



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**CIVIL SUIT NO.14 OF 2006**

**KARUTHU MAGIRI alias MARY MAGIRI (suing as the administratrix Of the  
estate of M'MAGIRI M'ANAMPIU..... PLAINTIFF/RESPONDENT**

**VERSUS**

**JOHN KABURU MAGIRI.....APPLICANT/DEFENDANT**

**SETTLEMENT FUNDS TRUSTEE .....2ND DEFENDANT**

**M'RUTERE M'NGUTHARI .....3RD DEFENDANT**

**FLORENCE MUTHONI ABIRA CHARLES .....4TH DEFENDANT**

**RULING**

1. This matter relates to a Notice of Motion dated 11/12/2018 brought pursuant to **Section 1A, 1B, 3A and 63 of the Civil Procedure Act (CAP 21)**. The applicant seeks an order of injunction restraining the plaintiff, her children or anyone at her behest from entering or interfering with the applicant's properties namely L. R NTIRIMITI SETTLEMENT SCHEME/1056 and 1057; and an order for the OCS Subuiga Police Station to implement the orders.

2. The grounds upon which the application is premised upon are in its body and the supporting affidavit of John Kaaburu Magiri, who is one of the defendants herein, sworn on 11/12/2018. It is contended that the plaintiff has started to interfere with the applicant's properties considering she has no sustainable claim as the properties are registered in the applicant's name. The plaintiff has entered the land by force and planted potatoes and wheat. That unless the court intervenes, there shall be a breach of peace and tranquility and the applicant will suffer irreparable loss and damage. Applicant contends that he had previously filed a case CMCC 608 OF 1998, which was resolved in his favour, though plaintiff appealed and succeeded on the basis that the case ought to have been filed before the Land Dispute Tribunal, but this Act was repealed.

3. The application was opposed vide the replying affidavit of the plaintiff, Karuthu Magiri sworn on 21/01/2019. She deponed that the application is bad in law for the applicant cannot seek a permanent injunction as case has been finalized. She avers that she has lived on the land for over twelve (12) years and she never recognized the proprietor rights of the plaintiff in the Suit Lands hence his claims over them has extinguished by operation of the law. She contends that the Judgment of the magistrate's court was set aside on appeal.

4. This matter was canvassed by way of written submissions.

The applicant submitted that there was previous litigation between the applicant and plaintiff in *CMCC No. 608 of 1998* which was then subject of appeal in *HCCA No. 62 of 2001* which never granted the plaintiff any rights over the property. It declared that the magistrate's court had no jurisdiction to deal with the matter of trespass. With the dismissal of the plaintiff's claim the same remains *res judicata*. The title remains registered in the name of the applicant who is entitled to the protection stipulated under **Section 25 and 26 of the Land's Act and Article 40 of the Constitution of Kenya, 2010**.

5. The plaintiff submitted that the applicant has not satisfied the test for granting an injunction as stated in **Giella vs Cassman Brown &**

**Company Limited (1973) EA 358.** For an application for an injunction to succeed, an applicant must establish a *prima facie* case with a probability of success and also demonstrate that he will suffer irreparable damage if the injunction is not granted. For a *prima facie* case to exist there must be a case brought before the court. There is no case at all in court which is pending for determination as this suit was dismissed for want of prosecution. Thus, the court is *functus officio* and has no jurisdiction to hear and determine this application.

6. The issue for determination before this court is ***whether to issue the injunction sought.***

7. When it comes to injunctions, the pre-requisites that an applicant ought to meet have already been set in the classic case of **Giella vs Cassman Brown & Company Limited (1973) EA 358** as follows:

- a) **An applicant must show a prima facie case with a probability of success.**
- b) **Applicant might suffer irreparable loss which would not be adequately compensated by an award of damages.**
- c) **If the court is in doubt, to decide on a balance of probabilities.**

8. Before delving into merits of the application, I am of the opinion that it is vital to lay down the history of this suit. The history as regards to the Suit Land began in the Chief Magistrates court *Civil Suit No. 608 of 1998* where a permanent injunction was granted against the current plaintiff restraining her from entering the applicant's parcel of land NO. NTIRIMITI SETTLEMENT SCHEME/219. The current plaintiff appealed to the High Court in *HCCA No. 62 of 2001*, where the appeal was allowed on the basis that the lower court had no jurisdiction to entertain the matter because of the provisions of **Section 3(1) of the Land Disputes Tribunals Act**. The decision of the lower court was set aside. The plaintiff filed this suit which was dismissed vide the ruling dated and delivered on 12/11/2015.

9. Now, with regard to the first ingredient the Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya and others [2003] eKLR** stated as follows:

**“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. ... a prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”**

10. The question is ***what prima facie case does the applicant have to prove with a probability of success upon trial?*** It is apparent that there is no case before me as the suit was dismissed. As a result, the first condition has not been met resulting to the failure of not being able to meet the others.

11. Section 34 of the Civil Procedure Act provides that:

**“(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees. (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court. Explanation.— For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit”.**

12. What are the questions that arose between the parties herein relating to the execution of the decree? None! I have perused the entire record and I have not seen any pleadings of the applicant let alone a counterclaim. I am in agreement with plaintiff's arguments that this court is *functus officio*.

13. Accordingly, I am of the view that the application is un-meritorious, the same is hereby dismissed with each party bearing their own costs.

**DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF APRIL , 2020 IN THE ABESENCE OF THE PARTIES AND THEIR ADVOCATES.**

**NB:The electronic delivery of this ruling has been occasioned by the prevailing circumstances on Covid 19 pandemic. The advocates concerned have nevertheless given their consent for the said ruling to be delivered and transmitted to them through the emails they have provided.**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**