



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MURANG'A**  
**ELCA NO. 8 OF 2018**

SAMSON NONO GACHAU.....1<sup>ST</sup> APPELLANT

GEORGE MUCHAI NJOROGE.....2<sup>ND</sup> APPELLANT

VS

GRACE NJERI NDOHO.....1<sup>ST</sup> RESPONDENT

JAMES MWANGI GACHANJA.....2<sup>ND</sup> RESPONDENT

VIRGINIA WAIRIMU NDOHO.....3<sup>RD</sup> RESPONDENT

**(An appeal arising from the Ruling and orders of the Hon D. Orimba SPM**

**delivered on the 24/7/14 in Kigumo PMCC No 48 of 2014).**

**RULING**

1. In the Resident Magistrates Court, the Plaintiffs (now Respondents) filed suit against the Defendants (Appellants) on the 23/4/14 seeking a declaration that they are entitled to ½ share of Parcel LOC13/GITHUMU/1604 (suit land) as well as orders of cancellation of entries in the suit land and registered the suit land in the name of the 1<sup>st</sup> Plaintiff.
2. Simultaneously, the Plaintiffs filed a notice of motion seeking interalia orders of injunction restraining the Defendants jointly and severally their employees servants or agents from selling transferring and interfering with the suit land pending the hearing and determination of the suit.
3. In resisting the notice of motion, the Defendants filed a Preliminary Objection on the grounds that the Court lacked jurisdiction to hear the matter and secondly that the suit was incompetent and bad in law.
4. With the consent of the parties and the concurrence of the Court the Preliminary Objection and the Notice of Motion were heard and determined together. In his ruling rendered on the 24/7/14 the learned magistrate dismissed the Preliminary Objection and upheld the Notice of Motion.
5. Being aggrieved with the ruling the Appellants proffered this appeal summarized as follows;
  - a. The lower Court had no jurisdiction over the land dispute which should be in the Environment and Land Court.
  - b. The Learned Magistrate misdirected himself in placing reliance on Practice directions as issued by the Chief Justice vide Gazette Notice No 16268 (practice direction No. 7) which contravened Art 162 (2) of the constitution.
  - c. The learned magistrate erred in deciding a matter that was best suited for the succession Court
  - d. The Learned magistrate erred in fact and in law in finding that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had met the threshold for granting injunctive orders.
6. Parties elected to canvass the appeal by way of written submissions which I have read and considered.

7. It is on record that the appellants withdrew their appeal on the matter of the preliminary objection on grounds that the same has been overtaken by events given the holding of the Supreme Court in the case of **The Law society of Kenya Nairobi Branch Vs Malindi Law Society & 6 Others (2017) EKLR** where the apex Court held that the magistrates Courts have jurisdiction to hear and determine land matters subject to their pecuniary jurisdiction. This ground is therefore moot.

8. The key issue for determination therefore shall be whether the magistrate erred in granting the injunctive orders as he did.

9. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are: that firstly, an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience. The Court of Appeal in **Mbao vs First American Bank of Kenya Ltd & Two Others C.A. No. 39 OF 2002 (2003 eKLR)** defined a prima facie case in the following terms;

“A prima facie case in a civil application include 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”.

10. Did the Respondents show a prima facie case with a probability of success? The background of the case as set out in the pleadings is that the suit land is a subdivision of parcel No LOC3/GITHUMU/902 which belonged to the deceased husband of the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant. Upon the succession of his estate the suit land devolved to the widows to hold jointly. I have been invited to look at the confirmed grant on record which regrettably is illegible and am not able to decipher anything from it. The existence of the confirmed grant is not in contestation. The 2<sup>nd</sup> Plaintiff claims a share of the family land while the 1<sup>st</sup> Plaintiff lays claim on the land based on joint ownership. It is their case that the 1<sup>st</sup> Defendant through illegal and fraudulent connivance with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants transferred the suit land to the 2<sup>nd</sup> Defendant without the consent of the 1<sup>st</sup> Plaintiff. The Plaintiffs pleaded fraud.

11. The Defendants hold the position that since the suit land was owned jointly, the 1<sup>st</sup> Defendant simply transfer her ½ share entitlement to the 2<sup>nd</sup> Defendant who in turn sold to the 3<sup>rd</sup> Defendant.

12. The fact of the joint ownership of the suit land parcel No 902 between the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Defendant gives the 1<sup>st</sup> Plaintiff a prima facie case for determination at the trial. The Plaintiffs are questioning the manner in which the 2<sup>nd</sup> Defendant disposed of interest in land that had hitherto been held jointly without the consent of the co-owner. Whether it will succeed or not is for the trial Court to determine. The 1<sup>st</sup> limb succeeds.

13. In respect to adequacy of damages as compensation the Court of Appeal in the case of **Muiruri Vs Bank of Baroda (Kenya) Ltd 2001 e K L R 183** had this to say;

“besides, disputes over land in Kenya evoke a lot of emotions and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”.

This is such a case that damages may not compensate the Applicant adequately.

14. Is the Court in doubt? The balance of convenience tilts in granting the injunction for the preservation of the subject matter of the suit. This Court is empowered under section 63 of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules, upon which I uphold the decision of the learned Magistrate. I see no reason to disturb the decision of the learned Magistrate save to say that he fell in error in not giving the reason for the decision.

15. In the end the appeal is bereft of merit. It is dismissed with costs to the Respondents.

**16. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 23<sup>RD</sup> SEPTEMBER 2019.**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Ms Njoka HB for Ms Mwanzile for the 1<sup>st</sup> & 2<sup>nd</sup> Appellants

Malenya HB for Kirubi for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

3<sup>rd</sup> Respondent – Absent

