



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 67 OF 2015**

**CYRUS GITUTO MUGO..... PLAINTIFF**

**VERSUS**

**DAVID WACHIRA MUGO.....1<sup>ST</sup> DEFENDANT**

**HARRISON MUCHIRA KARIMI.....2<sup>ND</sup> DEFENDANT**

**RULING**

This is in respect to the plaintiff/applicant's Notice of Motion dated 13<sup>th</sup> June 2015 seeking the substantive order that pending the hearing of this suit, the defendants/respondents, their agents, servants and or representatives be restrained from alienating or dealing in whatsoever way with land parcel No. INOI/MBETI/515. There is another prayer (No.6) seeking the setting aside of an order issued in favour of the 2<sup>nd</sup> defendant/respondent in Civil Suit No. 147 of 2014 declaring the 2<sup>nd</sup> defendant/respondent to be the legal owner of that parcel of land. However, such an order cannot be granted at this stage and will have to await the full trial. The other orders sought in the said application are also basically repeating what is sought in the substantive application which is an injunctive relief.

The said application is supported by the plaintiff/applicant's affidavit in which he has deponed, inter alia, that the parcel of land No. INOI/MBETI/515 (hereinafter the suit land) is family land given to the 1<sup>st</sup> defendant/respondent to hold in trust for the family including the plaintiff/applicant and one Julius Kariuki Mugo and that the plaintiff/applicant has lived thereon for over twenty three (23) years together with his family and has therefore acquired it by adverse possession. However, the 1<sup>st</sup> defendant/respondent has fraudulently transferred the suit land to the 2<sup>nd</sup> defendant/respondent hence this application.

The 1<sup>st</sup> defendant/respondent filed a replying affidavit which is not easy to understand but in paragraphs 21 and 22 thereof, he concedes to the said application. In paragraph 21, he has deponed as follows:-

***21 "That the said property INOI/MBETI/515 be preserved as it were before the declaration of sale by the Resident Magistrate Kerugoya"***

In paragraph 22 of the same replying affidavit, he also depones as follows:-

***22 "That I swear this affidavit in support of the applicant application with some amendment as plead (sic) in this affidavit for purpose of conserving the properties in form of conservatory orders"***.

In paragraph 11 of the same replying affidavit, the 1<sup>st</sup> defendant/respondent also denies having transferred the suit land to the 2<sup>nd</sup> defendant/respondent.

The 2<sup>nd</sup> defendant/respondent did not file any replying affidavit nor oppose the application in any manner though duly served.

In the course of considering this application, I did notice what was referred to as a notice by the 1<sup>st</sup> defendant/respondent to withdraw the said replying affidavit. Neither of the two defendants/respondents attended the Court on 28<sup>th</sup> September 2015 when the application came up for inter-parte hearing.

I have considered the application and it is clear from the 1<sup>st</sup> defendant/respondent's replying affidavit that the same is not opposed and is infact conceded as per paragraphs 21 and 22 of the replying affidavit. In the circumstances, I grant prayers 3 and 5 of the plaintiff/applicant's Notice of Motion dated 13<sup>th</sup> June 2015. Prayer No. 6 will have to await the full hearing. I must point out to plaintiff/applicant's counsel that the said Notice of Motion did not cite the provisions under which it is founded and while the Court can excuse this lapse where litigants are acting in person, counsels should always cite the law under which the Court is moved.

Costs shall be in the cause.

COURT: Ruling delivered this 9<sup>th</sup> day of October, 2015 in open Court.

Mr. Kiarie for Plaintiff/Applicant absent

Mr. Abubakar for Mr. Ndana for Defendant/Respondent present.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> OCTOBER, 2015**