



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL SUIT NO. 113 OF 2002**

JAPHETHER WAMALWA KILUI & 8 OTHERS PLAINTIFF

VS

1. MATHEW MUNYOLE WAFULA

2. BEN MACHABE WAFULA DEFENDANT

RULING

The plaintiffs herein in their plaint seek to have the consent Judgment dated 10th January 2001 in Bungoma H.C.C.C. No. 3 of 2001 declared null and void on the grounds that the same was obtained by fraud.

However in the intervening period before the substantive suit is heard the plaintiffs filed a chamber summons pursuant to the provisions of order XXXIX rule 1 of the Civil Procedure rules and prayed for an order for a temporary injunction to restrain the first defendant from subdividing or presenting for subdivision or resurvey Land Parcel number KIMILILI/KIMILILI/108 to create new titles other than those originally created and registered in the names of the plaintiffs as follows:

- 1. 1st Plaintiff KIMILILI /KIMILILI/2438*
- 2. 2nd Plaintiff KIMILILI/KIMILILI/2430 & 2435*
- 3. 3rd Plaintiff KIMILILI/KIMILILI/2432*
- 4. 4th Plaintiff KIMILILI/KIMILILI/2436*
- 5. 5th Plaintiff KIMILILI/KIMILILI/2431*
- 6. 6th Plaintiff KIMILILI/KIMILILI/2433*
- 7. 7th Plaintiff KIMILILI/KIMILILI/2434*
- 8. 8th Plaintiff KIMILILI/KIMILILI/2495*
- 9. 9th Plaintiff KIMILILI/KIMILILI/2323*

The plaintiffs also sought for injunctive orders to restrain the 1st defendant from presenting complaints to the District Officer Kimilili Division in respect of ownership and subdivision of land parcel number KIMILILI/KIMILILI/108 which are registered in the names of the plaintiffs.

The summons is supported by the affidavit of the 9th plaintiff, Titus Musuya Sakwa sworn on 24th

October 2003.

The plaintiffs aver that they each bought land from the defendants and that the 2nd defendant transferred to them their portions as particularized above. It is stated that the 2nd defendant had taken up letters of administration in respect of the Estate of Joseph Wafula Bukhuni (deceased) the original registered owner of Land Parcel number KIMILILI/KIMILILI/108.

The plaintiffs further alleged that the defendants conspired in 2001 to cancel their title deeds using a fraudulent consent in Bungoma H.C.C.C No. 3 of 2001. The plaintiffs attempted to be joined to that suit but their application was dismissed by the Hon. Mr. Justice Ringera for lack of merit. A copy of the ruling was annexed to the supporting affidavit of Titus Sakwa.

The Plaintiffs claimed that the 1st defendant is using the Kimilili District Officer to harass them and with a threat to resurvey the parcel of land in dispute. It is stated that there is a likelihood of a threat to peace and life.

The 1st defendant, Mathew Munyole Wafula, resisted the application by filing a replying affidavit sworn on 24th February 2004. He averred that the land in dispute was owned by their deceased father and that they inherited the land in which he was to get 8.5. acres and the 2nd defendant was entitled to 15 acres to be excised from L.R. No KIMILILI/KIMILILI/108. He avers that new pieces of land namely L.R. Nos 4086 and 4087 were parceled out of L.R. No. KIMILILI/KIMILILI/108 as shown by the Mutation form annexed to this affidavit.

The 1st defendant denied that the consent complained of was obtained by fraud.

The dispute before me appears to be simple. It would appear the plaintiffs are in occupation of the suit premises as well as the defendants.

It has been stated many times that the principles of injunction are well settled. The principles were laid down in the notorious case of **GIELLA VS CASSMAN BROWN & CO. LTD (1973) E.A. 358** namely:

- (i) That an applicant must show that he has a prima facie case with a probability of success.*
- (ii) That the applicant is likely to suffer irreparable loss which cannot be compensated by way of damages.*
- (iii) That if the court is in doubt the court can decide the application on a balance of convenience.*

In this case it was incumbent upon the applicants to establish these principles to enable me exercise my discretion in their favour. The applicants alleged that they bought the land dispute and that titles have been issued to them.

I expected the applicants to annex to the affidavit in support of the summons copies of the sale agreements, land control board consent, mutation forms, letters of administration of the estate of Joseph Wafula Bukhuni deceased, consent order or Judgment in Bungoma H.C.C.C. No. 3 of 2001 and of course copies of the title deeds allegedly issued to them. I have perused the affidavits of Titus Musuya Sakwa and found out that he has not annexed any of these documents. Consequently, I find that the applicants have not shown me that they have a prima facie case with a probability of success. The 1st defendant has annexed to his affidavit a copy of the official search which shows that L.R. NO. KIMILILI/KIMILILI/108 is registered in the name of the 2nd defendant, Ben machabe Wafula,. The same has not been subdivided as alleged by the parties herein.

The applicants have not addressed me on whether they would suffer irreparable loss or not if the order of injunction is not granted. I have examined the pleadings before and the submissions presented to me. This is a matter which I can say that the anticipated injury can be compensated in monetary terms. No

peculiar circumstances have been disclosed to me to convince me that the loss is likely to be irreparable. In any case the consideration is identified in monetary terms.

The third principle is only applicable where the court is in doubt. I will not consider this principle in light of my findings on the first two principles.

A fourth principle has evolved over time. It has been stated that the conduct of the parties must be scrutinized. In this matter I have formed the opinion that the plaintiffs have hidden a lot of information from this court. This means that they were not candid to this court. This gives me a discretion to deny them the orders sought even on that ground alone.

The upshot therefore is that the summons is dismissed with costs to the Respondent.

DATED AND DELIVERED THIS 11th DAY OF March 2004

J.K. SERGON

JUDGE