



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

Civil Case 28 of 2004

GICHUKI GATHAARA KIMITI PLAINTIFF/APPLICANT

VERSUS

1. NDIRANGU NJOGU DEFENDANT/RESPONDENT

2. PETERSON MWANGI KARIUKI INTERESTED PARTY/RESPONDENT

R U L I N G

By a Chamber Summons dated 17th August 2005 Gichuki Gathaara Kimiti who is the Plaintiff/Applicant seeks orders restraining the respondents from alienating, selling and or otherwise interfering with plot Numbers Muhito/Gatuna/1493 and Muhito/Gatuna/1494 pending the hearing and determination of the suit herein. The respondents to the application are Ndirangu Njogu who is the Defendant and Peterson Mwangi Kariuki who has been joined to the suit as an interested party. The applicant contends that the interested party has attached plot Nos. Muhito/Gatuna/1493 and Muhito/Gatuna/1494 (hereinafter referred to as suit properties) which are the subject of the applicant's claim against the Defendant herein, and has gone to the land control Board seeking its consent alleging that the applicant's suit has been determined. The applicant alleges that at the time the lower court gave orders adverse to his interest the suit properties were not registered and no such orders could issue. It was submitted that the applicant was likely to suffer irreparable loss if the suit properties are sold whilst the interested party's interest is only execution of a monetary decree.

For the interested party it was submitted that the application was misconceived as the interested party was merely giving effect to orders issued in Nyeri C.M.C.C. No. 474 of 2000 and confirmed in Nyeri High Court Civil Appeal No. 129 of 2002. It was further contended that this suit was merely filed in order to frustrate the execution process in Nyeri C.M.C.C. No. 474 of 2000, and that the interested party having been the successful bidder at the execution sale he cannot be restrained from completing the sale which was made pursuant to a court judgment.

The Defendant did not object to the application. He maintained that he had sold the plots in question to the applicant and obtained the consent of the land control Board, and that the interested party had unlawfully attached the suit properties.

The applicant herein is seeking an order of interlocutory injunction. The principles upon which such an order can be made remains as laid down in the renown case of **Giella v/s Cassman Brown & Co. Ltd. [1973] EA 358** i.e. That the applicant must establish a prima facie case with a probability of success, show that he will suffer irreparable harm which cannot be adequately compensated by an award of

damages and if the court is in doubt it should decide the application on the balance of convenience.

The facts relating to the events preceding this application were captured in the ruling delivered by this court on 10th February 2005 relating to the interested party's application dated 14th January 2005.

While the applicant concedes that orders for attachment of the suit property in execution of the decree in Nyeri CMCC No. 474 of 2000 were issued by the court, it is his contention that the orders were given per incuriam as no such plots had been registered at that time and that in any case the transaction between him and the Defendant predated the suit i.e. Nyeri CMCC 474 of 2000.

The allegations being made by the applicant may well be true, nevertheless it is not open to him to ignore the orders of the court as long as the same remain in force. The fact remains that the suit properties were attached and sold to the interested party in execution of a decree issued in Nyeri CMCC 474 of 2000. The orders were made before the applicant filed this suit. The applicant's objection to the attachment and sale of the suit properties was in fact heard in Nyeri CMCC 474 of 2000 and dismissed by the court. That ruling was upheld by the High Court in High Court Civil Appeal No. 129 of 2002. The applicant does not appear to have taken any further action under Order XXI of the Civil Procedure Rules to set aside the sale. He is therefore bound by the orders allowing the attachment and sale to proceed.

I find that the applicant has not established that he has any prima facie case with a probability of success against the interested party. To grant the order of injunction sought would not only be against public policy but also an abuse of the process of the court as it would have the effect of interfering with the execution of a lawful court order.

I find that the applicant has not fulfilled the first requirement laid down in the case of **Giella v/s Cassman Brown & Co. Ltd.** His application therefore fails and is accordingly dismissed with costs.

Dated signed and delivered this 24th day of November 2005

H. M. OKWENGU

JUDGE