



REPUBLIC OF KENYA

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

**Civil Case 155 of 2003**

**PETERSON MARUI GITHINJI ..... APPELLANT**

**VERSUS**

**JAMES MURIUKI GUTU ..... RESPONDENT**

**J U D G M E N T**

James Muriuki Gutu hereinafter referred to as the Respondent successfully applied to the Resident Magistrate's Court at Kerugoya for orders of interlocutory injunction under Order XXXIX rules 1 & 2 of the Civil Procedure Rules restraining Peterson Marui Githinji (hereinafter referred to as the appellant) from selling, transferring, charging, alienating or in any other manner interfering with land parcel No. Baragwe/Guama/1242 (hereinafter referred to as the suit land) pending the hearing and determination of the suit and a further injunction restraining the appellant and James Mwangi Nyanja (hereinafter referred to as 2<sup>nd</sup> Defendant), their agents or servants or anyone claiming through them from interfering with the Respondent's use and utilization of the suit land and all crops growing thereon until the suit is heard and determined.

Being dissatisfied the appellant has brought this appeal. In his memorandum of appeal the appellant has raised 4 grounds to the effect that:

- *That the injunction was wrongly granted given that the Respondent was a trespasser on the suit land whilst the appellant was the registered proprietor.*
- *That the Respondent was in illegal and unlawful occupation of the suit land.*
- *That the trial magistrate disregarded the mandatory provisions of sections 6, 7 and 22 of the Land Control Act.*
- *That the injunction was granted in complete disregard of the conditions set out in Giella vs Cassman Brown & Co. Ltd. [1973] E.A. 358.*

From the affidavit of the Respondent sworn in support of the application for the interlocutory injunction and the replying affidavit of the appellant and the 2<sup>nd</sup> Defendant it is evident that the suit land was previously registered in the name of the 2<sup>nd</sup> Defendant but was transferred to the appellant just before the Respondent filed his action. It is also clear that the

Respondent's application for the interlocutory injunction was founded on two lease agreements and a sale agreement he alleged to have entered into with the 2<sup>nd</sup> Defendant.

The lease agreements were entered into on 17<sup>th</sup> January 2001 for a period of 22 years and a second agreement on 16<sup>th</sup> January 2002 for a lease of another portion of the land. None of the lease agreements were registered nor stamp duty paid nor was any consent of the Land Control Board obtained.

An agreement for sale of the land is alleged to have been entered into on 18<sup>th</sup> December 2002 was also exhibited, but again no consent of the Land Control Board was obtained. An undated application for the Land Control Board, consent was exhibit but this does not appear to have been submitted to the Land Control Board. According to the Respondent he was preparing to attend the Land Control Board for the consent when all the Land Control Boards were disbanded by the Government in June 2003. However the agreement having been entered into on 18<sup>th</sup> December 2002, the Respondent was required to obtain the Land Control Board consent within 6 months from that date. This means that the agreement became void after 18<sup>th</sup> June 2003 if no consent of the Land Control Board was obtained. There is no averment that an application was submitted to the Land Control Board for the consent.

In fact going by the undated copy of the application for the Land Control Board consent which was exhibited the implication is that no application had been submitted to the Land Control Board. The Respondent did not give any evidence or date of the alleged disbandment of the Land Control Board, nor did he show that he made any efforts to obtain extension of time for obtaining the Land control Board consent from the court.

In effect therefore the lease agreements and the sale agreements were both void for lack of Land Control Board consent and were therefore not enforceable. This means that on the evidence availed to the court the Respondent did not establish a prima facie case with a probability of success. This is the prerequisite for granting an interlocutory injunction as per the test laid down in the case of **Giella v/s Cassman Brown & Co. [1973] E.A. 358.**

In granting the order of interlocutory injunction, the trial magistrate appears to have been influenced by the fact that the Respondent had planted tea, coffee and several other crops on the disputed land. It was however apparent from the lease agreements exhibited that the crops were planted pursuant to those lease agreements. Even assuming that the lease agreements were not void for want of land Control Board consent, the agreements clearly provided for a liquidated damages clause. It cannot therefore be said that the Respondents loss cannot be adequately compensated by an award of damages.

I find that the trial magistrate erred in granting the interlocutory injunction when there was no prima facie case with a probability of success upon which the interlocutory injunction could be based. I therefore allow this appeal, set aside the orders made by the Resident Magistrate on 4<sup>th</sup> December 2003 and substitute thereof with an order dismissing the application dated 5<sup>th</sup> November 2003. Costs to the appellant. Those shall be the orders of this court.

***Dated, signed and delivered this 16<sup>th</sup> day of June 2006***

**H. M. OKWENGU**

**JUDGE**