



**REPUBLIC OF KENYA**  
**IN THE E.L.C COURT OF KENYA AT EMBU**

**E.L.C. 29 OF 2016**

**SAMUEL NJERU DANIEL.....PLAINTIFF**

**VERSUS**

**JAMES NJERU NTHIGA.....1<sup>ST</sup> DEFENDANT**

**ANN WAMBUI NJERU.....2<sup>ND</sup> DEFENDANT**

**PAUL THEURI MUTAHI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a Plaint dated and filed on 18<sup>th</sup> April 2016 the Plaintiff sued the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants claiming some reliefs with respect to his parcel of land originally registered as Title No. MBETI/GACHOKA/88 which had been subdivided into three parcels namely Title Nos. MBETI/GACHOKA/4234, 4235 and 4236.
2. It is evident from the pleadings that the Plaintiff intended to sell about 2 acres of land out of his original Title No. MBETI/GACHOKA/88 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is also pleaded that the 3<sup>rd</sup> Defendant who is said to be a surveyor simply drew and filed his mutations without visiting the ground and fixing beacons. There is a dispute as to who between the Plaintiff on the one hand, and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant on the other actually instructed the surveyor.
3. It is pleaded that as a result of the surveyor's said actions the sub-division was done in such a manner as would result in partial demolition of the Plaintiff's permanent house and lack of access to the main road. The Plaintiff therefore sought an order for the cancellation of the registration of the said three parcels arising out of the subdivision to enable him undertake a proper survey.
4. Simultaneously with the filing of the suit, the Plaintiff also filed a Notice of Motion application of even date seeking a prohibitory order to be registered against Title No. MBETI/GACHOKA/4235 which was registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The said application was supported by an affidavit sworn by the Plaintiff on 18<sup>th</sup> April 2017 to which he attached several exhibits including photographs of his permanent house which he says is in danger of demolition.
5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed grounds of opposition to the Plaintiff's said application for a prohibitory order but there is no indication in the court file of a replying affidavit filed by them. The 3<sup>rd</sup> Defendant has never entered appearance or filed a defence to the action.
6. The Plaintiff's said Notice of Motion was listed for hearing on a number of occasions in 2016 but could

not proceed to hearing as the parties were hoping to reach an amicable settlement. Ultimately, when the parties appeared before the Deputy Registrar on 13<sup>th</sup> July 2016, they informed the court that no settlement had been reached but they agreed to dispose of the said application through written submissions.

7. The parties filed their written submissions between August and September 2016 and had the matter listed for mention before me on 8<sup>th</sup> March 2017 when a date for ruling was given.

8. My understanding of this matter is that the Plaintiff is not disputing the sale of 2 acres of his land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He concedes that he was paid the full purchase price and that he was to conclude the sale amicably. What he is challenging is the manner in which the 3<sup>rd</sup> Defendant undertook the survey and mutation during the process of sub-division. He also denies having attended the Land Control Board for consent for the purpose of the transfer to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

9. The Plaintiff further states in the application that he is ready and willing to transfer the 2 acres once he re-surveys his land to obviate the necessity of having to demolish part of his house and to enable him gain access to the main road.

10. In their grounds of opposition dated and filed on 18<sup>th</sup> May 2016, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants state that a prohibitory order is not a remedy available under section 3A of the Civil Procedure Act, (Cap 21) or Order 40 of the Civil Procedure Rules; that they have indefeasible rights under sections 24 and 25 of the Land Registration Act; and that registration of an adverse order would violate the provisions of the said two sections.

11. I have considered the rival submissions of the parties. The main issues for consideration, in my view are as follows:

1. Whether a prohibitory order can be granted under section 3A of the CPA or Order 40 of the CPR.
2. Whether the Plaintiff has made out a case for the grant of a prohibitory order.
3. Whether such a prohibitory order, if granted, would violate the rights protected under sections 24 and 25 of the Land Registration Act.

12. The first issue is really a matter of semantics and technicalities of procedure. It is true that under Order 40 of the Civil Procedure Rules, there is no specific reference to a 'prohibitory' order. The term prohibitory order is commonly used in execution proceedings relating to immovable property. For instance, under Order 22 Rule 48 (1) of the Civil Procedure Rules, 2010 provides that:

***“Where the property to be attached in immovable, the attachment shall be made by an order prohibiting the judgement – debtor from transferring or charging the property in any way, and all persons from taking any benefit from the purported transfer or change, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.”***

13. The purpose of such prohibitory or inhibition order is obviously to preserve the property pending completion of the process of execution. Such orders prevent any further dealings with the subject property so that a decree for its attachment or delivery, as the case may be, is not rendered nugatory.

14. It is also true that although Order 40 of Civil Procedure Rules makes provision for the issuance of temporary injunctions, it does not specifically mention a “prohibitory” injunction which is in essence a restraining injunction. The provisions of Order 40 Rule 10 Civil Procedure Rules grant jurisdiction for the court to issue an order of “preservation” of any property which is the subject matter of a suit.

15. The application may have been more carefully drafted or worded, but it is clear to the court what the Plaintiff is seeking and the purpose of the order. It is clear from ground (f) of the grounds in support of

the Notice of Motion that “the purpose of this application is for preservation of this land parcel pending the hearing and determination of the suit herein.”

16. Section 68 of the Land Registration Act calls such order an order of “inhibition”. In my opinion, it does not matter whether the Plaintiff calls it an order of prohibition, prohibitory injunction, preservation or inhibition. Its purpose is clear to the court and this court is enjoined to dispense justice expeditiously without undue regard to procedural technicalities under Article 159 (2) of the Constitution of Kenya 2010 and section 19 of the Environment and Land Court Act of 2011. I therefore find, and hold, that the court has jurisdiction to grant such an order.

17. The second issue is whether or not the Plaintiff has made out a case for the grant of such an order. When the application is considered from the view point of a prohibitory injunction under Order 40 Civil Procedure Rules, the Plaintiff is required to satisfy the principles set out in the case of Giella vs Cassman Brown & Co [1973] EA 358. Although the 1<sup>st</sup> and 2<sup>nd</sup> Defendant’s filed a defence denying the allegations in the Plaint, the 3<sup>rd</sup> Defendant has never filed a defence to the action. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants chose to file only grounds of opposition to the application. The facts of the case are such that the Plaintiff is aggrieved by the manner in which the survey was undertaken by the 3<sup>rd</sup> Defendant. It is common ground that the Plaintiff was the registered owner of the Title No. MBETI/GACHOKA/88 from which 3 parcels were carved out including the one currently registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

18. The allegations against the 3<sup>rd</sup> Defendant are serious just as the pleaded consequences of his actions of allegedly conducting a sub-division on paper work without visiting the ground or obtaining proper instructions from the property owner. It is further alleged that the transfer to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was undertaken without the Plaintiff having applied for such consent from the Land Control Board. I am therefore satisfied that these are serious issues to be tried at the hearing and the Plaintiff has made out a *prima facie* case with a probability of success.

19. The second principle for consideration is whether or not an award of damages would be an adequate remedy should the Plaintiff succeed at the trial. Whereas a monetary award may be adequate to compensate for demolition or partial demolition of a house, subject, of course, to the ability of the Defendants to pay, it is doubtful if the alleged blockage of an access to the main road can be remedied by way of damages. I, therefore, have no hesitation in holding that the Plaintiff has satisfied the second principle for the grant of an order of prohibitory injunction.

20. The Plaintiff having satisfied the first two principles for the grant of such order, it is not necessary to consider the balance of convenience in the circumstances.

21. It has also been submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that the instant application is *res judicata* on account of the removal of a caution which had been placed on the suit property. The caution is said to have been lodged by or at the instance of the Plaintiff and was reportedly removed in Embu CMCC 232 of 2015. I have no doubt in my mind that such removal of a caution placed administratively by a party would not constitute any form of *res judicata* as known to law.

22. The last issue for consideration is whether the granting of a prohibitory order would violate the rights of the proprietor of land under sections 24 and 25 of the Land Registration Act 2012. I have no hesitation in answering this question in the negative. The most obvious reason would be that even the said Act itself provides for such restrictions on the rights of a proprietor. For instance, section 68 of the Act provides for the registration or orders of inhibition which would restrict further dealings or registration of any instruments inconsistent with the inhibition. The material provisions of section 68 (1) provides as follows:

**1. The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until occurrence of a particular event, or generally until further order, the registration or any dealing with any land, lease or charge.**

23. The upshot of the foregoing is that the Plaintiff's Notice of Motion dated 18<sup>th</sup> April 2016 is hereby allowed in terms of prayer 3 thereof. The Plaintiff shall file a written undertaking as to damages within 14 days from the date hereof. Costs of the application shall be in the cause.

Orders accordingly.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **16<sup>TH</sup>** day of **MARCH 2017**

In the presence of Mr Momanyi holding brief for Ms Muthoni for the Plaintiff and Mr Okwaro holding brief for Mr Njiru for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Court clerk Njue

**Y.M. ANGIMA**

**JUDGE**

**16.03.17**