



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

**AT MOMBASA**

**CIVIL SUIT NO. 495 OF 2011**

**PAUL NJAU KIMUTUA.....PLAINTIFF**

**VERSUS**

**DICKSON MBUGUA NJAU.....DEFENDANT**

**RULING**

(1) By a Notice of Motion amended on the 5<sup>th</sup> October 2011, the plaintiff seeks an order of injunction to restrain the defendant, his agents, employees or persons claiming through him from erecting, developing, trespassing or in any way interfering with the plaintiff's ownership of sub-division No. 815/1 of section No. VI Mainland North pending the hearing and determination of the suit.

(2) The application is supported by the affidavit of the plaintiff sworn on the same date viz. 5<sup>th</sup> October 2011 and the grounds set out in the motion, being principally that:-

a) The plaintiff is the registered and or absolute proprietor of the suit property which he has subdivided into 13 plots one of which he has gifted to the defendant, who is his biological son, to establish a home for his family and also carry on business, therefrom.

b) The defendant has without the plaintiff's consent trespassed on a neighbouring sub-division plot and delivered building materials with the intent of constructing permanent structures on the said plot.

(3) In his said affidavit the plaintiff has deponed that the defendant's encroachment on the neighbouring plot has affected the plaintiff's access to the property as well as frustrated his intention to gift the remaining portions of the land to the defendant's brothers and sisters. The Plaintiff deponed that efforts at amicable solution of the matter at family meetings have been fruitless with the defendant's acts of interference and trespass prompting the plaintiff to report the matter to the police and leading to criminal proceedings against the defendant for creating a disturbance in a manner likely to cause a breach of peace contrary to section 95(1) (b) of the Penal Code in criminal case No. 2617/11, **R. vs. Dickson Mbugua Njau**

(4) The defendant filed, through his advocates, a Memorandum of Appearance on 11/10/2011 but despite opportunity to do so granted by the court upon adjournment on 12/10/2011 to the 26/10/11 for hearing of the application, the defendant did not file a replying affidavit and neither did he attend court on the 26/10/11 for the hearing, and the matter proceeded in his absence.

(5) This being a **GIELLA V. CASMAN BROWN** application, the plaintiff must show that he has a prima facie case with probability of success; that he stands to suffer irreparable damage; and that, in the

event of doubt, the balance of convenience lies with the plaintiff. In determining whether the plaintiff has a prima facie case two issues arise for consideration:

- a) The sanctity of title and the rights of a registered proprietor, and
- b) Whether a child has any right enforceable at law against his father over land for which the father is the registered proprietor.

(6) As regards the sanctity of title, section 21 of the Land Titles Act under which the suit property is registered provides that:-

*“21. Save as in this Act otherwise expressly provided, every certificate of title duly authenticated under the hand and seal of the Recorder of Titles shall be conclusive evidence against all persons (including the Government) ...”*

Under section 20 of the Act, a certificate of title is given by the Recorder of Titles “to those persons whose right to any immovable property of any interest therein has been determined.” Pursuant thereto a transfer dated 8/12/1972 is shown on the certificate of ownership as having been made in favour of the plaintiff. The registration of the transfer on the certificate of ownership is conclusive evidence of the plaintiff’s right to the immovable property the subject of this suit, because in terms of section 8 of the Transfer of Property Act all the interest of the registered proprietor passed to the plaintiff as transferee upon the transfer.

(7) The defendant did not file his replying affidavit and the court cannot anticipate his claim or interest in the suit property. A determination of the defendant’s interest, if any, in the suit property will have to await full hearing upon the defendant’s filing of his defence in the suit. However, on the material before the court at this stage the application will have to be determined on the status of the parties as disclosed by the plaintiff’s affidavit. It has been held that a child has no right in law against her father’s estate during his life time. Bosire, J (as he then was) in **MARY WAHITO MBUGUA V. PETER MBUGUA NJUHIGU** Nairobi HCCC 1370 of 1995 held that:-

(i) An absolute owner of property has prerogative to deal with his land as pleases and in family matters such rights may only be trammelled if the plaintiff’s person is threatened or where a recognized legal right over the property is threatened.

(ii) The plaintiff (child) had no right in law, custom or equity over her father’s estate in his lifetime capable of being protected by injunction.

The decision was upheld by the Court of Appeal both in the interlocutory stage for injunction pending appeal and in the appeal itself from the Judge’s orders. The entire ruling in **C.A. NO. NAI 189 OF 1995, MARY WAHITO MBUGUA V. PETER MBUGUA NJUHIGU** and was as follows:-

*“The Applicant Mary Wahito Mbugua is the daughter of the 1<sup>st</sup> Respondent Peter Mbugua Njuhigu. The 1<sup>st</sup> Respondent is or at some stage was the registered owner of various pieces of land in Kiambu District. The applicant wants us to stop her father from transferring his lands and her claim is apparently brought on the basis that as a daughter of the respondent, like the other children entitled to inherit land from the father and that the court should prevent her alleged right of inheritance being rendered nugatory in the event that the 1<sup>st</sup> Respondent is allowed to dispose of the lands. We think this application is totally frivolous; like the Judge of the High Court, we very much doubt whether there would be any legal basis upon which court can prevent a man from using that which is admittedly his own in the manner he pleases. We are not even aware that there is law which requires a man to preserve his property so that his children can exercise their alleged right of inheritance in the event of the man dying. What we are in fact saying is that the applicant has not shown to us that she has an arguable appeal. We have grave doubts on the legal basis of her claims. That being our view of the matter this application fails and we order that it be dismissed with costs to the respondents.”*

During the hearing of the appeal at which the appellants did not attend, the court in dismissing the appeal

for non prosecution also stated “we do not think that the appeal would have succeeded before us as it looks that appellant has no *locus standi*.”

(8) Without prejudice to any claims or interest that the defendant may put forth in his defence to the suit, I find that the plaintiff has a prima facie case with probability of success. A prima facie case does not mean a case that must succeed at the trial as the defendant may through his defence demonstrate a legal right over his suit property such as to disentitle the plaintiff to the relief sought.

As regards irreparable damage, the conventional thought on land related matters is that deprivation of an interest in land is not sufficiently remediable by an order of compensation in damages. In addition, the effect of the refusal of the order for injunction in this case is that plaintiff cannot gift to the defendant’s brothers and sisters their portions of land as he has intimated. I find such loss to be an irreparable damage to the plaintiff and his other family members. The balance of convenience, if I had any doubt in the matter, lies with the registered proprietor of the suit property rather than with an apparent trespasser. Should the defendant eventually succeed all he would have suffered is the delay in his proposed developments on the land.

(9) Accordingly, I grant the order for temporary injunction in the terms prayer under prayer 3 of the Notice of Motion of 5/10/2011. Costs in the cause.

Dated and delivered at Mombasa this 24th day of November 2011

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of**

.....for the Plaintiff

.....for the Defendant

..... Court clerk.

**EDWARD M. MURIITHI**

**JUDGE**