



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 196 OF 2017**

**DANIEL GITONGA RUGU.....1<sup>st</sup> PLAINTIFF/APPLICANT**

**PAULINE WANJIKU RUGU.....2<sup>nd</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**ISAAC RUGU WAMBUGU.....1<sup>st</sup> DEFENDANT/RESPONDENT**

**LUCIA NJUGUNA NDWATI.....2<sup>nd</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 19<sup>th</sup> March 2015 brought under *Order 40 Rule 1,2,8, and 9, of the Civil Procedure Rules, Section 3A and 63 (e) of the Civil Procedure Act and all enabling provisions of the law wherein* the Applicants prayed for the following orders;

i. Spent

ii. Spent

iii. That pending the determination of this suit, the honorable court be pleased to issue a temporal injunction restraining the Defendants by themselves, their agents and/or servants from entering into, disposing off, alienating and/or in any manner dealing with parcel of land known as Nyandarua/ Melangine/2433 and 2434

iv. That the OCS of Melangine Police station to enforce the terms of the above orders.

v. That that costs of this application be provided for.

2. The Application was premised on the grounds on the face of the application as well as on the supporting affidavit sworn by Daniel Gitonga the 1<sup>st</sup> Plaintiff/Applicant on the 19<sup>th</sup> March 2015.

3. This is a matter pitting family members against each other whereupon failure to settle the issue out of court, the Applicant's Counsel sought for orders to have the Application disposed of by way of written submissions which was accepted by the court and parties herein directed to file and serve the said submissions.

4. Whereas the Applicants failed to file their submissions the Respondents filed their submissions on the 14<sup>th</sup> November 2017.

5. That directions to dispose of the same by way of written submissions was taken on the 19<sup>th</sup> September 2017 in the absence of the Applicants wherein the court directed parties to file and serve their submissions and file the same within 14 days respectively

6. That highlighting of the submissions was scheduled for the 14<sup>th</sup> November 2017 wherein the Defendant/Respondents served their copy of the submissions and notice of the hearing date upon the Applicants on the 13<sup>th</sup> October 2017.

7. The Applicant's counsel confirmed receipt of both the documents by stamping on the copies of the Defendant/Respondent's submissions and notice of the hearing date whereon the Respondents filed their affidavit of service to that effect on the 18<sup>th</sup> October 2017.

8. When the matter was called out for highlighting of the submissions, only the Respondents had filed their submissions and were present in

court, the Applicants had neither filed their submissions nor present in court.

9. The court having satisfied itself that service was properly effected, proceeded to accept the submissions filed by the Respondent and gave a date for the ruling.

10. Despite the fact the Applicants neither filed their submissions nor prosecuted their application, I have however looked at the application thereto.

11. It is not in contention that the 1<sup>st</sup> Applicant herein is related to the 1<sup>st</sup> Respondent in that he is his son. The 2<sup>nd</sup> Applicant is the 1<sup>st</sup> Respondent's ex-wife.

12. The Applicants filed the present application on the premise that whereas they are proprietors of the suit lands herein, they were apprehensive that the 1<sup>st</sup> Respondent was in the process of disposing the same. The 2<sup>nd</sup> Applicant had even placed a caution on the suit land before coming to court to seek for injunctive orders against the 1<sup>st</sup> Respondent.

13. I have looked at the documents annexed to the application and do not find any evidence proving that the suit lands are registered in any of the Applicant's names, conferring upon them proprietorship of the suit lands.

14. On the contrary what is on record is that parcels of land No. parcel No. Nyandarua/Melangine/2429-2436 was as a result of sub-division of the mother land No. Nyandarua/Melangine/1061 which was part of the 1<sup>st</sup> Respondent's heritage and out of which he sold No. Nyandarua/Melangine/ 2434 to the 2<sup>nd</sup> Respondent, who registered it in her name.

15. Part of the parcels of land he gifted to his children.

16. I have also considered the submissions filed by the Respondent in opposition of the application where they submitted that the 1<sup>st</sup> Applicant was not entitled to the suit land because the 1<sup>st</sup> Respondent herein was the proprietor of the suit having been registered as such therefore giving him the right to the exclusive possession. The 1<sup>st</sup> Applicant was there for a trespasser since the property had not been willed to him.

17. The 1<sup>st</sup> Respondent further submitted that the 2<sup>nd</sup> Applicant with whom they had divorced in 1996 no longer had any rights on the suit land after the divorce, and since the 1<sup>st</sup> Respondent was the proprietor of the land and could deal with the same as he pleased, he had sold the same to the 2<sup>nd</sup> Respondent who had been legally registered as the proprietor of the suit land.

18. The Respondent further submitted that the Applicant had not established a Prima facie case as was stipulated in the celebrated case of **Giella vs Cassman Brown** to warrant the orders so sought and prayed that the appeal be dismissed.

19. In consideration of the application before me and further in consideration of the provisions of section 24(a) and 25(1) of the Land Registration Act No. 3 of 2012, the same clearly outlines the interests and rights of a registered proprietor. I am also aware on the position of a holder of a title deed in respect of land under Section 26(1) of the Land Registration Act.

20. That Having regard to the fact that the application herein was not prosecuted and further that on an balance of convenience, that the same tilts in favor of declining to issue the injunction, I am guided by the case of **Abel Salim & Others -v- Okongo & Others [1976] KLR 42** where the court of Appeal held:-

*“In granting or refusing to grant an interlocutory injunction, a court exercises discretion. I am of the view that the conditions for the grant of an interlocutory injunction are well settled and I can see no reason to depart from them. These are stated in **Giella -v- Cassman Brown & Co. Ltd. [1973] EA 358 at 360***

21. Ultimately therefore, upon considering all the evidence herein, I am satisfied that the Applicants have not established either a prima facie case with a probability of success, or any of the conditions set down in the celebrated case of *Giella -v- Cassman Brown* have been demonstrated by the Applicants to entitle them to the orders sought in the Notice of Motion dated 30<sup>th</sup> July 2015.

22. The court of appeal in the case of **Kenya Commercial Finance Co. Ltd -vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya -vs- David Kitu & Another (2014) eKLR** observed as follows:-

*“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 one is satisfied”.*

23. Having found that The Plaintiff/Applicant has therefore not established a prima facie case, by virtue of the provisions Section 24(a) and 25(1) of the Land Registration Act No. 3 of 2012, I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella -vs- Cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.

24. Consequently, I dismiss the application dated 19<sup>th</sup> March 2015 with costs to the Respondents.

25. It is further directed that, the parties herein do comply with the provisions of *Order 11 Civil Procedure Rules* within the next 21 days upon delivery of this ruling so as to have this matter heard and determined.

26. The case is herein transferred to the Chief Magistrate's court for hearing and determination.

**Dated and delivered at Nyahururu this 31<sup>st</sup> day of May 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**