



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 360 OF 2017**

**JANE NJERI NJENGA.....1<sup>st</sup> PLAINTIFF/APPLICANT**

**MARGARET WANJIRU GATHUA.....2<sup>nd</sup> PLAINTIFF/APPLICANT**

**PERIS WAMAITHA KIGWA.....3<sup>rd</sup> PLAINTIFF/APPLICANT**

**MIRIAM MUTHONI MWAI.....4<sup>th</sup> PLAINTIFF/APPLICANT**

**SAMUEL WAHOME GACHUGI.....5<sup>th</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**HON JOHN KIERU WAMBUI.....DEFENDANT/RESPONDENT**

**RULING**

1. Vide an application by way of Notice of Motion dated 21<sup>st</sup> April 2017 brought under *Section 1A, 1B and 3A, of the Civil Procedure Act and under Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules, and all enabling provisions of the Law the Applicant seeks for interim injunctive orders against the Defendant/Respondent* *injunctioning him by himself, his agents, his servants and/or employees from entering, erecting structures, demarcating and/or in any other way interfering with L.R No. Nyandarua/Oljoroorok Salient/1470-4974 pending the hearing and determination of this suit.*
2. The application was premised on the grounds on the face of it and supported by an affidavit sworn by the 5th Plaintiff/Applicant on the 21<sup>st</sup> April 2017.
3. It is worth noting that after the above application was filed. The Respondent filed a preliminary objection which in effect sought to strike out the suit. That subsequently, by consent directions were taken to dispose of the said Preliminary Objection by way of written submissions and thereafter highlight the same.
4. The parties were to file and serve the said submissions within 14 days and thereafter highlight on the same. The Defendant failed to adhere to the court's directions and as such, the application for Preliminary Objection was dismissed for want of prosecution.
5. On the application in issue, by consent the same was disposed of by written submissions wherein the Applicants filed their submissions on the 20<sup>th</sup> November 2017 while the Respondent filed theirs on the

18<sup>th</sup> December 2017.

### **Applicant's case**

6. The Applicants' submission was to the effect that they were the registered proprietors of the suit lands herein above mentioned, having acquired the same as a group from one Hellen Murringi Kabutha wherein they had divided the same amongst themselves and acquired individual titles thereafter as is shown in the annexed certificates of official search marked as JWG1.

7. That the Respondent without color of right held his campaigns and meetings on the said suit land declaring the same to be public land wherein he promised his voters that he would construct a police station and allocate space to members of the public to erect kiosks thereon, in bid to lure them to vote for him. That he succeeded in his campaign, was re-elected and to realize his promise, he brought a government grader on the suit land and flattened the same as is seen in the annexed photographs marked as JWG 4.

8. The Applicants have denied that the land is public land and state that indeed the suit land is private land.

9. That the provisions of section 24 of the Land Registration Act are clear as to the rights of registered proprietors of the suit properties and vest absolute ownership of the suit land in the Applicants herein.

10. They Applicants relied on the case of **Ngurumna Ltd vs. Jan Bunde Nielsen & 2 Others [2014] eKLR** to confirm the fact that they had established a prima facie case to the effect they were the registered proprietors of the suit lands and were thus apprehensive that if the Respondent carried out his plans, then they would suffer irreparable injury unless the orders herein sought were granted.

11. The Applicants further relied on the **Court of Appeal case of Georege Orango Orago vs George Leilwa Jagalo & 3 others Civil Appeal 62/2009** where it was held that the purpose of an injunction was to preserve the subject suit pending the hearing and determination of the suit and urged the court to preserve the subject suit herein as the balance of convenience tilted in their favour.

12. The Application was opposed by the Respondent who submitted that the Applicants had not discharged the burden placed upon them in the laid down principles in the celebrated case of **Giella vs. Cassman Brown and company Ltd [1973] E.A 358**, to warrant then the injunction so sought.

13. They submitted that contrary to the submission by the Applicants, the Respondent indeed held his campaigns on the 9<sup>th</sup> April 2017, but not on the Applicants' suit land but rather on the adjacent piece of land where members of the public implored him to investigate on the issues of land grabbing.

14. That there was no evidence adduced by the Applicants that the Respondent herein declared the suit land public land, which is a preserve of the National Government through the National Land Commission and the County Executive Committees where the Respondent was not a member and lacked authority to do so. That further, issuing the orders so sought would therefore be in futility.

15. The Respondent further submitted that the Applicants did not adduce evidence whether the said grader was a County grader or the National Government grader and further that there was no evidence adduced by the Applicant in the form of a work ticket or other documents to prove that the alleged grader flattened the suit land at the behest of the Respondent, keeping in mind that he lacked such authority.

16. That the Applicant having failed to establish the party that instructed the said grader to go onto the land suit and level the same, failed to establish any cause of action against the Respondent and/or a prima facie case and as such, this application ought to be dismissed.

17. That indeed based on the case of **Ngurumna Ltd vs. Jan Bunde Nielsen & 2 Others** herein above cited, the Applicants had not demonstrated how they stood to suffer irreparable harm, which damages

could not be an adequate remedy. That since the Applicants had pleaded trespass that amongst remedies available to them was payment of damages.

18. That the Applicant's case was full of misrepresentation, half-truths and thus they were undeserving of equitable remedy of injunction as they had not proved that the balance of convenience tilted in their favor.

19. The Respondent thus relied on the cases of **Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR** and **Meru Mwalimu Co-operative Savings and Credit vs. Co-operative Bank of Kenya Ltd [2012] eKLR** to buttress their submission. They thus submitted that the application lacked merit and the same should be dismissed with costs.

### **Analysis and Determination**

20. Having heard submissions by both sides as well as having regard to the annexures filed herein, consequently the pending issue for determination is whether this court should grant the Applicant an interim injunction pending the hearing of the suit.

21. The celebrated case of **GIELLA versus CASSMAN BROWN (1973) EA 358** set out conditions for the grant of an interlocutory injunction which principles were authoritatively captured in the famous Canadian case of **R. J. R. Macdonald vs. Canada (Attorney General) [1994] 1 S.C.R. 311** where the three part test of granting an injunction were established as follows:-

- i. Is there a serious issue to be tried( prima facie case)
- ii. Will the Applicants suffer irreparable harm if the injunction is not granted;
- iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

22. On the first issue as to whether the Plaintiff/Applicants in this matter had made out a prima facie case with a probability of success. I am guided by the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, where a prima facie case was described as follows:

*“a prima facie case in a Civil Application includes 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.”*

23. Have the Plaintiff/Applicants herein demonstrated that they have a genuine and arguable case? In asserting their ownership rights over the suit property, they annexed copies of the search certificates and Mutation forms in respect of the suit properties to show that they were the registered proprietors of the suit property. The law is very clear on the position of a holder of a title deed in respect of land.

**24. Section 26(1) of the Land Registration Act** provides as follows:

*“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner .....and the title of that proprietor shall not be subject to challenge...”*

25. In light of the above, this court finds that the Plaintiff/Applicants have established that they are indeed the duly registered proprietors of the suit property and are entitled to all the rights appurtenant thereto unless otherwise proved during the hearing of the main suit.

26. On the second issue as to whether the applicants would suffer irreparable harm if the injunction is not

granted, I have seen the pictures herein attached in their application that show that indeed there is activity that has been carried on the suit land to the effect that the same has been levelled.

27. Granted that this activity commenced soon after the Respondent's re-election and after promising his voters that he would construct a police station and kiosks upon the land in his campaign speech, it is normal that the Applicants are apprehensive that they would suffer irreparable harm if the injunction was not granted.

28. Given such a scenario the court has a duty to consider whether or not to grant or deny the conservatory relief so as to enhance the Constitutional values and objects of the specific right in the Bill of Rights.

29. Based on the above findings, I am convinced that the Plaintiff/Applicants have shown that they have beneficial interest in the suit land which is capable of being preserved and/or protected by means of an interlocutory injunction as we await the conclusion of this case.

30. Accordingly, I find that the Plaintiff/Applicants have established a prima facie case with a probability of success at the main trial and I do proceed to grant them order of injunction sought, with the result that the Applicant's Notice of Motion dated 21<sup>st</sup> April 2017 succeeds with costs to the Plaintiff/Applicants.

31. I now direct parties to comply with order 11 within 30 days from today so that the matter can be set down for hearing.

**Dated and delivered at Nyahururu this 18<sup>th</sup> day of April 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**