



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CIVIL SUIT NO. 639 OF 2011**

**PETER NJUGUNA BACHA.....**

**DAVID WAHOME BACHA .....**

**PATRICK NDUNG’U BACHA..... PLAINTIFFS**

**SCHOLASTICA NDUTA BACHA.....**

**-VERSUS-**

**JAMES BACA WAHOME.....1<sup>ST</sup> DEFENDANT**

**RAHAB WANJIRU GATHARA.....2<sup>ND</sup> DEFENDANT**

**PETER THUKU GATHARA.....3<sup>RD</sup> DEFENDANT**

**RULING**

The plaintiffs have filed the instant suit seeking a permanent injunction restraining the defendants from selling, charging, leasing and/or interfering in any manner with the land Parcel Number Ngenda/Karuri/714 and a further order compelling the 1<sup>st</sup> defendant to subdivide what they describe as ancestral land among the beneficiaries.

The Notice of Motion filed contemporaneously with the plaint on 27<sup>th</sup> September, 2012 seeks the following substantive order:-

***That a temporary order do issue restraining the defendants/respondents by themselves, their agents, servants or any other person or entity claiming under them from entering upon that parcel of land known as Title No. Ngenda/Karuri/714 from taking possession, alienating, constructing, selling, transferring, disposing of, or dealing in any way or manner with all that property known as***

***Ngenda/Karuri/714 pending hearing and determination of this application interpartes.***

The other order the applicants have sought in the application is that the orders hereto be enforced by the OCS Gatundu Police station by arresting and charging any person contravening the orders hereto. The foundation of the application inter alia is that the plaintiffs contend to be the lawful beneficiaries and bona fide true owners of the suit property it being their only ancestral land. The plaintiffs further contend the 1<sup>st</sup> defendant who is their father has refused to subdivide the suit property amongst themselves. The plaintiffs further aver that their father is showing the land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and other strangers with the intention of disposing the property without consulting them and further contend they stand to suffer irreparable harm/damage unless an order of restraint is issued to forestall the disposal of the property. The plaintiff's application is further supported by the supporting affidavit sworn by Peter Njuguna Bacha on 25<sup>th</sup> September, 2012.

The defendant for his part has sworn a replying affidavit dated 15<sup>TH</sup> November, 2012 in opposition to the plaintiff's application. The defendant has deponed that he is the legal owner of the suit property and that he got the land from his grandfather and that he did not inherit the land from his father. Infact he avers his father filed a suit against him vide Kiambu CC No. 195 of 1971 claiming the land but the suit was decided in his (1<sup>st</sup> defendant's) favour but he opted to give a portion of a1 Acre to his father. The 1<sup>st</sup> defendant avers that he has notified his children including the plaintiffs about his intention to subdivide and dispose some portion of the land to meet his needs. He deponed that the subdivision takes into account all his children and contends that the plaintiffs have no basis to stand in the way to prevent him to carry out his wishes.

The parties, the plaintiffs and 1<sup>st</sup> Defendant have filed written submissions reiterating their respective position and it is the plaintiff's burden to demonstrate they have a prima facie case and that they stand to suffer irreparable damage should the injunction not be granted as prayed. The plaintiff's case is hinged on their claim that they are beneficiaries of what they claim to be ancestral land that is registered in the name of their father who is the 1<sup>st</sup> Defendant. The 1<sup>st</sup> defendant has deponed that the subject land was not bequeathed to him by his father and that the same cannot be said to be ancestral land. This averment by the 1<sup>st</sup> defendant has not been disputed by the plaintiffs.

More significantly however, is that the 1<sup>st</sup> defendant is the registered absolute proprietor of the subject property and as per Section 28 of the Registered Land Act Cap 300 Laws of Kenya (now repealed and replaced by the Registration of Land Act 2012) the rights of a proprietor are indefeasible.

Section 28 of Registered Land Act Provides thus:-

***28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject:-***

- a. ***To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register and***
- b. ***Unless the contrary is expressed in the register, to such liabilities rights and interests as affect the same and are declared by Section 30 not to require noting on the register.***

***Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.***

The 1<sup>st</sup> Defendant is not registered as a trustee of the subject land for the plaintiffs and is in the face of Section 25 of the Registration of Lands Act 2012 (which replaced Section 28 Registered Lands Act) entitled to exercise all the rights of a proprietor. The plaintiffs in my view are attempting to force the 1<sup>st</sup> Defendants who is their father to subdivide and distribute the subject property in some specific manner.

The 1<sup>st</sup> defendant is still alive and he is entitled to deal with his subject property in any manner he chooses provided he abides by the law. The 1<sup>st</sup> defendant has denied that he has any intention of evicting the Plaintiff or any of Children and has infact stated that it is his wish to provide for all his children when he subdivides his parcel of land.

Having regard to all the facts and evidence tendered by the parties I am not persuaded that the plaintiffs have demonstrated that they have a prima facie case with a probability of success. The plaintiffs have also not demonstrated that they stand to suffer any irreparable loss/damage if the injunction is not granted.

Before I conclude this ruling I need to say something respecting the applicant's prayers in the Notice of Motion application. Prayer No. 2 of the Notice of Motion seeks an injunction pending the hearing and determination of this application interpartes. Even if the court, were to find the application merited and granted the prayer as prayed the order would not take effect as it would lapse immediately the court finished reading and signing the ruling. This in my view is a fatal defect as it would amount to the court granting an order in vain. In the premises I find the plaintiffs application for injunction to be devoid of any merit and I order the same dismissed with costs to the defendants.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF JULY 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the Defendants