



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 16 OF 2011

NANCY KAMENE MAINGI.....1ST PLAINTIFF

ZILPAH MONYANGI ACHOKI.....2ND PLAINTIFF

VERSUS

TERESIA K. MUTUKU.....1ST DEFENDANT

PAULINE M. PETER.....2ND DEFENDANT

ELIZABETH K. MUTHA.....3RD DEFENDANT

RULING

1. In the Application dated 27th April, 2018 the Plaintiffs are seeking for the following orders:

a. That pending the hearing and determination of intended Appeal from the Ruling delivered by the Honourable Court on 20th April, 2018, the Defendants/Respondents whether by themselves, their servants, employees and/or agents be and are hereby restrained from entering onto land known as Mavoko Municipality Block 6/179, constructing or continuing with the construction of any structure thereon, or purporting to sell, alienate, transfer, mortgage or otherwise dispose of the land known as Mavoko Municipality Block 6/179 or any portion thereof.

b. That status quo ante, the delivery of the Ruling dated 20th April, 2018, be maintained pending the hearing and determination of the intended Appeal.

c. That the costs of this Application be provided for.

d. That this Honourable Court be pleased to issue any other or further orders that it may deem fair and just.

2. The Application is premised on the grounds that the Plaintiff was the registered proprietor of parcel of land known as Mavoko Municipality Block 6/179 (*the suit land*); that the suit land was fraudulently transferred to the Defendants; that the Application which had sought for the reinstatement of the dismissed suit was disallowed and that the Plaintiff has filed an Appeal and that unless the injunctive orders are granted, the Plaintiff will suffer irreparable harm.

3. According to the Affidavit of the 1st Plaintiff, the Plaintiffs have always been on the ground and had in their favour an order of injunction and that unless the Application is allowed, they are likely to be evicted from the suit land.

4. The 3rd Defendant deponed that the court having dismissed the Application for want of prosecution, it does not have jurisdiction to entertain the current Application; that the order which dismissed the suit was a negative order which is not capable of execution and that the suit will not be rendered nugatory in the event the Appeal succeeds.

5. The 3rd Defendant finally deponed that entertaining the current Application is a kin to the court sitting on its own Appeal and that the Application should be dismissed.

6. The Applicants' advocate submitted that if the orders being prayed for are not allowed, the intended Appeal will be purely an exercise in futility; that the Plaintiffs are apprehensive that the Defendants will sell the land unless the orders are granted and that this court has powers to preserve the suit pending Appeal.

7. The Respondents' advocate submitted that the order which dismissed the suit was a negative order which is not capable of execution; that the conditions in the *Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358* cannot be considered at this stage and that entertaining the Application is a kin to the court sitting on its own Appeal.

8. As correctly submitted by the Respondents, this court dismissed the Plaintiffs' suit for want of production. In the said order of dismissal, the court did not make any positive order that is capable of being injuncted or stayed, either by this court, or the Court of Appeal.

9. Having dismissed the suit, the most that the Appellant can do is to have the Appeal heard for the purpose of ascertaining if the dismissal order should stand or not. However, the court cannot start interrogating the principles of *Giella vs. Cassman Brown (1973) E.A 375* to determine if the Plaintiffs have a prima facie case with chances of success or not. Indeed, doing so will amount to the court sitting on its own Appeal in a matter that was dismissed, not on merit but for want of prosecution.

10. If indeed the Plaintiffs are residing on the suit land, and in the absence of a court order or a notice requiring them to vacate the land, then the current Application is not necessary. For those reasons, I dismiss the Application dated 27th April, 2018 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE