



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 1142 OF 2013**

**JOSEPH WAMBUA MULUSYA.....APPLICANT**

**VERSUS**

**DAVID KITU A.K.A DAVID NZIOKA..... 1<sup>ST</sup> RESPONDENT**

**THE ESTATE OF NZIOKA MUINDE (DECEASED).....2<sup>ND</sup> RESPONDENT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 27<sup>th</sup> September 2013 in which the Plaintiff/Applicant sought for orders of injunction restraining the Respondents from entering into or in any way interfering with the Plaintiff/Applicant's parcel of land known as Kangundo/Kitwii/364 (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and an order of injunction restraining the Kangundo Land Control Board from approving any application for consent to transfer the suit property. The Plaintiff/Applicant also seeks for orders stopping the lower court proceedings in **Machakos CMCC No. 44 of 2009** stopped and for costs of this Application provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Joseph W. Mulusya, sworn on 27<sup>th</sup> September 2013 in which he averred that the suit property belongs to him, having purchased it in September 1988 from the bona fide administrators of the estate of the Late Nzioka Muinde being Mbinya Nzioka (first wife of Nzioka Muinde) and Angelina Wanza John (daughter of Nzioka Muinde) both of whom are now deceased. In support of this assertion, the Plaintiff exhibited an unregistered Transfer duly signed by those administrators. He further averred that he and his family have lived on the suit property since then to date, a period of over 22 years. He further averred that he has made serious developments and investments in the suit property including a permanent home. He further averred that he has since learnt that one Mr. David Kitu alias David Nzioka, one of the sons of the late Nzioka Muinde, has applied to the Land Control Board Kangundo seeking consent to transfer the suit property to a company known as Milhaven Enterprises Ltd. He further averred that the said David Kitu alias David Nzioka fraudulently obtained grant of letters of administration for himself and on behalf of the other beneficiaries under **Succession Cause No. 37 of 1989** in Machakos High Court and a title deed in respect of the suit property and that the other rightful beneficiaries had filed an objection seeking for revocation or annulment of that grant.

The Application is contested. The 1<sup>st</sup> Defendant/Respondent, David Kitu, filed his Replying Affidavit

sworn on 12<sup>th</sup> November 2013 in which he averred that he is the duly registered proprietor of the suit property and that his title was indefeasible. He exhibited a copy of his title deed. He also stated that the said title was granted by the Machakos Land Registrar pursuant to the confirmation of grant granted by the same court on 19<sup>th</sup> June 2006. He further stated that there has not been any revocation of the said title in pursuance to any court order issued to that effect and its validity is therefore beyond reproach. He further averred that the Plaintiff purported to purchase the suit property from Angelina Wanza John who is now deceased and who had no capacity to dispose of the suit property. He further stated that the Plaintiff/Applicant should not have proceeded to develop the suit property as he had done and that this does not constitute proprietorship. He further stated that it is in the interest of justice that he be allowed to enjoy all the rights and interests that accrue to a proprietor of land without any inhibition whatsoever.

In response thereto, the Plaintiff/Applicant filed his Further Affidavit sworn on 22<sup>nd</sup> November 2013 in which he averred that at the time Mbinya Nzioka and her daughter Angelina Wanza John sold the suit property to him they held a valid certificate of Confirmation of Grant of Letters of Administration of the Estate of the late Nzioka Muinde under **Succession Cause No. 2 of 1987**. He further stated that the 1<sup>st</sup> Defendant/Respondent was issued with title deed over the suit property fraudulently on 25<sup>th</sup> July 2008 which was close to 20 years after he bought, occupied and developed his permanent home on the suit property and established a model horticultural farm there. He further added that summons to revoke the grant issued to the 1<sup>st</sup> Defendant/Respondent was pending in Succession Cause No. 37 of 1989 therefore his title was not valid and indefeasible. He further stated that the title held by the 1<sup>st</sup> Defendant/Respondent was fraudulently acquired and that the truth would be established at the full hearing of this suit.

In response thereto, the 1<sup>st</sup> Defendant/Respondent David Kitu filed his Further Replying Affidavit sworn on 3<sup>rd</sup> December 2013 in which he confirmed that the grant issued to Mbinya Nzioka and Angelina Wanza dated 13<sup>th</sup> March 1987 was annulled before Justice E.N. Torgbor and that this was the only basis of the Plaintiff/Applicant's claim over the suit property. He further stated that the net result was that the Plaintiff/Applicant has never bought any land from any purported administrators and if he has, then the purported sale became void when the said confirmation of grant was annulled. He further averred that the Plaintiff/Applicant is not a beneficiary of the estate of the late Nzioka Muinde and was not recognized as a beneficiary thereof in the said confirmation of grant. He further averred that the said confirmation of grant was obtained after a long succession dispute between himself as the legal representative of Loko Nzioka and the late Angelina Wanza John as the legal representative of Mbinya Nzioka in **Succession Cause No. 37 of 1989**. He further indicated that there has not been any revocation of the aforesaid title in pursuance to any court order and therefore its validity is therefore beyond reproach.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”**

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

**“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

To establish a *prima facie* case, the Plaintiff/Applicant must have shown that he has an interest in the suit property which has apparently been infringed by the opposite party as to call for an explanation or rebuttal. Looking at the facts of this case, the Plaintiff has asserted that he is the owner of the suit property. To support his assertion, he has produced to this court an unregistered transfer document duly executed by himself on the one hand as well as one Mbinya Nzioka and Angeline Wanza John, both of whom I am now informed are deceased. According to the Plaintiff, those two individuals transferred the suit property to him in their capacity as the administrators of the estate of the late Nzioka Muinde. Apparently, the Plaintiff/Applicant did not lodge that Transfer for registration and a title deed was never issued in his name. It is now an undisputed fact that the grant of letters of administration to those two individuals was subsequently revoked and a fresh grant of letters of administration over the same estate was issued to the 1<sup>st</sup> Defendant/Respondent who is now the registered proprietor of the suit property on his own behalf and also in trust for the other beneficiaries of the said estate. He produced a copy of the title deed to the suit property in his name. The Plaintiff has asserted that the title deed held by the 1<sup>st</sup> Defendant/Respondent was obtained by way of fraud and is therefore invalid. This assertion has been vehemently opposed by the 1<sup>st</sup> Defendant/Respondent who stated that there has been no court order to that effect issued by the court and that therefore his title deed remains valid and indefeasible. Whether or not the title deed held by the 1<sup>st</sup> Defendant/Respondent is valid or not is an issue to be determined at the full hearing of this suit. For now, I seek to rely on the provisions of **section 26 (1) of the Land Registration Act** states as follows:

**“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –**

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

As I mentioned earlier, whether or not the title deed produced by the 1<sup>st</sup> Defendant/Respondent was obtained fraudulently is an issue that will be canvassed at the full trial of this suit. I am therefore not able to make a finding on that issue at this juncture. For now, I acknowledge that the 1<sup>st</sup> Defendant/Respondent has produced a copy of his title deed to the suit property. According to the legal provision cited above, this court is duty bound to hold that this is prima facie evidence that he is the absolute and indefeasible owner thereof. The Plaintiff/Applicant has not produced a similar title document but only produced an unregistered transfer which definitely does not confer any proprietary rights. I therefore hold that the Plaintiff/Applicant has not established a prima facie case with high chances of success at the main trial.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

**“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”**

In light of the foregoing, I hereby dismiss the Plaintiff’s Application with no order as to costs.

**SIGNED AND DELIVERED AT NAIROBI THIS 6 DAY OF JUNE 2014**

**MARY M. GITUMBI**

**JUDGE**