



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

**ELC CASE NO. 621 OF 2013**

ANN NJOKI NJUKI .....  
PLAINTIFF

VERSUS

NJERU MITABO ..... 1<sup>ST</sup>  
DEFENDANT

STEPHEN MUGENDI NJIRU ..... 2<sup>ND</sup>  
DEFENDANT

**RULING**

By his plaint filed herein on 3<sup>rd</sup> July 2013, the plaintiff/applicant sought orders that the two defendants/respondents be compelled to transfer two (2) acres out of parcel No. KYENI/KIGUMO/795. The claim was premised on the pleading that the plaintiff/applicant's late husband GICOB I WARIGI had vide an agreement dated 22<sup>nd</sup> February 1979 purchased two acres out of the said property (hereinafter the suit property) from the 1<sup>st</sup> defendant on which they have lived for the past 32 years. However, the 1<sup>st</sup> defendant had not yet transferred the said two acres to the plaintiff's husband by the time he died and she has now discovered that the suit property has been transferred to the 2<sup>nd</sup> defendant hence this suit.

The two defendants filed a joint defence in which it is alleged, inter alia, that there was no privity of contract between the plaintiff and 1<sup>st</sup> defendant and in any case, this suit is sub-judice as there is pending at the High Court Civil Appeal NO. 131 of 2012. Further, as there was no consent for the transfer, an order for specific performance is not available to plaintiff.

The plaintiff/applicant has now moved this Court for orders of injunction to restrain the defendants/respondents, their servants, agents or otherwise from interfering, dealing with, cultivating, harassing, transferring, trespassing or changing the status quo of the suit property until this suit is heard and determined. That application is the subject of this ruling.

The said application is supported by the plaintiff/applicant's affidavit and in opposition thereto, Mr. Njiru advocate for the defendants has filed grounds of objection including that since there was no consent to transfer, an order for specific performance cannot be granted and in any event, since the said agreement is dated 22<sup>nd</sup> February 1979, it is time barred and no orders for specific performance can be granted based on it and finally, the suit is frivolous and an abuse of the Court process.

I have considered the application, the supporting affidavit and other annexures as well as the objections thereto.

Among the objections raised is that this suit is time barred because it is founded on an agreement signed in 1979 and in any case, there was no consent to transfer the land. I have considered the said objections and it is clear from the plaint that apart from relying on the sale agreement between her late husband and the 1<sup>st</sup> defendant, the plaintiff is pleading that she has become entitled to the suit property by adverse possession (paragraph 19 of the plaint). Therefore, the issue before the Court is not simply an issue of an agreement. Indeed from the documents herein, it would seem that there is already a judgment in favour of the plaintiff's deceased husband over the suit property in CIVIL SUIT NO. 37 of 2011 RUNYENJES COURT and also a judgment in favour of the plaintiff against the 2<sup>nd</sup> defendant herein in EMBU CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 256 of 2012 which gave rise to HIGH COURT CIVIL APPEAL NO. 131 of 2012 EMBU.

Being an application for injunction, the same has to be determined within the guidelines set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are that the applicant has to show that he has in his favour a prima facie case with reasonable chances of success and that if the application is not granted, he will suffer irreparable loss that may not be compensated in damages and finally, if in doubt, the Court will decide the application on a balance of convenience. A further principle in considering whether or not to grant an injunction was identified by Justice Hoffman in **FILMS ROVER INTERNATIONAL 1986 3 ALL. E.R. 772** where the Judge said that the Court should take whichever course appears to carry the lower risk of injustice.

Bearing the above in mind, it is clear from the material placed before me that the suit property was originally registered in the names of the 1<sup>st</sup> defendant who gifted it to the 2<sup>nd</sup> defendant on 20<sup>th</sup> November 2012. On the face of it, it could be argued that being the registered owner of the suit property, the 2<sup>nd</sup> defendant cannot be enjoined. However, the 2<sup>nd</sup> defendant's registration as the owner of the suit property is not above board. In EMBU HIGH COURT CIVIL APPEAL NO. 131 of 2012 wherein the 2<sup>nd</sup> defendant was trying to restrain the plaintiff from burying her late husband on the suit property, Lady Justice Ong'udi questioned how the suit property had been registered in the names of the 2<sup>nd</sup> defendant herein and even directed the District Criminal Investigation Officer to investigate the issue and file a report within 14 days from 7<sup>th</sup> March 2013. It is not clear if that report was even filed or if indeed the matter was investigated as directed. What is clear however is that the plaintiff herein was allowed to bury her late husband on the suit land. In her ruling in that case, the Judge observed that the plaintiff and her late husband had known the suit land as their "**home for over 30 years**".

Similarly, in RUNYENJES PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 37 of 2011, an attempt by the 1<sup>st</sup> defendant herein to remove a caution that the plaintiff's deceased husband had placed on the suit land was dismissed and the Court went on to rule that the said caution should not be removed until the interest of the plaintiff's deceased husband over the 2 acres of land he had purchased from the suit land was heard and determined. It is clear therefore that although the 2<sup>nd</sup> defendant is the registered proprietor of the suit land, the plaintiff and her late husband have lived thereon for a considerable period of time and in fact the plaintiff's deceased husband is buried thereon and in the circumstances, the plaintiff has established a prima facie case with a probability of success over a portion (2 acres) of the suit property. She therefore deserves of the order of injunction.

On the second principle in the **GIELLA** case (supra), it is clear that the plaintiff's late husband is buried on a portion of the suit land and it is obvious that if the defendants were to alienate the same, the damage to the plaintiff would not be compensable by an award of damages.

I need not go further than that but even if this case was to be determined on a balance of convenience, the scales would tilt in favour of the plaintiff who has been in occupation of part of the suit land and which is the only home she has known as Ong'udi J. observed earlier. The lower risk of injustice dictates that I grant the injunction sought herein.

Ultimately therefore, having considered all the material before me, I grant the orders of injunction sought in the plaintiff/applicant's Notice of Motion dated 24<sup>th</sup> MARCH 2014.

Costs to the plaintiff/applicant.

**B.N. OLAO**

**JUDGE**

**11<sup>TH</sup> JULY, 2014**

11/7/2014

Before

B.N. Olao – Judge

Mwangi – CC

Plaintiff – present

Defendant – absent

COURT:

Ruling delivered this 11<sup>th</sup> day of July 2014 in open Court.

Plaintiff/Applicant present

Defendant/Respondent absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**11<sup>TH</sup> JULY, 2014**