



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC CASE NO.54(B) OF 2018**

**KATULU KIMILU MBINDYO (Suing as the legal representative**

**of the estate of MBINDYO MUSYOKI).....PLAINTIFF/APPLICANT**

**-VERSUS-**

**PETER KIOKO KIMILU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**HILLARY KYENGO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. What is before this Court for ruling is the Plaintiff's/Applicant's Notice of Motion application expressed to be brought under Section 3A of the Civil Procedure Act, Order 40 of the Civil Procedure Rules and all other enabling provisions of the law for orders: -

**1) Spent.**

**2) THAT a temporary injunction do issue restraining the defendants/respondents from interfering and/or dealing with MAKUENI/KAKUTHA/1164 (herein after called the suit land) pending hearing and determination of this suit.**

**3) THAT a permanent injunction do issue against the respondents from interfering and/or trespassing, dealing with MAKUENI/KAKUTHA/1164.**

**4) THAT cost of this application to be in the cause.**

The application is dated 28<sup>th</sup> April, 2018 and was filed in court on the 25<sup>th</sup> May, 2018. It is predicated on the grounds on its face and is supported by the supporting affidavit of Katulu, the Plaintiff/Applicant herein, sworn at Nairobi on 28<sup>th</sup> April, 2018.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents have opposed the application vide their replying affidavits both sworn at Nairobi on 19<sup>th</sup> November, 2018 and filed in court on even date.

3. There is a further affidavit by Lukas Kimeu Kisungo sworn at Nairobi on 19<sup>th</sup> November, 2018.

4. The Plaintiff/Applicant and the Defendants/Respondents have filed their respective submissions pursuant to the court's directions to dispose off the said application by way of submissions.

5. In paragraphs 1, 2, 3 and 4 of her supporting affidavit, the Plaintiff/Applicant has deposed that she is the legal representative of the estate of Mbindyo Musyoki (deceased) as can be seen from a copy of limited grant of letters of administration ad litem (KKM1), that land parcel number Makueni/Kakutha/1164 is registered in the name of Mbindyo Musyoki as can be seen from the certificate of official search (KKM2), that the registered owner died intestate leaving behind four widows and 21 children all from five houses and that the 1<sup>st</sup> Respondent who is her son has illegally and without any color of right sold the aforementioned parcel of land to the 2<sup>nd</sup> Respondent who is residing on the said parcel of land number Makueni/Kakutha/1164.

6. In his replying affidavit, the 1<sup>st</sup> Respondent has deposed in paragraphs 3, 4, 18 and 19 of his affidavit that the application is misconceived, bad in law, an abuse of the court process and ought to be dismissed with costs, that land parcel number Makueni/Kakutha/1164 is registered in the name of Mbindyo Musyoki who is his grandfather, that there is Makueni succession cause No.157 of 2018 in respect of the deceased's estate and that the main issue in dispute is the determination of rightful heirs and dependants, if any, of the estate of the deceased.

7. The 2<sup>nd</sup> Respondent has deposed in paragraph 9 of his replying affidavit that he has never bought land from the 1<sup>st</sup> Respondent and nor does he reside on the suitland or wasting it.

8. The Counsel for the Applicant framed four issues for determination namely:-

**1) Whether the 1<sup>st</sup> Defendant had legal authority to sell and/or transfer the suit property to the 2<sup>nd</sup> Defendant.**

**2) Whether the 2<sup>nd</sup> Defendant has a legal right to occupy the suit property.**

**3) Whether the Plaintiff is entitled to be awarded interest and general damages against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.**

**4) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be condemned to punitive damages for their actions in relation to the estate of the deceased.**

9. On the other hand, the Counsel for the Respondents have submitted that in order for the order of injunction to be granted, the Applicant must satisfy the three principles enunciated in ***Giella vs. Cassman Brown & Co. Ltd. [1973] EA 358***. The Respondent's Counsel pointed out that in light of the succession cause No.157 of 2018, it is only fair that this suit be stayed and the order of status quo be maintained.

10. Having read the application together with the replying affidavits as well as the submissions filed, my finding is that this being an application for interlocutory injunction, the Applicant herein must satisfy the three principles set out in the aforementioned ***Giella vs. Cassman Brown's*** case (supra). I do note that the Counsel for both parties in their submissions largely dwelt on the merits of succession proceedings. In my view, those arguments are better directed to the court with appropriate jurisdiction to handle Probate and Administration. Be that as it may, I do note that even though the Applicant has letters of limited grant ad litem (KKM1) to enable her file and prosecute suit, she has not demonstrated that she has a prima facie case with probability of success. She has also not shown that she will suffer irreparable injury that cannot adequately be demonstrated by an award of damages. In any case, the Applicant is required to satisfy the principles set out in *Giella's* case (supra) sequentially. In the case of ***Kenya Commercial Finance Co. Ltd. Afraha Education Society [2001] eKLR*** it was held that;

*“the sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first is satisfied.”*

11. My finding is that the application lacks merit. I will dismiss it and since the parties herein are more or less related, I direct that each one of them shall bear their costs.

**Signed, Dated and Delivered at Makueni this 07<sup>th</sup> day of October, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Muthiani holding brief for Mr. Mutavi for the Defendants/Respondents

No appearance for the Plaintiff/Applicant

Ms. C. Nzioka – Court Assistant

**MBOGO C. G., JUDGE,**

**07/10/2019.**