



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT MERU

ENVIRONMENT AND LAND NO. 21 OF 2014

MARY KARAUKI.....PLAINTIFF

ISAIAH THIAINE MUNYUA.....2ND PLAINTIFF

VERSUS

DAVID MUNYUA.....DEFENDANT

**R U L I N G**

1. This application dated 10/02/2014 and stated to be predicated upon the provisions of the law cited on the face of the Notice of Motion seeks the following prayers:-

1. ***THAT this Application be certified as urgent and be disposed off on a priority basis.***
2. ***THAT this Honourable Court be pleased to grant a temporary order of injunction restraining the Defendant /Respondent herein from selling, renting and /or in any way disposing off all or any portion of land parcel No. 1470 Antuamburi Adjudication Section pending the hearing and determination of this application.***
3. ***THAT this Honorable Court be pleased to grant a temporary order of inhibition to inhibit any transaction and the registration of any dealings in relation to land parcel No. 1470 Antuamburi Adjudication Section pending the hearing and determination of this application.***
4. ***THAT this Honourable Court be pleased to grant a temporary order of injunction restraining the Defendant/Respondent herein from selling, renting and or in any way disposing off all or any portion of land parcel No. 1470 Antuamburi Adjudication Section pending the hearing and determination of this suit.***
5. ***THAT this Honourable Court be pleased to grant a temporary order of inhibition to inhibit any transaction and the registration of any dealings in relation to land parcel No. 1470 Antumburi Adjudication Section pending the hearing and determination of this suit.***
6. ***THAT the Costs of this application be provided for.***

2. The Application is supported by the Affidavit of MARY KARAUKI and has the following grounds:-

1. ***THAT the Land in question is the property of the Late Jeremiah Munyua who died in 1987.***

**2. THAT the Defendant/Respondent breached the expectations of trust and caused the land subject of this suit to be registered solely in his name leaving out the Plaintiffs.**

**3. THAT the Plaintiffs have filed a suit seeking the declaration that the defendant holds the land in trust.**

**4. THAT should the defendant dispose off the property then Plaintiffs claim would be defeated.**

**5. THAT its in the interest of justice that this application be allowed.**

3. In their Submissions, the Applicants say that the Defendant holds the land in trust for them but he has been selling to third parties portions of the land. They say that the Defendant if not prohibited through a Court Order from disposing of the land, they will lose their claim altogether and suffer irreparable loss.

4. The Applicants say that the 1st Applicant is the widow of the late Jeremiah Munyua while the 2nd Applicant and the Respondent are the sons of the Applicant and the late Jeremiah Munyua. They say that at one point someone called Macharia Wambugu attempted to grab the property of the deceased Macharia Munyua and this necessitated objection proceedings which the Respondent conducted as a representative of the family. They claim that the Respondent misused his position a proxy and had the suit land registered in his own name.

5. The Applicants have submitted that the suit land being family land, they had a *prima facie* case that entitled them to grant of Injunctive Orders. They also say that they would suffer irreparable damage if the Respondent sold family land. They say that since they had demonstrated that the Respondent was selling family land, which demonstration is evidenced by Annexure MK 3 in the Affidavit of Mary Karauki, the 1st Applicant, the balance of convenience tilted in their favour. The upshot of their arguments is that they had satisfied all the ingredients enunciated in the Classic Case of *Giella Versus Cassman Brown [1973] EA 358*.

6. The Defendant has opposed the Application. He says that it is settled law that a trust is created by an express declaration of the person in whom the property is vested. He says that this could be under a will or by way of a trust or even under a document not under seal or even orally. He says that there is nothing whatsoever in the pleadings that shows that the Defendant holds the land in trust for the Applicants.

7. The Respondent says that he has absolute ownership to the suitland and therefore, his rights are protected. He further says that his ownership of the suit land is recognized by Article 64 of the Constitution of Kenya, 2010. Being owner of the land, It is argued that the Applicants have not established any *prima facie* case as one of the ingredients necessary for the grant of Injunctive Orders as enunciated in the Classic case of *Giella Versus Cassman Brown (opcit)*.

8. The Respondent has proffered the case of *NOOR MOHAMMED JAN MOHAMMED VERSUS KASSAM ALI VIRJI MADHANI [1953] 20 LRK and EA INDUSTRIES VERSUS TRUFOODS [1972] EA 420* for his proposition that in order to justify the granting of Injunctive Orders, one must demonstrate that his property is in imminent danger. The Defendant has also said that before Injunctive Orders can be granted, It must be demonstrated that the anticipated loss would be irreparable and incapable of being compensated by way of an award for damages. The Respondent submits that no possibility of irreparable loss exists. The Respondent further says that he is in occupation and, therefore, the balance of convenience tilts in his favour. It is submitted that the Applicants have failed to satisfy one of the 3 ingredients, enunciated by the case of *Giella Versus Cassman Brown (op cit)* which would entitle them to the Injunctive Orders they seek.

9. I have carefully considered the pleadings filed by the parties, their submissions and the authorities they have proffered. The Court of Appeal has in a veritably erudite manner given guidance regarding how applications for interlocutory injunctions should be handled. In the case of *Mbuthia Versus Jimba Credit Corporation*, the Court 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.”***

10. I do not intend to delve into disputed matters which can only be determined after the main suit has been heard. Some of the matters canvassed by the parties can only be determined after the main suit has been heard. These include whether or not the land the subject of this suit is family land or not. The issue concerning if or not the Respondent holds the suit land in trust for the Applicants is also apposite. Also subject to be tested during hearing of the suit is the claim that the Applicants have sold 11 ½ acres of family land.

11. I note that prayer 4 seeks to preserve the suit land so that it does not change hands before this suit is heard and determined. It does not seek to injunct the Respondent from accessing or cultivating land parcel No. 1470 Antuamburi Adjudication Section. Prayer 5 seeks an order for inhibition. This is also meant to preserve the suit land pending hearing and determination of this suit.

12. I opine that should it be found after the hearing of the suit that the suit land is family land and that the Respondent holds it in trust for the Applicants, the applicants would, should the land have changed hands during the intervening period, have suffered irreparable loss. I opine that family land may have sentimental and spiritual value that can not be compensated by an award of damages.

13. should the Court, after hearing the suit, find that the suit land is not family land and that the Respondent does not hold it in trust for the Applicants, then he will be declared the owner of the land and be awarded damages. He will not have suffered irreparable loss.

14. After weighing the respective propositions proffered by the parties, I find that as juxtaposed with the weight of the Respondent's propositions, the Applicants propositions have a heavier and more compelling weight. In the Circumstances, **I allow the application. Prayers 4 and 5 are granted.**

15. Costs shall be in the cause.

16. It is so ordered.

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

CC: Daniel/Lilian

Miss Kiome h/b Mutinda for the Plaintiff/Applicant

Mrs. Kaume present for the Defendant /Respondent

**P.M.NJOROGE**

**JUDGE**