



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

**CIVIL CASE NO. 312 OF 2011**

**ZINGER ENTERPRISES LIMITED ..... PLAINTIFF/APPLICANT**

**VERSUS**

**1. ESTHER WANGARI NGARI**

**2. DISTRICT LAND REGISTRAR, KAJIADO .... DEFENDANTS/RESPONDENTS**

**R U L I N G**

1. The amended **Notice of Motion** dated 21/11/2011 seeks, *inter alia* the following orders:-
3. **“THAT this Honourable Court be pleased to grant a temporary injunction restraining the 2<sup>nd</sup> Defendant/Respondent whether by itself, its employees, agents and/or servants from holding the hearing scheduled for 22<sup>nd</sup> November 2011 and/or any other such hearing over the caution lodged by the Plaintiff against the parcel of land known as Title No. Kajiado/Mailua/690 pending the hearing and determination of this suit.**
5. **THAT this Honourable Court be pleased to grant a temporary injunction restraining the 1<sup>st</sup> Defendant/Respondent whether by itself, its employees, agents and/or servants from transferring, selling or howsoever disposing off property Title No. Kajiado/Mailua/690 or removing the caution lodged against the said parcel of land known as Title No. Kajiado/Mailua/690 pending the hearing and determination of this suit.**
6. **THAT in the event the caution is removed by the Defendants during the pendency of this application and this suit, then the Honourable Court be pleased to grant an order directing the Defendants to re-register the said caution at the Defendants’ cost.”**
2. According to the affidavit in support and the supplementary affidavit, the Applicant entered into a sale agreement with the first Respondent for the purchase of the suit property on 15/6/2010. That in breach of the said sale agreement the 1<sup>st</sup> Respondent refused to handover the completion documents to the Applicant’s advocates. To protect his interest, the Applicant lodged a caution against the suit property with the **Kajiado Land Registry**.
3. The Applicant’s complaint is that the 1<sup>st</sup> Respondent’s children who claim beneficial interest in the property have applied to the Land Registrar for the removal of the caution. The Applicant’s contention is that the suit property devolved absolutely to the 1<sup>st</sup> Respondent vide the confirmed grant of representation in the estate of the late **Evanson Ngari Kamau**.
4. The Applicant is further aggrieved by the decision of the 2<sup>nd</sup> Respondent who has served the Applicant with a hearing notice for the removal of the caution despite the 2<sup>nd</sup> Respondent having been served with the copy of the plaint.

5. The application is opposed. It is stated in the replying affidavit by the 1<sup>st</sup> Respondent that her late husband, **Evans Ngari P. Kamau** (deceased) died intestate on 19/5/2006. That the deceased was the registered owner of the suit property. That following the demise of the deceased, the 1<sup>st</sup> Respondent obtained the Grant of Letters of Administration on 12/5/2008 and the certificate of confirmation of the grant was issued on 7/2/2011. According to the 1<sup>st</sup> Respondent, the land that she sold to the Applicant is **LR No. Kajiado/Mailua/908** and the land was successfully transferred to the Applicant.
6. The 1<sup>st</sup> Respondent has denied having entered into any agreement with the Applicant for the sale of the suit property and terms any purported sale of the suit property as fraudulent. The 1<sup>st</sup> Respondent has further deposed that under **section 82 (2) of the Law of Succession Act**, she had no capacity to enter into a sale agreement involving the estate of her late husband. The 1<sup>st</sup> Defendant criticized the sale agreement as having not been properly executed and attested. The 1<sup>st</sup> Defendant has accused the Applicant of failure to follow the due process of the law as provided by the **Company's Act Cap 486 Laws of Kenya, Orders 4 rule 4 and Order 9 rule 2 (c) and Order 51 rule 13 (2) of the Civil Procedure Rules; Section 130 – 133 of the Registered Land Act and Section 13 A of the Government Proceedings Act Cap 40 Laws of Kenya.**
7. The application was canvassed by way of written submissions which I have duly considered.
8. The principles of grant of temporary injunctions were set out in the celebrated case of **Giella –vs- Cassman Brown & Co. Ltd [1973] EA 358** as follows:-

**“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

9. The Applicant's case stems from a sale agreement allegedly entered into between the Applicant and the 1<sup>st</sup> Respondent on 15/6/2010 for the sale of the suit property. It is not in dispute that the suit property is registered in the name of the late **Evanson Ngari P. Kamau** (deceased) who died intestate on 19/5/2006. It is also common ground that at the time the said agreement was entered into, the certificate of confirmation of the grant in the estate of the deceased had not been confirmed.
10. The purported agreement was entered into contrary to the **Law of Succession Act** which provides as follows:-

**Section 55 (1):-**

**“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.”**

11. **Section 82 (ii) of the Law of Succession Act** provides that no immovable property shall be sold before the confirmation of the grant.
12. The 1<sup>st</sup> Respondent therefore had no capacity to enter into the sale agreement in question. The agreement was a nullity and void *ab initio*.
13. Under **section 16 of the Government Proceedings Act**, no injunctions can be issued against the Government. The said provision of the law stipulates as follows:-

**16 . (1)**

**In any civil proceedings by or against the Government the court may, subject to the provisions of this Act, make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:**

**Provided that-**

- i. **Where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and**
- ii. **In any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.**
- iii. **(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.”**

14. The proceedings also contravened **section 13A (1)** of the **Government Proceedings Act** which provides as follows:-

**“No proceedings against the Government shall be or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.”**

15. The Registrar in question is an officer of the **Government of Kenya** and therefore the orders of injunction cannot issue against him.

16. Under **section 133 (1)** of the **Registered Land Act Cap 300 Laws of Kenya**, a caution may be withdrawn by the cautioner or removed by order of court or by order of the Land Registrar. The removal of the caution by the Land Registrar is subject to the procedures set out under **section 133 (2)**. It is noted that there are no allegations made against the Registrar for non-compliance with the law. Other matters of law raised by the Applicant relate to procedural technicalities and do not go in to the substances of the matter.

17. *Prima facie*, the application fails to meet the threshold for the grant of orders of injunction. Consequently, I dismiss the application with costs.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this **11<sup>th</sup>** day of **March** 2015

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**B. THURANIRA JADEN**

**JUDGE**