



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

Civil Case 163 of 2009

**STEPHEN MBUTHIA GICHURIU.....1ST PLAINTIFF
MICHAEL MURIUKI KARIA.....2ND PLAINTIFF
CHRISTOPHER GICHURIU.....3RD PLAINTIFF
VERSUS
JACKSON NJOGU GICHURIU.....1ST DEFENDANT
SAMMY MWANGI RUHARA.....2ND DEFENDANT**

RULING

The subject matter of this ruling is the summons dated 6th November 2009 in which Stephen Mbutia Gichuriu, Michael Muriuki Karia and Christopher Kaburia Gichuriu, the applicants herein have asked this court to issue the following orders:-

2. That the 1st defendant/respondent by himself, agent or anybody else working under him by temporary injunction be restrained from selling, leasing, charging, or in any other way parting with possession of land parcel No. IRIA-INI/CHECHE/1446 pending the hearing and determination of this application inter parties and or until the hearing and determination of this suit.
3. That the 2nd defendant/respondent by himself, agent or anybody else working under him by temporary injunction be restrained from selling, leasing, charging, or in any other way parting with possession of land parcel No. IRIA-INI/CHECHE/1445 pending the hearing and determination of this application inter parties and or until the hearing and determination of this suit.
4. That costs of this application be provided for.

The summons is supported by the affidavit of Michael Muriuki Karia sworn on 30th November 2009. Jackson Njogu Gichuriu and Sammy Mwangi Ruhara being the 1st and 2nd respondents each filed a replying affidavit to oppose the summons. The 2nd defendant/respondent also filed grounds of opposition.

When the application came up for interpartes hearing, Mr. Karweru, learned advocate for the 2nd defendant argued two preliminary points against the substantive originating summons and the summons. It is said that the 2nd defendant purchased the parcel of land known as L.R. No. Iriaini/Cheche/1445 from the 1st defendant for value without notice in the year 1998. The 2nd defendant averred that he was not aware that the 1st defendant held the aforesaid parcel in trust for any one. Mr. Kamwenji, learned advocate for the plaintiffs was of the view that the 1st defendant held the parcel of land known as Iriaini/Cheche/1085 in trust for himself and the plaintiffs. In breach of the aforesaid

trust the 1st defendant is alleged to have caused the aforesaid land to be subdivided into L.R. No. Iriaini/Cheche/1445 and L.R. No. Iriaini/Cheche/1446. Mr. Kamwenji is of the view that the 2nd defendant purchased L.R. No. Iriaini/Cheche/1445 while he knew the 1st defendant held it in trust for others.

I have taken into account the submissions of both learned counsels. It is not in dispute that the 1st defendant was registered as proprietor of L.R. No. Iriaini/Cheche/1085 by transmission. It is also not in dispute that the 1st defendant subdivided the aforesaid parcel into two portions i.e. L.R. No. Iriaini/Cheche/1445 and 1446. The 1st defendant remained with Iriaini/Cheche/1446 while he sold L.R. No. Iriaini/Cheche/1445 to the 2nd defendant. The plaintiffs have now filed the Originating summons seeking to declare that the 1st and 2nd defendants are holding those parcels in trust for them. Pending the hearing and determination of the originating summons, the plaintiffs have now taken out the summons dated 6th November 2009 in which they sought for injunctive orders to restrain the defendants from interfering in any manner with the suit land. The applicants must show that they have a prima facie case with some probability of success. They have also to show that unless the injunctive order is given, they would suffer irreparable loss. I have carefully considered the issues raised by the 2nd defendant and I am convinced that the plaintiffs have not shown a prima facie case with a probability of success. There is no evidence that the 2nd defendant had prior knowledge that the 1st defendant held the suit parcel of land in trust for others. Having failed to establish the aforesaid fact, then the 2nd defendant's title is protected under the provisions of Law of succession Act. Whoever will feel aggrieved can only seek damages from the offending party. In this regard it is obvious that the plaintiffs' remedy will be damages as against the 1st defendant.

There is evidence that the parcel of land known as L.R. No. Iriaini/Cheche/1446 is still in the name of the 1st defendant. I am convinced the plaintiffs' claim against the 1st defendant is arguable. It is possible that they may be able to show that he is holding L.R. No. Iriaini/Cheche/1446 in trust for them. In this regard I am convinced the plaintiffs have shown that they have a prima facie case with a probability of success. I am also satisfied that unless the order is given against the 1st defendant, the plaintiffs are likely to suffer irreparable loss in that if the 1st defendant disposes of L.R. No. Iriaini/Cheche/1446 to an innocent third party, then the plaintiffs will not be able to recover the same since the third party's title is protected under the Law of succession Act.

In the final analysis the summons dated 6th November 2009 is allowed in terms of prayer 2 and 4 as against the 1st defendant. The application is dismissed as against the 2nd defendant with costs.

Dated and delivered this 14th day of May 2010.

J.K. SERGON
JUDGE