



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

CIVIL CASE NO. 32B OF 1997

ALLOEISIOUS IRIGA PLAINTIFF

V E R S U S

SETTLEMENT FUND TRUSTEES 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

LUCY KIRUMBA M'MBIJIWE 3RD DEFENDANT

BETH MUTHONI RUKARIA 4TH DEFENDANT

RULING OF THE COURT

The present application was filed in court by the plaintiff/applicant on 13/10/2005. The application is brought under Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. The application was filed under Certificate of Urgency. The same was duly certified as such.

In the main, the applicant seeks an order of injunction against the third and fourth defendants to restrain them, either by themselves, their servants, officers, employees and/or agents from entering, remaining, occupying, cultivating, developing, using or in anyway interfering with the applicants or the applicant's servants, agents, workers or successors in title quiet user, cultivation and enjoyment of plot numbers 282/458; 282/646 and 282/24 Ex-Lewa Settlement Scheme, Meru Central District, pending the hearing and determination of the suit. The applicant also seeks such further or better orders as will meet the ends of justice. Finally, the applicant has prayed for an order condemning the 3rd and 4th Respondents/Defendants with the costs of this application.

There are four grounds on the face of the application, namely: -

(a) That the 3rd and 4th Defendants/Respondents fraudulently acquired the said plot which is the subject matter of this case and Meru CMC CR. Case NO. 90/04 (Republic v Ann Wambui & 3 others) pending before the Meru Chief Magistrate's Court.

(b) That an order of temporary injunction restraining the 1st and 2nd Defendants from allotting the said plot to the Defendant was given on 20th of May 1997.

(c) That the 3rd & 4th Defendants and/or their agents have entered the suit lands and started

cultivating there.

(d) That the applicant is apprehensive that they will move and plant wheat and/or other crops.

There is also, in support of the application, an Affidavit sworn by the applicant on 12/10/2005. Among the salient averments therein are the following: -

- That the applicant was allotted plot number 282/458; 282/484; 282/485; 282/486 Ex-Lewa Settlement Scheme, Meru (these plots will hereinafter be referred to as the suit lands)
- That he has peacefully and quietly occupied and cultivated the same, planting wheat thereon.
- That this suit was filed against the 1st and 2nd defendants and that orders of injunction against the said defendants restraining them from canceling the allotment of any of the suit lands.
- That inhibitions had earlier been placed on all the suit lands, but that on 24/7/2003, inhibitions on numbers 282/484 and 282/486 were removed at the applicant's own motion, so he could transfer the said named suit lands to his sister. The order lifting the inhibition aforesaid was annexed to the affidavit and marked "AN1".
- That on 4/9/2003, some orders were fraudulently obtained by fraudsters lifting restrictions over suit land numbers 282/458 and 282/646. A copy of the allegedly fraudulent order was annexed to the affidavit and marked "AN2".
- That suit land 282/24 was also fraudulently transferred as per annexure AN3 (a),(b) and (c) respectively.

The applicant goes on to state that after removal of the inhibitions, the fraudsters went ahead to transfer the suit lands to the third and fourth defendants. He also deponed at paragraph 11 of the supporting affidavit that the fraudsters involved in the scam are facing criminal charges before the chief magistrate's court Meru in criminal case No. 90 of 2004. A copy of the charge sheet was annexed and marked "AN4". The deponent has also averred that consequent upon the fraudulent transfers the third and fourth defendants have now entered the suit lands and started cultivation thereon using tractors.

It is for these reasons that the applicant now seeks the order of injunction against the third and fourth defendants in terms of prayer 2 of the application dated 12.10.2005 and filed in court on 13.10.2005.

The applicant was granted an ex-parte order of injunction on 18.10.2005.

After the filing of the replying affidavits in opposition to the application the applicant sought and obtained leave of the court to file and serve a further affidavit which he did on 15.11.2005 in response to the replying affidavit made and sworn by the third defendant.

The applicant disputed the third defendant's allegation that he attended the Land Control board and signed the transfers in favour of the said third and fourth defendants. He contended that both the consents from and the applications to the Timau Land Control Board which were annexed and marked "LKM4" and "LKM5" to the third defendant's affidavit were all forgeries. The applicant also denied that he knew either the third or fourth defendants.

The applicant also averred in his further affidavit that the orders dated 4.9.2003 removing restrictions from suit lands 282/458 and 282/646 were granted without an application for the same. The applicant also questioned the authenticity of the purported sale agreements, contending that if he had such transaction then the same would have been done by his lawyers, m/s Kiautha Arithi & Co. Advocates and not by any other firm of advocates.

Finally, the applicant averred that he still holds the original title deeds to the suit lands allegedly transferred by himself to the third and fourth defendants.

The application is opposed. The replying affidavit thereto is sworn by the third defendant who has averred that the applicant applied for and obtained the Timau Land Control board consent for the transfer of the suit lands to the third and fourth defendants. There is annexed to the said affidavit copies of the

various applications to the Timau Land Control Board (“*LKMI* ” and “*LKM3*” respectively. She also annexed to her affidavit copies of the necessary consents in respect of suit land numbers 282/458, 282/646 and 282/24.

The third defendant contended that criminal case No. 90 of 2004 does not involve her and that the same has not been heard and determined to establish whether there was any fraud; and further that the fact that the criminal case is pending in court does not entitle the applicant to the order of injunction now herein sought. She contends further that both herself and the fourth defendant are lawfully registered proprietors of the respective suit lands and that their rights as such proprietors should not be denied them before it is established that there was fraud leading to their acquisition of the respective suit lands.

The third defendant has also deponed at paragraph 12 of her affidavit that applicant has not come to court with clean hands for failing to disclose that criminal case No. 90 of 2004 is against his own sister Ann Wambui Nderi and that he is the complainant herein.

The parties’ advocates submitted at length. Mr. Mwanzia for the applicant urged the court to find that the applicant has satisfied the conditions set out in the now much celebrated case of ***Giella V. Cassman Brown*** (1973) EA 358 for the granting of an interlocutory injunction. The advocate for the first and second defendants, though served, did not appear at the hearing. On the other hand, Mr. Gikunda for the third and fourth defendants contended that the applicant has not satisfied the said conditions and thus urged the court to dismiss the application with costs.

The point for determination is whether the applicant has satisfied those conditions set out in the ***Giella*** case (above) by the pleadings as supported by the submissions made on his behalf by his counsel. It was held in the ***Giella*** case that for an interlocutory injunction to issue the court must be satisfied.

- (a) That the applicant has a prima facie case with a probability of success.
- (b) That unless the order sought is granted the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
- (c) If in doubt, the court to decide the application on the balance of convenience.

Regarding the balance of convenience, the Court of Appeal in the ***Giella*** case relied on their decision in the case of ***E.A. Industries V. Trufoods (1972) E.A. 420***.

Applying the above principles to the instant case, the court is persuaded that the applicant herein has shown that he has a prima facie case with probability of success. It is admitted by the third and fourth defendants, and confirmed by the applicant, that there is a pending criminal case being criminal case number 90 of 2004 involving the suit lands. That case is yet to be heard and determined. One of the accused persons therein is the applicant’s sister, Ann Wambui Nderi. If at the end of the trial, the accused persons therein are convicted, it would follow that the transactions which led to the acquisition of the applicants respective suit lands by the third and fourth defendants would come into question. The pleadings also show that both the first and third accused in the criminal case were prime movers in the whole transaction that gave the respective suit lands to the third and fourth defendants.

The third and fourth defendants have contended that they are lawfully registered proprietors of the respective suit lands, yet there is evidence by the applicant that he is still in possession of the original title deeds in respect of the suit lands. The fact of the applicant being in possession of the original title deeds when the suit lands are said to have been sold by him brings into sharp focus the mode of transfer of the suit lands to the third and fourth defendants and whether indeed such transfer was not tainted with fraud. The defendants have not adduced evidence to show that the applicant failed to surrender the said title deeds. These and other questions are in my view, weighty matters that will need to be determined during the hearing of this suit. The third and fourth defendants have not rebutted the applicant’s claim that the identity card number which was shown to be his both on the application for transfer and on the agreement for sale was not his number.

I have had a look at the applicant's amended plaint filed in court on 13.10.2005 and one cannot say that his case does not have a probability of success. On that ground, this application succeeds.

The next question for determination of the court is whether any loss/injury that the applicant is likely to suffer cannot be adequately compensated by an award of damages. The applicant has averred that he was allotted the various suit lands totaling about 65 acres on 9.9.1986 and that since then, he has occupied and cultivated the same on which he plants wheat. At one time, the first and second defendants threatened to cancel all the allocations to the applicant, though allotment of plot 282/616 was the one that was cancelled and allocated to one Jeremy Kinoti. Mr. Mwanzia for the applicant submitted that if the suit lands are alienated by the third and fourth defendants, the loss to the applicant would be so great that no amount of damages would be adequate compensation. In this case, the court is of the view that apart from the monetary value attached to the suit land, there is also sentimental value which money cannot adequately compensate. On this ground therefore, the application succeeds.

Mr. Gikunda for the third and fourth defendants contended that since the orders of court removing the inhibitions over plot numbers 282/458 and 282/646 (produced and marked as "AN2" to the supporting affidavit) were not associated with his clients, then they should not be used against them. It is thus not denied that these orders were obtained without any application. It is clear from the record that it was as a result of those orders of 19.12.2003 that the process of transfer of parcel 282/24 transferring the same to the third defendant and parcels 282/456 and 282/646 to the fourth defendant commenced. In my view therefore, even if this application were to be decided on balance of convenience, the scales do tilt in favour of the applicant. The application would thus succeed.

In the circumstances, this application succeeds. The temporary orders of injunction granted to the applicant by this court on 18.10.2005 are thus confirmed. The third and fourth defendants/respondents, their servants, officers, employees and/or agents are restrained from entering, remaining, occupying, cultivating, developing using or in any way interfering with the applicant's servants, agents, workers or successors in title quiet user, cultivation and enjoyment of plot numbers 282/458, 282/646 and 282/24 Ex-Lewa Settlement Scheme, Meru Central District pending the hearing and determination of this suit.

Costs of the application are awarded to the applicant.

Orders accordingly.

Dated and delivered at Meru this 7th day of December 2005.

**RUTH
JUDGE
7.12.2005**

N.

SITATI