



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

**ELC CIVIL SUIT NO 78 OF 2015**

JACKSON KIOGORA GITONGA.....1ST PLAINTIFF  
LAWRENCE M.MBABU.....2ND PLAINTIFF  
MARY EUNICE TIRINDI TERESIO.....3RD PLAINTIFF  
ROSE CAIKUTHIL.....4TH PLAINTIFF  
FRANKLINE MUTEMBEL.....5TH PLAINTIFF

**VERSUS**

JACOB MUTHAMIA JEDIEL.....1ST DEFENDANT  
JACKSON RUGENDO.....2ND DEFENDANT

**R U L I N G**

1. This application is dated 22nd December, 2015 and seeks prayers that:-

- 1. This application be certified urgent, be heard during this Courts vacation and order be granted ex-parte in the first instance.***
- 2. A very urgent order be issued for a period of 14 days only restraining the 2nd defendant, his servants and/or agents or anybody acting by or through him from entering into or remaining onto land parcels No. Igoji/ Mweru 1/1560, 1561 and 1562 or in any way interfering with or alienating the said land parcels pending the hearing of prayer No. 3 below.***
- 3. This Honourable Court be pleased to restrain by an injunction the 2nd defendant his servants and/or agents or anybody acting by or through him from entering into or remaining into land parcels No. Igoji/Mweru 1/1560,1561 and 1562 or in any way interfering with or alienating the said land parcel till this suit is heard and determined.***
- 4. Officer in charge of Kieni Kia Ndege Police Post do enforce the orders of the Court.***
- 5. Costs of this application be provided for.***

2. The Application is supported by the Affidavit of Jackson Kiogora Gitonga, the 1st Plaintiff and has the following grounds:-

- 1. The Plaintiffs herein are in possession of Land parcels No. IGOJI/MWERU 1/1560, 1561 and***

**1562 registered in the names of the 2nd Defendant but previously registered in the names of the 1st defendant as Igoji/Mweru/1527.**

**2. The Plaintiffs have extensively developed the said parcels of land and constructed thereon permanent and semi-permanent structures where they have established their homes and planted subsistence crops and indigenous trees. The Plaintiffs depend entirely on the land for their livelihood and that of their families.**

**3. The Plaintiffs have filed this suit claiming title by way of adverse possession and accusing the defendants of perpetrating a fraud against them.**

**4. On 16th December, 2015, the 2nd Defendant came into the land with a large group of unruly characters and purported to take possession of the land but their efforts were thwarted by the Plaintiffs. Then on 21 December, 2015, the 2nd defendant again engaged the same group of thugs and tried to take over by violence but again the Plaintiffs thwarted the effort.**

**5. That the actions of the 2nd Defendant are unlawful and penal code offences under Section 90 of the Penal Code relating to forcible entry in land. Unless the Court intervenes to maintain the Status Quo the 2nd Defendant is likely to cause a breach of peace or change the fair playing level of the suit.**

3. The 1st defendant has opposed the application through his Replying Affidavit sworn on 16th January, 2016 and filed on 19th January, 2016. The Affidavit says:-

**1. That I am the 2nd Respondent/Defendant in this matter and thus competent to swear this affidavit in reply to the Plaintiff's application dated 22-12-2015.**

**2. That the Plaintiff's have no claim against me at all and I do not know them.**

**3. That I bought the subject matter herein L.R IGOJI/MWERU 1/1560 and 1562 from the second defendant who was the lawfully registered owner.**

**4. That I paid the full consideration thereof after visiting the land registry to verify the ownership.**

**5. That the Plaintiff entered into my land forcefully in the month of December, 2015 without my authority or consent and thus a trespasser.**

**6. That the 1st Defendant (sic) has recently constructed a house thereon illegally and unlawfully and he cannot claim any ownership either in equity or the Law.**

**7. That the 2nd defendant (sic) and 3rd defendants have never ever stepped on this land and their allegation are false and untrue.**

**8. That the 4th defendant (sic) is the mother of the 5th Defendant and they only occupy a small portion of L.R IGOJI/MWERU 1/1562.**

**9. That indeed the plaintiffs have no sustainable claim against me and the application is only meant to allow them to occupy my land illegally.**

**10. That the plaintiffs have not made any prima facie case to warrant the granting of the prayers sought at all.**

**(11) That a trespasser should not be allowed to occupy my land when I am the genuinely registered owner.**

**11. That I bought the said properties with all their development and therefore should be allowed to enjoy my property.**

**12. That the Plaintiff's application is only meant to allow the Plaintiff's occupy my land and make false allegation of adverse possession which is not founded on facts or the Law.**

**13. That what is deponed to herein is true to the best of my knowledge, information and belief.**

4. I note that in paragraphs 6, 7, and 8 of the Replying Affidavit, the 1st Respondent may mistakenly be referring to some plaintiffs as Defendants. This somehow obfuscates the real meaning of what is being deponed.

5. On 16/1/2016 the parties proffered a consent signed by their Advocates which the Court adopted as its order. The Consent was in the following terms:-

**“CONSENT**

**1. The current status Quo be maintained with the effect that the Plaintiffs will not be evicted from the suit lands, Land Parcel Number IGOKI MWERU/1/1560, 1561 and 1562 pending hearing and determination of this application.**

**2. By Consent application to be heard on 17/02/2016.**

6. On 17/03/2016, the Applicants and their Advocate did not come to Court. After the 2nd Defendant told the Court that some of the Plaintiffs lived on part of the land, I delivered a ruling that held that in the interest of justice, it was necessary to hear all the parties. I directed that the parties do file Written Submissions.

7. It has been submitted for the Applicants that they were in occupation of the suit lands when the 1st Defendant caused transfer of the suit lands to the 2nd Defendant. The Court has been told that the suitlands, to wit; parcel Nos. Igoji/Mweru/1/1560, 1561 and 1562 were Subdivisions of the original parcel No. Igoji/Mweru/1/1527 which was registered in the name of the 1st defendant.

8. The Applicants say that they predicate their claim over the whole land, by way of adverse possession, on the Limitation of Actions Act, Cap. 22 laws of Kenya as they had occupied the land for over 12 years and have extensively developed it. They further say that the Defendants have admitted that they have not been in occupation of the suit lands.

9. The Plaintiffs say that in his witness statement, the 1st Defendant admits that he received money from the 1st Plaintiff in 2008 for a sale of a portion of his land. They also say that he admits the 4th and 5th Plaintiffs claim that they bought land from him. They, however, say that the 1st Defendant avoids to comment on the Sale Agreement between him and the 2nd and 3rd Plaintiffs. It is opined, on their behalf, by Boniface Njiru, their Advocate that a person who received money from several purchasers, and who did not convey the land to them, but did so to another party, had acted fraudulently and was in breach of contract. They say that the 3rd party, the 2nd Defendant may have committed the tort of inducing breach of contract and may be liable for damages.

10. The applicants submit that they had a *prima facie* case as they had paid money to the 1st Defendant and that they would suffer irreparable loss if the Injunction they seek is not granted as they would be evicted from the land. They submit that the balance of convenience tilts in their favour.

11. The Plaintiffs in support of their various propositions proffered the cases of *Giella Versus Cassman Brown & Co. Ltd [1971]EA 358*, *Mrao Versus First American Bank of Kenya Limited and 2 others [2003]KLR1 25* and *Sarokh kher Mohamed Ali versus Southern Credit Banking Corporation and Another [2008] e KLR*.

12. The Defendants oppose the application and at the outset say that a claim for adverse position can only be commenced by way of Originating Summons and not by plaint. They also say that in their claim for fraud, the plaintiffs, should have joined the Attorney General as that claim concerns titles to land. With due respect to this Submission, I do opine that not all incidents of fraud involve the Land Registrars as the alleged fraud may be against individuals without the participation of Land Registrars.

13. The Defendants say that their side has deponed that the 4th Plaintiff and her son, the 5th Plaintiff entered the suit land forcefully without the authority of the Defendants who are the registered owners. They also say that the 1st Plaintiff only entered the suitland recently in the year 2016. They further say that the 2nd and 3rd Plaintiffs have never possessed or occupied any part of the subject matter and have no properties therein. They deny that the Defendants have occupied the suit lands for a period of over 12 years or at all.

14. The Defendants have submitted that since the Plaintiffs claim is predicated upon the sale of Agricultural land, the claim must fail and any purported sale be declared null by virtue of Sections 6 and 7 of the Land Control Act for lack of the apposite consents.

15. The Defendants have submitted that the Plaintiffs have not demonstrated the ingredients enunciated in the case of *GIELLA Versus CASSMAN BROWN AND CO. LIMITED [ 1973] EA 358* in that they have not established a *prima facie* case and they have also not demonstrated that denial of the Injunctive Orders sought would spawn suffering of irreparable loss. The Defendants say that as they are registered owners of the disputed land, the balance of convenience should tilt in their favour. They further say that their titles(s) is/are protected under Sections 25 of the Land Registered Act.

16. I have considered the pleadings, the Submissions and the authorities proffered by the parties in support of their respective propositions. Some of the issues canvassed by the parties can only be determined after the hearing of the main suit. At the interlocutory stage a Court must not make definitive findings on disputed facts and claims. It may, though, pronounce itself on undisputed and uncontroverted facts. Guidance in handling applications for interlocutory Injunctive Orders was, in a veritable manner, offered by the Court of Appeal which in the case of *Mbuthia Versus Jimba Credit Corporation [1988] KLR 1* opined as follows:-

***“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court judge had gone beyond his proper duties and made final findings of fact on disputed affidavits.”***

17. I will not delve into determining disputed facts and claims at this interlocutory stage. Issues such as to how a claim for entitlement to land by way of adverse possession can be commenced, whether all the Defendants have been in occupation of the suit land or lands, or if this suit should be declared null and void for lack of requisite Land Control Consents etc can only be determined after the hearing of the suit.

18. The 1st Defendant has not challenged the claim that he received money from some of the defendants which money was supposed to be purchase price for parts of his land. Both Defendants have not controverted the claim that at least some of the defendants were in occupation of the suitland. The length they have been in occupation of the suitland can only be determined after the main suit has been heard.

19. It is clear that the 1st Defendant's conduct spawned this suit. He purported to sell land to several parties and refused to complete the apposite process necessary for transfer of the land to the people he had received money from. Indeed, he could be accused of obtaining money by false pretences. This conduct by the 1st Defendant must veritably invite judicial deprecation. One can not have his cake and still eat it. This conduct is despicable and pellucidly opprobrious.

20. I find that the Plaintiffs have a *prima facie* arguable case. I find that they may suffer irreparable loss should this Court not grant the Injunctive Orders they seek. I also find that clearly the balance of convenience tilts in the Plaintiff's favour. The upshot of my findings is that the weight of the propositions proffered by the plaintiffs outweighs the weight of the defendants propositions. In the Circumstances, this

application is allowed. For avoidance of doubt, **Prayers 3 and 4 are granted.**

21. Costs shall be in the cause.

22. It is so ordered.

**DELIVERED IN OPEN COURT AT MERU THIS 14TH DAY OF SEPTEMBER, 2016 IN THE PRESENCE OF:-**

CC: Daniel/Lilian

Rimita h/b Gikunda for 1st Defendant/Respondent

Njiru absent for the Plaintiff/Applicant

**P .M. NJOROGE**

**JUDGE**