



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

**AT NAIROBI**

**ELC CIVIL CASE NO.1130 OF 2016**

**GRACE MWIKALI NZIOKA.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**NDUNGE NDUNDA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MUSAU NDUNGE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**KYALO NDUNGE alias YUSUF MUSAU KAVEE...3<sup>RD</sup> DEFENDANT/RESPONDENT**

**NTHAMBI NDUNGE.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**PHILIP NDUNGE.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 16<sup>th</sup> September 2016 brought under Section 1A, 1B and 3a of the Civil Procedure Act, Order 40 rule 2, 3 and 4, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

2. It seeks order:-

***(1) Spent***

***(2) Spent***

***(3) That a temporary injunction do issue restraining the defendants whether by themselves, or their agents, employees or servants, from entering, dividing, constructing, trespassing, cultivating, interfering, residing, selling, subletting, transferring, charging, alienation or in any other way dealing with the plaintiff's property known as KANGUNDO/ISINGA/1054 and KANGUNDO/ISINGA/992 pending the hearing and determination of this suit.***

***(4) That costs of this application be borne by the defendants.***

3. The grounds are on the face of the application and are set out in paragraph 1 to 9.

4. The application is supported by the affidavit of Grace Mwikali Nzioka, the plaintiff/applicant herein

sworn on the 16<sup>th</sup> September 2016.

5. The application is opposed. There is a replying affidavit sworn by Yusuf Musau Kavee, the 2<sup>nd</sup> defendant/respondent and filed in court on the 30<sup>th</sup> September 2016.

6. On the 31<sup>st</sup> May 2017, the court directed that the application be disposed by way of written submissions. By 25<sup>th</sup> July 2018, the defendants/respondents had not filed their submissions and a date for ruling was given.

7. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit, the annexures and the written submissions of counsel. The issues for determination are:-

***(a) Whether or not the plaintiff's/applicant's application meets the threshold for grant of temporary injunction.***

***(b) Who should bear costs?***

8. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**. The Court of Appeal stated what amounts to prima facie case.

I am guided by the above authorities.

9. It is the plaintiff's/applicant's case that the defendants/respondents are trespassers. That they have constructed permanent structures, have cut down trees and further committed mass acts of destruction in total disregard of the plaintiff's/applicants absolute right to own property under Article 40 of the Constitution of Kenya 2010.

10. The plaintiff/applicant is not holding the suit property in trust for the defendants/respondents. Further that the plaintiff/applicant has been exposed to substantive loss and damage due to the illegal activities of the defendants/respondents. She stands to suffer irreparable loss if the orders are not granted. The balance of convenience tilts in favour of the plaintiff/applicant who is the registered owner of the suit property. She prays that the application be allowed.

11. It is the defendants/respondents' case that the 1<sup>st</sup> defendant/respondent entered into a woman to woman marriage with the plaintiff/applicant's mother under Kamba customary law by an agreement dated 13<sup>th</sup> March 2010. That the plaintiff/applicant holds the suit property in trust for them after the demise of the plaintiff/applicant's mother, Kavee Muya who was the owner the suit property.

12. I find the allegations raised by the defendants/respondent's are weighty and will have to be proved during a full hearing where evidence will be presented. In the case of **Njenga vs Njenga [1991] KLR 401**. Borire J (as he then was) held that:

***“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.***

13. I am persuaded by the facts presented by the plaintiff/applicant on one hand and the defendants/respondents on the other hand, that there is need to preserve the suit property pending the hearing and determination of the suit. The defendants/respondents have maintained that they are not trespassers to the suit property.

14. I find that the plaintiff/applicant has failed to demonstrate that she will suffer irreparable loss if those

orders are not granted.

15. In conclusion, I find that this application is not merited and it is dismissed. It is in the interest of justice that the status quo be maintained pending the hearing and determination of this suit. This is to say that there shall be an order of inhibition, inhibiting the registration of any or any dealings with parcel numbers Kangundo/Isinga/1054 and Kangundo/Isinga/992 until this suit is heard and determined. The costs of this application abide the outcome of the main suit.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 11<sup>TH</sup> day of DECEMBER 2018**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for Plaintiff

.....Advocate for the Defendants

.....Court Assistant