



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**ENVIRONMENT AND LAND COURT**  
**ELC CASE NO. 542 OF 2013**

JAMES MUNENE NDUMBI ..... PLAINTIFF

VERSUS

ANTHONY WACHIRA NDUMBI ..... DEFENDANT

**RULING**

This is in respect to the plaintiff/applicant's Notice of Motion dated 7<sup>th</sup> May 2013 and filed in Court on the same day seeking orders that the defendant/respondent by himself, his agents and or servants be restrained by way of temporary injunction as against denying the plaintiff/applicant user and access to plot No. 1640 Kagumo Town and/or denial of Safaricom agents from access to the booster therein and/or committing any acts of waste or construction on the subject land parcel pending hearing and determination of the suit.

The application is supported by the applicant's affidavit in which he depones, inter alia, that he and the defendant are the registered owners of plot

No. 1640 situated at Kagumo Town. A certificate of the lease certificate is annexed to the said affidavit in which he goes on to state that he has developed the property with the consent of the family having acquired the same through Succession. However, the defendant has now turned hostile and even denied access to the Safaricom workers to the booster located between that plot and another plot No. 1639 which is registered in his names. The defendant is also committing acts of waste on the property.

The application is opposed and in his replying affidavit, the defendant/respondent depones, inter alia, that following the death of their father, he and his other brother MACHARIA NDUMBI were registered joint owners of the property MUTIRA/KAGUYU/1640 in equal shares and the two agreed that plaintiff/applicant would buy out MACHARIA NDUMBI by paying him Ksh. 300,000/=. He was however surprised to learn later that infact MACHARIA NDUMBI had transferred his share to the plaintiff without his knowledge. The plaintiff then had a road of access curved through the property without informing him.

Counsels for both parties have filed their submissions which I have considered together with the rival affidavits and other annextures.

This being an application for injunction, it is to be considered in light of the principles set out in the case of GIELLA VS CASSMAN BROWN LTD 1973 E.A 358 and which are:-

1. *The Court must be satisfied that the applicant has established a prima facie case with the*

***probability of success***

2. ***The Court must be satisfied that unless the injunction is granted, the applicant would suffer irreparable injury which is uncompensable in damages and,***
3. ***If in doubt, the Court will determine the application on a balance of convenience.***

It is not in dispute that the parties herein are jointly registered as proprietors of the property in dispute which is plot No. 1640 Kagumo and is also described as MUTIRA/KAGUYU/1640 in the certificate of lease annexed to the plaintiff/applicant's supporting affidavit. At this point it is not clear whether their ownership of the property is as joint tenants or tenants in common. What is not in dispute is that both are registered as owners of the said property and are both in occupation. None of the parties can claim a superior title to the property. In the circumstances, the Court cannot injunct either of them from using the land and I find it difficult to comprehend the plaintiff/applicant's claim that the defendant/respondent is wasting the property which he too has an interest in. clearly, the plaintiff/applicant has failed to surmount the first hurdle as laid down in the ***GIELLA*** case (supra).

The applicant having failed to satisfy the first principle in the aforesaid ***GIELLA*** case (supra), I see no need to consider the matter any further. I therefore find the applicant's Notice of Motion dated 7<sup>th</sup> May 2013 to be lacking in merit and the same is dismissed with costs.

**B.N.OLAO**

**JUDGE**

**8<sup>TH</sup> OCTOBER, 2013**

8/10/2013

Coram

B. OLAO – Judge

CC – Muriithi

Mr. Ngangah for Applicant - absent

Mr. Mwai for Thungu for Respondent – present

COURT: Ruling delivered this 8<sup>th</sup> day of October 2013 in open Court.

**B.N. OLAO**

**JUDGE**

**8<sup>TH</sup> OCTOBER, 2013**