear that where a party disobeys

restraining orders, the court would readily undo and transaction.

Reliance was placed on the case of **Mawji Versus International University & Another [1976] KLR** wherein Madan J, as he then was, stated: -

“It would be a poor and insufficient system of justice, unethical, to contemplate if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to a 3rd party. The court, therefore, must protect the status quo.”

It was contended also that the written law, specifically section 52 of the Transfer of Property Act, disallowed litigating parties to give to other persons rights over property in which disputes were pending in litigation. It was contended that the Director who swore an affidavit for the 1st plaintiff was the same Director who testified on 4th May, 2005 before Justice Ojwang and was the same person who had sworn several affidavits for the plaintiff throughout the conduct of the suit. In this suit and applications it was clear that the said director was fully aware of these pending proceedings and also the facts thereof.

It was, therefore, observed that the same director should not now claim that there was no specific order barring the plaintiff from transferring the suit land. It was submitted that the defendants/applicants herein had satisfied the requirements for grant of injunction laid down in the case of **Geilla versus Cassman Brown & Co. Ltd [1973] EA 358**. It was contended that the injunction ought to be directed at and bind the alleged purchaser, so that the said purchaser does not alienate the property further.

On prayer 3 of the application, it was counsel’s contention that the 1st plaintiff was bent on perverting justice by interfering with the suit parcel of land in a manner that eroded the jurisdiction of this court. This was evidenced by the fact that in 2008 the 1st plaintiff occasioned damage and waste upon the said piece of land and failed to restore it to its original state despite a court order to that effect. It was therefore, imperative that an order be granted to preserve the suit land till the determination of the suit. No order would be more suitable or deserving in the circumstances than a prohibitory order. Reliance was placed on the case of **Mawji versus International University & Another [1976] KLR** where Madan J, as he then was, stated that the court had power to prevent a breach of the provisions of section 52 of the Transfer of Property Act by imposing a prohibitory order against the title.

On prayer 4, it was contended that the 1st plaintiff had indicated in a replying affidavit filed on 20th May, 2010 that it had sold the suit land to a third party who was not disclosed.

The intended 2nd respondent had also filed a replying affidavit claiming that its client who was not disclosed had bought the said parcel of land. Though they disclosed an extract copy of the title, no entry evidencing a transfer of the subject land was disclosed. In addition, the 2nd respondent had purported to advertise the alleged sub-division for sale. It was the argument that there was a conspiracy to conceal the identity of the purported purchaser. The defendants had visited the land and in fact found some persons surveying it and sub-dividing it. The deed file and correspondence in the Lands office are said by the 2nd respondent to be missing.

The 2nd respondent in the affidavit claimed that the advocate representing the purchaser was MS Walter Kontos Advocates, but instead the issue was referred to the M K Chebii & Co. Advocates who were the advocates acting for the 1st plaintiff. The said advocates did not respond to the request for particulars. It was contended, therefore, that the intended purchaser knew about these proceedings. They must have had constructive knowledge and, therefore, they should be bound by decisions to be made by the court herein.

It was contended that it was imperative that prayer 4 be granted, otherwise if titles were issued for subdivisions it would result in unnecessary amending of pleadings or filing other suits in order to have the court adjudicate over the matter. That would be a multiplicity of suits.

It would militate against the process in this suit where already a number of witnesses had given evidence, and where only brief witnesses were remaining to testify. Reliance was placed on Section 64 of the Registration of Titles Act (cap 281) which provides: -

“In any proceedings, respecting any land or transaction or contract relating thereto, or in respect of any instrument, caveat, memorial or any other entry affecting any such land, the court may, by order, direct the Registrar to cancel, correct, substitute or issue any memorial or entry in the register or otherwise to do such acts or make such entries as may be necessary to give effect to the judgment or order of the court.”

Counsel contended that this honourable court will not be going against the decided case authorities in granting an order for the status quo ante to be restored immediately irrespective of who benefited by the offending transfer.

On prayer 6, counsel contended that the 1st plaintiff had participated in the suit from 1984 and had even called witnesses and filed applications. He was represented by counsel M K Chebii including the time of delivery of a ruling by Justice Warsame on 16th July, 2008 and the same advocate remained on record until after the present application was served on him. The 1st plaintiff was aware of the existence of the application for injunctive orders by the defendant as well as the outcome thereof and was bound by the same. Therefore, the 1st plaintiff had sufficient notice to comply with the orders given on 11th August 2008. Reliance was placed on the case of **Mary Ndunge Wambua versus Fidelis Wambua Musembi [2005] EKLR** wherein the High Court stated as follows: -

“Mrs. Magana submitted that even if there was no evidence that the applicant was physically served with the said order, there was no dispute that she was aware of the existence and so she was obliged to respect and comply with the same in default of which she would be in breach.”

It was therefore, contended that the 1st plaintiff cannot be believed that they were not aware of the pending litigation. In any case ignorance of the law was not a defence as everybody was presumed to know the law including section 52 of the Transfer of Property Act. There was justification for committal to jail.

On prayer 5, counsel contended that this being a suit in which the defendants are claiming title by adverse possession, the said prayer was justified. Reliance was placed on Section 17 of the Limitation of Actions Act (Cap 22) wherein it is provided that and the period in which a land owner is allowed to file suit for the recovery of land is 12 years from the date the right of action accrued.

Reliance was placed on the case of **Public Trustee versus K Wandulu [1982 – 1988] 1KAR page 504** in which the court stated that the title of a registered owner after the limitation period is not extinguished but is held by him in trust for the person who has acquired title against the proprietor. It was contended that the defendants herein had acquired title and therefore, the 1st plaintiff as trustee would have no capacity to sell or transfer the suit property and any attempt to do so was void.

It was prudent, therefore, that the status quo ante be restored and the title to the suit property deposited in court awaiting the final decision in the suit.

On prayer 7, counsel submitted that the court should give effect to the Overriding Objective under Section 1A of the Civil Procedure Act (Cap 21) by ordering 1st plaintiff and 2nd respondent and their advocates to perform their duty by disclosing the authenticity of the alleged purchaser of the suit parcel of land.

The application is opposed. The 1st plaintiff/respondent filed an affidavit sworn on 19th May 2010 by Basil Criticos described as a Director of the 1st plaintiff. It is deponed in the said affidavit that the

application is incompetent and bad in law, and should be dismissed. That at all material times, the 1st plaintiff was the registered owner as was stated in evidence adduced by the plaintiff's witnesses. That by an agreement in writing dated 12th August, 1970, the plaintiff agreed to sell the land to Kinuthia Kinyanjui now deceased and John Njenga and Njenga Wachuka for a consideration of Ksh.70 million subject to the consent of the Land Control Board. That consent of the Land Control Board was not granted and the agreement, therefore, became void.

That the plaintiff subsequently, forwarded monies paid to the deceased owing to the failure to obtain consent of the Land Control Board but the deceased declined to receive the said money. That since commencement of this suit neither the defendant nor the deceased had sought orders for injunction to restrain the plaintiff from selling the suit premises. That the deponent of the affidavit was not aware of any restrictions placed by the defendant or the deceased against the title to prohibit or restrain the plaintiff from selling the suit premises. That there being no restraining orders, the plaintiff proceeded to sell the land to a third party after establishing through a 3rd party that there was no restriction placed on the title to prevent the sale. That neither the plaintiff nor the co-directors had ever been served with an order or penal notice emanating from this suit.

The 1st plaintiff/respondent through their advocate filed written submissions on 8th February 2011. It was contended that this being an application for contempt and committal of the directors of the 1st plaintiff to civil jail, the application is fatally defective because the order and penal notice were not served on the directors of the 1st plaintiff. There was no copy of the order and penal notice allegedly served exhibited in court. There was no affidavit of service by a process server on how service was effected. More importantly, it had not been shown that service was effected on the directors of the 1st plaintiff. That the replying affidavit sworn by Basil Criticos was not contravened in any way.

It was emphasized that no order or penal notice was ever served on the directors of the plaintiff. The penal notice marked as annexure "NNK 2A" in the supporting affidavit sworn by Nicholas Njenga Kinuthia clearly indicated that it was addressed to the 1st plaintiff and not the directors.

It was contended that contempt proceedings were of quasi criminal nature and that all the procedure must be strictly observed. A contemnor could not be condemned without being given a chance to respond by service in person, including service of a penal notice. There must also be evidence filed contained in the affidavit of service showing that the order and penal notice had been served. Lack of the said service against the directors rendered the application incompetent and fatally defective.

It was also contended that the application was brought wrongly under both section 5 (1) of the Judicature Act (Cap 8) and Order 39 rule 2A of the Civil Procedure Rules. Counsel contended that under the Judicature Act, the application for contempt could only be filed after leave of the court was granted. Under Order 39 Civil Procedure Rules an application for contempt could be filed even where no consent was obtained. The mixing up of the law in this application made it incurably defective. Counsel cited **Nyeri HCCC No. 111 of 2002 Dr. Moses Njue versus Charles Mwaniki Kamara** where the court entertained a preliminary objection against an application for contempt on the basis that there was no evidence of personal service of the order or penal notice.

The court was urged to find this to be a similar situation in which the application is fatally defective. The court was also urged to find that since the application was brought under Section 5(1) of the Judicature Act and leave was not obtained, this application should be dismissed.

Reliance was placed on a number of cases regarding service of the penal notice and failure to do the same. It was the contention that lack of service of the court order and penal notice against the directors of the 1st plaintiff rendered the application fatally defective and incompetent.

It was contended that this application should also be dismissed because it has attempted to seek orders against persons who were not party to the suit. Nenka Developers Limited was not a party or a plaintiff in this suit. When the claim filed is examined, it comes out clearly that only G Criticos & Company Limited

were a party. It was not clear how Nenka Developers Limited became 2nd plaintiff in this suit.

In addition to the above, counsel contended that as deponed in the affidavit of the plaintiffs sworn by Basil Criticos, the suit premises had already been sold to a 3rd party. That 3rd party or purchaser had not been enjoined in this suit as a party, yet the defendants by their application dated 21st April 2010 seek orders that are likely to affect the interests and title of that 3rd party, which was contrary to the principles of natural justice that a person should not be condemned unheard. The failure of the defendants to include the purchaser as a party means that the application is fatally defective and should be dismissed in limine. Reliance was placed on a number of case authorities. These include **Nairobi HCCC No. 622 of 1989 Peter Irungu Wainaina versus Njuguna Kihara** wherein the court stated as follows: -

“It seems to me that the plaintiff’s claim must therefore, fail because it has been brought against the wrong defendants. Njuguna Kihara is not the registered proprietor of the land. The court cannot make an order affecting Chege Njehia’s title behind his back without giving him notice and an opportunity of being heard in answer to any claim over his land.”

It was also argued that the application has been overtaken by events. This is because the suit premises had already been sold to a 3rd party and title transferred. Though by prayer 3 the applicants seek for an injunction to restrain transfer of the suit premises, the said premises had already been transferred to a 3rd party way back in 2009. At that time, there was no order of injunction to restrain the plaintiff from selling the property. Injunctive orders cannot be granted after a sale has already taken place.

The 2nd plaintiff/respondent filed a notice of preliminary objection on 29th June, 2010. The objections are 3 and I will reproduce them here under. They are as follows: -

- 1. That the application is premature as no leave has been granted to join the 2nd respondent as a party to this suit yet the applicants have allegedly named and joined the 2nd respondent as a party.***
- 2. That the 2nd respondent is not suited as a plaintiff as the said respondent has no claim against the applicants to warrant it being enjoined as a plaintiff.***
- 3. That the application is an abuse of court process.***

Counsel for the 2nd respondent Onyoni Opini and Gachoka Advocates filed written submissions on 23rd January, 2011. It was contended that under prayer 2 the application seeks to join the 2nd respondent as a party to the said suit as the 2nd plaintiff and 2nd defendant in the counter claim. That for the court to grant leave for a party to be added either as a plaintiff or a defendant the person applying must satisfy the court that the intended party to be enjoined is a necessary party. In the present case, the defendants had not in their affidavit given satisfactory information that the 2nd respondent was a necessary party. It was not the duty of the intended 2nd plaintiff to disclose the purchase of the property as that could be done by easily conducting a search of the property at the Lands Office. In law, he who alleges has to prove. The applicants should not shift the burden of proof to the 2nd respondent who was not a transferee of the suit property.

It was contended that the application to join the 2nd respondent as a plaintiff in the main suit was misconceived. Reliance was placed on the case of **Lombard Banking Kenya Ltd Versus Shah Bhagwanji [1960] EA 969** where it was stated that no person may be joined to a suit as a plaintiff without his consent. The defendants had not disclosed reasonable grounds on which the 2nd respondent should be enjoined as plaintiff or respondent in the present suit. They have also not provided any evidence to link the intended 2nd plaintiff to the ownership of the suit premises.

In addition, the proceedings in this suit are so advanced and joining the intended 2nd respondent was not desirable as that would reopen this old case afresh.

On prayers 3 & 4 of the application the defendants were seeking restraining orders against the 1st respondent and intended 2nd plaintiff and also the Registrar of Titles. It was contended that the intended 2nd plaintiff had merely stated that it was an agent, therefore, it was not necessary to be enjoined as parties as the orders issued would still bind them.

On prayer 3 specifically, there were orders sought against the Registrar of Titles who was not a party. That prayer has to fail as the applicants are not coming to court with clean hands as they are not giving the Registrar of Titles a chance to be heard.

On the balance of convenience, it was contended that such balance was in favour of the intended 2nd plaintiff. The intended 2nd plaintiff should not be enjoined as a party. Reliance was placed on the case of **Geilla Versus Cassman Brown & Co. Ltd [1973] 358**. It was contended that the amended defence and counterclaim exhibited did not disclose any case against the intended 2nd plaintiff.

It was also argued that the applicants had also not given the legal capacity of the intended 2nd plaintiff whether it was a natural or legal entity. Any order granted may be in vain for lack of that capacity. The court was urged to dismiss the application against the 2nd plaintiff. It was contended that the applicants ought to have filed separate applications to enjoin the intended 2nd plaintiff or deal with prayer 2 of the application first and then deal with the rest of the prayers later after leave has been granted or rejected. The application as it is, is a nullity.

On the hearing date, Mr. Ndungu Githuka appeared for the defendant/ applicants. Mr. Githinji appeared for the 1st plaintiff and the 2nd intended plaintiff. Miss Kamiri appeared for interested parties who are said to be beneficiaries. The counsel who appeared in court adopted the documents and submissions filed.

I have considered the application, documents filed, the submissions and the law.

This application has many prayers. The 1st and 2nd plaintiff's/respondent filed preliminary objections to the application. They sought this court's indulgence to determine the whole application on the basis of preliminary objections filed. However, I found that canvassing those preliminary objections would have to cover issues of facts. Therefore, I declined to determine the application on the basis of those preliminary objections. I ordered that legal and factual issues relating to the whole application be raised at the substantive hearing of the application.

I have now, therefore, to consider both the legal and factual issues raised in the whole application.

As I stated earlier, the application has a number of prayers. Nenka Developers under prayer 2 are sought to be enjoined as 2nd plaintiff in the main suit and 2nd defendant in the counter claim. The application however, does not refer to them as intended 2nd plaintiff/respondent, but instead listed them as 2nd plaintiff/respondent.

Joinder of parties as plaintiffs is governed by the provisions of Order 1 rule 10 of the Civil Procedure Rules. Rule 10 (1), (2) and (3) provides as follows: -

"10. (1) where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit if satisfied that the suit has been instituted through a bona fide mistake and that it is necessary for the determination of the real matter in dispute to do so order any other person to be substituted as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of proceedings, either upon or without the application of either party on such terms as may appear to the court to be just order that the name of any party not properly joined whether as plaintiff or defendant, be struck out and that the name of any person who ought to be enjoined as plaintiff or defendant, or whose presence before the court may be necessary in order to

enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.

(3) No person shall be added as a plaintiff suing without a next friend or a plaintiff under any disability without his consent in writing thereto.”

It is clear from the above rules that the court has powers to enjoin a person as a plaintiff at any stage of the proceedings, whether an application has been made by any of the parties or on the court's own motion. However, in the case of a person who is being enjoined as a plaintiff and is not a person who is suing as a next friend or a person under disability, he cannot be joined as plaintiff without his consent in writing.

In the present case, it is not the court which intended to join Nenka Developers as plaintiffs. It is the defendants who want to join them as plaintiffs. There is nothing on record to show that Nenka Developers have given their consent in writing for them to be joined as an additional plaintiff. There is also no indication that such consent was at least sought from them prior to the filing of this application seeking to join them as plaintiffs. The law in my view is clear. That a person who is not either under disability or suing through a next friend cannot be joined as a plaintiff unless his consent has been obtained in writing. There being no consent in writing from Nenka Developers Limited for them to be joined as plaintiffs, the law clearly says they cannot be joined as such plaintiffs. I find and hold that Nenka Developers Limited cannot be joined as parties in these proceedings. I will therefore have to dismiss prayer 2. It is so dismissed.

Prayer 3 is for interlocutory injunction against plaintiffs who have been presumed to be 2 in the said prayer. I have already found Nenka Developers are neither plaintiff currently nor is there justification for joining them as parties. This prayer will, therefore, only be applicable to G Criticos & Co. Limited. It is a prayer for injunction pending the hearing and determination of this suit. It relates to a piece of land which is the subject matter of this suit. The law with regard to the grant of interlocutory injunction has been well settled. It was clearly laid out in the now famous case of **Geilla Versus Cassman Brown & Co. Limited (supra)**. An applicant for an interlocutory injunction has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, the applicant has to demonstrate that he will suffer irreparable loss if the injunctive orders are not granted, that is to say that an award of damages will not be adequate compensation. Thirdly, if the court is in doubt, it will determine the matter on the balance of convenience.

This is a case where the defendants are asking to be declared the owners of the land through adverse possession. The case has been partly heard. Evidence has been tendered. The defendants/applicants are administrators of somebody who has already died. The court will later have to determine the case between evidence given by adverse possessors and the plaintiff. The issue of credibility and the law will have to be considered by the court before coming to a final conclusion. The case that cannot be determined at this stage. It can go either way. In those circumstances, one cannot say that the defendants/applicants do not have a prima facie with probability to success. Therefore, I find and hold that the defendants/applicants have a prima facie case in this matter. They have demonstrated so in this application. I find that they have satisfied the requirements that they have a prima facie case with probability of success.

The second consideration is whether they will suffer irreparable loss if injunctive orders are not granted. This is an issue that relates to land and it is indicated by both sides that there is an intention either to dispose the same or it has already been disposed off. I do not think that once the land is disposed off to the 3rd parties, compensation in monetary terms will be adequate compensation for the defendants. It is not possible to determine the amount of compensation and its adequacy. I, therefore, find that if the injunctive orders are not granted the defendants/applicants will suffer irreparable loss or damage.

The applicants having satisfied the two main requirements in the case of **Geilla Versus Cassman Brown & Co. Ltd (supra)**, I do not find it necessary to consider the 3rd parameter of balance of convenience, because I do not entertain any doubt that the two requirements for the grant of interlocutory injunctions have been satisfied. I will therefore, grant prayer 3, with regard to G. Criticos & Co. Ltd. I grant prayer 3

with regard to G. Criticos & Co. Ltd.

Prayer 4 is an order sought against the Registrar of Titles directing the Registrar to register a restriction against the title No.L.R. 17894 prohibiting the registration of any transfer to the 2nd plaintiff respondent or any other transaction pending determination of the suit. The Registrar of Titles or the Commissioner for Land are not parties in these proceedings. It is trite that courts should not issue burdening orders unless the person against whom such orders are issued is either a party in the proceedings or knows about the proceedings or has a legal duty to effect the court orders.

The Registrar of Titles is not a party in these proceedings. I have not been told that the said Registrar of Titles is aware of these proceedings or of the request for such an order. I have also not been told that the law imposes a statutory duty on the Registrar of Titles to prohibit registration of any transactions just by virtue of court order in which he is not a party. Certainly, the affidavit in support of the application does not say so. The submissions also do not state so. My understanding of the law is that any party interested in a particular land asset which has a title can register a restriction against that title. In my view, this court is being asked to impose burdens on a 3rd party without that 3rd party being given an opportunity to be heard. That is contrary to the law and the principles of natural justice. I will not grant the said prayer. Therefore, prayer 4 will have to be dismissed. I dismiss the same.

I now go to prayer 5. It is a request that if transfer has already been registered an order do issue directing the Registrar of Titles to cancel any entry relating thereto. This prayer in my view is premature and misplaced in an interlocutory application such as the present Chamber Summons. Granting this prayer will amount to finally determining the whole issue in context. That can only be done after evidence is tendered and a determination is done as to who the actual owner of the subject land is. An order directing the Registrar of Titles to cancel titles already made will only be a consequential order after the rights of the parties have been determined. This prayer is therefore premature and cannot be granted at this interlocutory stage. I dismiss the same.

Prayer 6 is a request for the directors of the 1st plaintiff to be detained in court for disobeying an order in contempt of the order given by the court on the 11th July, 2008. I have seen the ruling that was dated 11th July, 2008 and delivered on 16th July, 2008. That ruling, inter alia, issued a temporary injunction restraining the plaintiffs or their authorized agents or persons from quarrying, mining, removing plants, soil, murrum and other materials, trespassing upon, or altering the status quo of the suit premises or injuriously affecting the environment until determination of the suit. The applicants herein have not stated in what particular way the plaintiffs have disobeyed the court orders. They have not stated that the plaintiffs were for example carrying out quarrying or mining or removing plants or soil or materials or trespassing or altering the status quo of the suit premises or otherwise affecting the environment of the same.

When parties come to court for restraining orders, they should be specific. When a party wants to get orders against sale, transfer, parting with possession or subdivision of land they should be specific. From the orders given by the court, it is not clear which one has been breached by the plaintiff. It is, therefore, not possible to say for sure on what basis one can be committed to jail for disobeying a court order. Contempt of court proceedings are of a quasi criminal in nature and that why the standard of proof has to be slightly higher than that of ordinary civil cases. I am not satisfied that the applicants have laid down a basis for committing anybody to civil jail in the application. If the issue was the restoration of the status quo ante, there does not appear to be any notice to the plaintiff demanding restoration of the status quo ante and indicating what status quo ante is, for the plaintiff to take or fail to take necessary action. In my view, therefore, the applicants have not established a case for committal of anybody to civil jail for contempt of court for disobedience of court orders given on 11th July, 2008. The request for committal into prison for contempt of court appears not well thought out. It will be dismissed. I dismiss the same.

Prayer 7 is for the title land reference No. 10090/14 to be deposited in court and held until determination of the suit. Indeed, this court has jurisdiction to order deposit in court of valuable items to avoid parties intermeddling with those valuable items to the detriment of other litigants. In our present case, the

transactions for the intended sub-division of the land cannot possibly continue further, if the title is deposited in court. There are complains that the plaintiffs want to sub-divide the land and dispose of it to third parties, thus defeating the purposes of this suit. The interests of justice would require that the orders that will ultimately be made by this court are not rendered nugatory or of no effect because of parties entering or finalizing transactions to the detriment of other parties. In my view, depositing the title in court could be one way of avoiding adverse transactions taking place. I find justifiable reason to order that the title be deposited in court to avoid further legal transactions in the matter that could affect the contesting parties. I will, therefore, grant this prayer. The documents to be deposited in 7 days.

Prayer 8 for further orders as the court may deem fit is in my view superfluous I will not grant any order additional to the substantive orders prayed for herein.

I allow the application to the extent of the orders I have granted above.

As for costs, they will be in the cause.

Dated and delivered at Nairobi this 29th day of July 2011.

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GEORGE DULU

JUDGE

In the presence of

None appearance for plaintiffs

Mr. Githuka for defendants/applicants

C Muendo – court clerk