



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**ENVIRONMENT AND LAND COURT**  
**E.L.C CAUSE NO. 100 OF 2014**  
**IN THE MATTER OF LR NO LOC 2/GATHARAGE/3556**  
**AND**  
**IN THE MATTER OF DECLARATION OF A CUSTOMARY TRUST**  
**BETWEEN**  
**EARNEST NJOROGE MAINA**  
**FLORENCE WANJA NJOROGE.....APPLICANTS**  
**VERSUS**  
**SAMUEL MAINA MACHARIA.....RESPONDENT**

**RULING**

1. Before me for determination are two applications. The first one is dated **12<sup>th</sup> May, 2014** filed by the applicants seeking that an order of inhibition be issued inhibiting any dealings with **LR No. Loc 2/Gacharage/3556** (hereafter referred to as the suit land) pending the hearing and determination of this application.
2. The application is premised on the grounds stated on the face of the application and is supported by the affidavit of **Arnest Njoroje Maina** sworn on **12<sup>th</sup> May, 2014**. He depones that the restriction and caution placed on the title of the suit land may be removed any time for the reason that the defendant had successfully obtained orders of removal of the said caution. The applicants are apprehensive that if the orders sought in this application to preserve the suit land are not granted, the respondent who has already sold the suit land to one **Douglas Mwangi Ngeru** will succeed in transferring the same.
3. The application is opposed vide a replying affidavit filed by the respondent on **17<sup>th</sup> June, 2014**. He depones that he is registered as the absolute owner of the suit land and does not hold the same in trust for anybody; that the said parcel was transferred to him by his father who is still alive; that he sold the suit land to Douglas Mwangi Ngeru in 2012 and received the full purchase price which proceeds he used to purchase another parcel of land at Matuu- Masinga measuring three acres; that he is ready to accommodate the 1<sup>st</sup> applicant thereon but not the 2<sup>nd</sup> respondent as she is his estranged wife and has since been married to someone else.

4. Before filing his reply to the aforesaid application, the respondent filed the second application before me for determination dated **5<sup>th</sup> June, 2015** seeking that the applicants be ordered to deposit Kshs. 850,000/= as security for costs and any decree that may be obtained against the respondent before any orders could be granted in the application dated 12<sup>th</sup> May, 2012. No replying affidavit was filed by the applicants in this case but they made a feeble attempt to oppose the application in their written submissions.
5. On **18<sup>th</sup> June, 2014** counsels for the respective parties with the concurrence of the court, agreed that the two applications be disposed of together by way of written submissions. The applicants filed their written submissions on **16<sup>th</sup> June, 2014** while the respondents filed theirs on **17<sup>th</sup> June, 2014**.
6. In their submissions, the applicants stated that this court has power to issue inhibition orders in accordance with **Section 68** of the Land Registration Act, 2012. They also submitted that their claim raises an issue of resulting trust.
7. As stated earlier, they submitted on the application for security of costs, but I will not consider those submissions as the applicants did file any document opposing the application as required by law.
8. In his submissions, the respondent states that he was gifted the suit land by his father who is still alive without any conditions. He relied on **Section 71** of the Land Registration Act, 2012 and the case of **Maria Ngangi Gwako Vs Charles Mwenzi Ngangi** (2014) eKLR where in both, the rights of a son over his father's property are not provided for as a registrable interest over a title to land.
9. Further it was his contention that the 2<sup>nd</sup> applicant who is his estranged wife had not demonstrated that the suit land forms part of the matrimonial property and the agreement dated 12<sup>th</sup> May, 2010 does not state that the respondent could not sell the remainder of the suit land measuring 0.9 acres.
10. On his application for interests on costs dated **5<sup>th</sup> June, 2014** he submitted that the applicants application is based on malice and ill will as their intention is only aimed at frustrating the transfer of the suit land to Douglas Mwangi Ngeru. He prays that since he has already used the money paid to him by the purchaser and purchased another parcel of land and will therefore not be in a position to refund the purchase price, the applicants be made to deposit the sum of 850,000/= being the purchase price and other costs that may arise in these proceedings.
11. The first application seeks orders to preserve the suit land pending the hearing and determination of the originating summons. The conditions for granting an injunction were well settled in the case of **Giella – vs – Cassman Brown and Co. Ltd & Another** [1973] E.A, namely that the applicant must show that they have a *prima facie* case with a probability of success. Secondly, they must demonstrate that they might suffer irreparable injury if the injunction is not issued and thirdly, should the court be in doubt, it will decide the application on a balance of convenience.
12. In the judgment delivered by the lower court in **Kigumo Civil case No. 84 of 2012** on **24<sup>th</sup> April, 2014**, whereas the court found that the 1<sup>st</sup> applicant's interest over the suit property as a son are not protectable by a caution, the court did find the 1<sup>st</sup> applicant to have a lawful interest in the suit land and gave him thirty days to file his claim in the appropriate manner which I believe informed the filing of the instant suit.
13. In his replying affidavit dated **17<sup>th</sup> June, 2014** the respondent has alluded to the fact that the applicants are members of his family and also to the fact that there was an agreement dated 12<sup>th</sup> May, 2010 that allowed him to sell 1 acre. I have perused the aforesaid agreement and noted that during the handing over of the title deed by his father, the respondent in the presence of his fathers **Richard Macharia Ngeru** and **Douglas Mwangi Ngeru**, accepted to be bound by the following terms; "**we have agreed I, Macharia and Douglas Mwangi that Maina should sell 1 Acre and leave 0.9 acres**" by signing the agreement.

14. This to me appears to be a condition placed by his father upon the respondent before handing over the title deed for the suit land to him. The respondent although the registered owner of the suit land, has not produced before this court any document to show that the terms of that agreement were changed and/or varied allowing him to now dispose of the remaining 0.9 acres of the suit land. It is my considered view, that the suit land having been given to him by his father with conditions, and the applicants (who are members of his family) laying a claim over the same under customary trust, it is this court's duty to preserve the suit land pending the hearing and determination of the originating summons because if the same is not preserved, the applicants rights over the suit land may be extinguished if the transfer is concluded.

15. On the respondents allegation that the 2<sup>nd</sup> applicant who is his estranged wife has no claim to the suit land, I wish to associate myself with the findings of the courts in the cases of **Ibrahim Mucheru Wahothi V Esther Wanjiru Mucheru** [2007] eKLR and **Khake v Wambui** 2004 eKLR where the courts found in the first case that for parties not divorced, a caution could be ordered to stay dealings in a suit property and in the latter case that a separated and or divorced wife had certain interests over a suit land.

16. For the above reasons, I am satisfied that the applicants have established a prima facie case with probability of success and I issue an inhibition order inhibiting any further dealings with LR No.Loc.2/Gacharage/3556 pending the hearing and determination of the originating summons.

17. On the second application dated 5<sup>th</sup> June, 2014 the respondent seeks security for costs. He gives his reasons as wanting to protect himself from any decree that the purchaser may obtain against him for not completing the sale transaction. He has prayed for Kshs 850,000/= part of it being the amount he received for sale of the suit land.

18. In considering an application for interests in costs, certain principles must be considered. The court of appeal in the case of **Huscroft v P & O Ferries Ltd – [2010]** EWCA Civ 1483, relying on the case of **Ali v Hudson [2003]** EWCA Civ 1793, expounded on these principles. Firstly, security for costs can be imposed to secure costs of a successful party against a losing party who is not serious about prosecuting the claim thus causing inflation of costs of the suit, breaching the overriding objective in the end. Secondly, a party who may not be able to meet costs of the suit eventually in case they lose especially if their case is frivolous and weak may also be ordered to deposit security of costs. However, the court warned that orders of security for costs should not be used as a tool to “**prevent the claimant pursuing his case to trial.**” The court found that security for costs is not limited on the grounds of strength of a party's case or regularity of a party flouting the laws and rules of procedure, but that the court should consider each case on its own merits and not stick to set rules, by emphasising form over substance.

19. Thirdly, the purpose of security of costs grants the court control over litigation where parties are not keen to pursue the matter for purposes of ensuring expedition. Costs are assessed on the estimate of the eventual costs at the end of litigation.

20. In the instant case, the amount prayed for by the respondent is Kshs 850,000/=. 750,000/= being money received for sale of the suit land and Kshs. 100,000/= being security of costs of any decree that may be obtained against the respondent by the purchaser of the suit land. Since the proceeds from the sale of the suit land have been used by the respondent to purchase another property for his sole benefit, I will only allow the application to the extent that the applicants do deposit as security for costs Kshs 100,000 as security for any decree that may be obtained by the purchaser Douglas Mwangi Nderu against the respondent. The same to be deposited in court within 45 days from the date hereof.

21. Costs of both applications shall be in the course.

**Dated, signed and delivered at Nyeri this 3<sup>rd</sup> day of March, 2015**

**L. N. WAITHAKA**

**JUDGE**

**In the presence of:**

Mr. King'ori for the respondent

Mr. Ng'ang'a holding brief for Mr. Kariuki for the applicant

Lydia – Court Assistant