



**REPUBLIC OF KENYA**

**High Court at Embu**

**Civil Appeal 131 of 2012**

**STEPHEN MUGENDI NJIRU.....APPELLANT/APPLICANT**

**VERSUS**

**ANN NJOKI.....RESPONDENT**

***(Being an Appeal from the Judgment of R.O. OIGARA Ag. Senior Principal Magistrate Embu***

***in CMCC 256 of 2011 on 21<sup>st</sup> December 2012)***

**R U L I N G**

This is the Notice of Motion dated 28<sup>th</sup> December 2012 brought under Order 40 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicant seeks an order of temporary injunction restraining the Respondent, her agent, servants, employees etc from burying the body of Gicobi Warigi on the appellants land parcel No. KYENI/KIGUMO/975 until the hearing and determination of the appeal.

It is supported by the grounds and supporting affidavit of the applicant. In it he states that this land was bequeathed to him by his grandfather. The Respondent herein has filed a long replying affidavit explaining how she and the deceased GICOB I WARIGI came to be in possession of the land. She has annexed a sale agreement, consent for subdivision from the Land Control Board, Judgment from Runyenjes Court plus a Judgment from Embu Chief Magistrate's Court.

The parcel of land in issue is KYENI/KIGUMO/795 and not KYENI/KIGUMO/975. There is a mention of a Nyeri High Court civil case but I have not seen any official document from that court confirming the position in Nyeri HCCC No. 333/86.

From what is before me it is clear that NJERU MITAMBO being the proprietor of Land Parcel No. KYENI/KIGUMO/795 entered into an agreement to sell to GICOB I WARIGI (deceased) 0.8 hectares out of this parcel of land. Gicobi Warigi was put into possession and that is where he has lived with his family. There is evidence of an application for consent and the actual consent granted by the Land Control Board for subdivision on 15/8/1979. Njeru Mitabo never subdivided the land.

The deceased herein placed a caution on this land. And on 5/8/2011 Njeru Mitabo filed a civil case No. 37/2011 at the Principal Magistrate's Court Runyenjes against the deceased Gicobi Warigi. The said case was fully heard and a judgment delivered on 22/11/2012. The Judgment clearly states that the plaintiffs suit was dismissed with costs. And that ***“ THE CAUTION SHALL NOT BE LIFTED UNTIL THE INTEREST OF THE DEFENDANT OVER THE 2 ACRES OF THE SUIT LAND HAVE BEEN CLEARED AND FINALISED ”***. This judgment has not been appealed against and neither has this judgment been set aside.

And on 4/12/2012 the appellant/applicant herein filed Embu CMCC No.256/2012, against the Respondent after the death of Gicobi. His claim was heard and so was the respondent's. A judgment dismissing it was delivered on 21<sup>st</sup> December 2012. This is what has given rise to the present appeal and application.

I can see in this file, documents reflecting copies of the Land Register. In spite of the fact that Njeru Mitabo had filed a suit at Runyenjes for removal of a caution, and Judgment was to be delivered on 22/11/2012, the said Njeru Mitabo was at the Lands office transferring the whole parcel to the applicant herein giving rise to the title deed issued to the applicant on 28/11/2012. As at 20/11/2012 the caution was still intact and the said Njeru Mitabo could not transact any dealings on this land.

The caution has to date not been lawfully lifted by virtue of the judgment delivered on 22/11/2012 by Runyenjes Court. The conduct of Njeru Mitabo who happens to be the applicant's grandfather is quite suspect. The District Land Registrar's office Embu has its share of blame in this.

This being the position would it be said that the principles in the **GIELLA VS CASSMAN BROWN CASE** for an injunction have been proved/established? I am afraid not. He who comes to equity must come with clean hands. And from the discourse above it is clear that the Respondent wishes to bury her late husband at a place they have known as home for over 30 years. The judgment from Runyenjes Court explains it all. It has not been set aside.

I also direct the DCIO Embu to investigate this issue and find out how this transaction between Njeru Mitabo and the applicant was carried out at the Land Registrar's office Embu when there was a pending judgment at Runyenjes Court vide Civil case No. 37/2011. And further how the Land Registrar Embu issued a title deed to the applicant in spite of the wording of the judgment delivered on 22/11/2012 by Runyenjes Court.

The DCIO's report to be filed within 14 days. I therefore dismiss the application dated 28/12/2012 with costs. The Respondent is allowed to go ahead and bury her deceased husband as earlier planned. The OCS Runyenjes to ensure this is done without any interference.

Costs to the Respondent. Right of appeal explained.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 7<sup>TH</sup> DAY OF MARCH 2013.**

**H.I. ONG'UDI  
JUDGE**

**In the presence of:-  
Both parties  
Njue CC**