



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Environmental & Land Case 145 of 2010**

**JAMES W. KIGO NGARAMA .....PLAINTIFF  
V E R S U S  
JAMES MBURU GAKUHA .....DEFENDANT  
R U L I N G**

On 13<sup>th</sup> August, 1999 the Plaintiff entered in a Sale Agreement in which he was selling 2 acres of land parcel L.R. No. Limuru/Bibirioni/1255 to the Defendant for KShs. 1,550,000/=. The Defendant was put into occupation on 1<sup>st</sup> January, 2006 and has been there since. He has so far paid KShs. 1,509,200/= of the purchase price.

Quite unfortunately, L.R. No. Limuru/Bibirioni/1255 did not belong to the Plaintiff. It belonged to his father Ngarama Wangunyu who had died on 15<sup>th</sup> July, 1992. Letters of Administration had not been taken out. On 23<sup>rd</sup> December, 2005 the deceased's son Wangunyu Ngarama received a confirmed Grant to the estate in SRM Court at Limuru **Succession Cause No. 66 of 2006** in which the Plaintiff was indicated as the beneficiary of the 2 acres in dispute. The transmission has not been registered.

The Plaintiff filed this suit on 15<sup>th</sup> March, 2010 seeking a declaration that the Sale Agreement above was null and void. He also sought that the Defendant, and all those acting under him, be restrained by injunction from trespassing, alienating, removing and/or interfering with the suit premises. Filed along with the suit was a chamber application under **Order 39 rules 1, 2, 3 and 9** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act** for both mandatory injunction and temporary injunction. His case is that at the time of the Agreement he had no capacity to sell the land as it did not belong to him but to his late father. He states that he did not seek the consent of his children before entering into the Agreement. Thirdly, he did not seek the consent of the Land Control Board, and, lastly, that the Defendant has not completed paying the purchase price.

The Defendant swore a replying affidavit and also filed a Defence. His defence is that the Plaintiff, not being the Administrator of the deceased and not being the registered proprietor of the disputed land, has no capacity to bring the suit or application. Secondly, that he cannot seek to benefit from his own wrongs.

The court received written submissions from counsel for the parties which it has considered.

The title No. Limuru/Bibirioni/1255 is still in the name of the Plaintiff's late father whose estate is being administered by Wangunyu Ngarama. The land is vested in the Administrator who is the only one that has the legal capacity to protect any interest therein by way of a suit. This is what **section 79** of the **Law of Succession Act (Cap. 160)** provides.

The principles governing the grant of an interlocutory injunction have been settled since the decision in **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**. The Applicant has to demonstrate a *prima facie* case with a probability of success, he has to show that if the injunction is not granted he stands to suffer such injury or loss that damages may not adequately compensate; and, if the court is in doubt, it will decide the application on the balance of convenience. Secondly, an injunction is an equitable remedy and whoever seeks equity must have clean hands.

Regarding an interlocutory mandatory injunction, it is now settled that the Applicant has to demonstrate an unusually clear and strong case at this stage. Such an injunction should be granted with reluctance and in very special circumstances as its effect is to resolve all the matters in question at an interlocutory stage (**Agip (K) Ltd –Vs- Mahesh Chandra Himatlal Vora and Others, [2003] 2 EA 285**). Further, an application for interlocutory mandatory injunction can only be brought by way of motion under **section 3A** of the **Civil Procedure Act**.

Coming back to the facts of this application, if the capacity of the Plaintiff has been questioned he cannot be said to have a *prima facie* case with a probability of success. It is also material that the Defendant was put into possession since 2006 after he substantially paid the purchase price. The balance of convenience should tilt in his favour. As to whether the Plaintiff can suffer irreparable damage, it is clear that the Defendant has no title to the land and cannot therefore legally alienate it. Even if he were to do it, the land was subject of a Sale Agreement and therefore its value is known. Damages can be computed and paid.

But the more critical issue is that the Plaintiff's hands are not at all clean in his dealing with the Defendant. He purported to sell land which he had no capacity or authority to do. He received the purchase price which he still retains. He was the one to seek the consent of the Land Control Board and that of his children which he failed to do. He cannot benefit from a court of equity.

I dismiss the application with costs.

**DATED AND DELIVERED AT NAIROBI  
THIS 13<sup>TH</sup> DAY OF OCTOBER 2010**

**A. O. MUCHELULE  
J U D G E**