



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ELC CASE NO. 195 OF 2014**

**MICHAEL KIMANI THUO.....1<sup>ST</sup> APPLICANT/PLAINTIFF**

**NJAGI METHA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**SOSPETER KARIUKI NDORO.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiffs filed this suit on 19th May 2014 seeking the main prayer that a permanent injunction be issued restraining the defendant from interfering with land parcels No. NTHAWA/RIANDU/4607 and 4608 which are registered in their (plaintiffs) names. The plaintiffs also sought orders for the rectification of the register in respect to land parcels No. NTHAWA/RIANDU/2949 and 2951 or in the alternative, the defendant be ordered to surrender the document in respect of land parcel No. NTHAWA/RIANDU/2949 and 2951 to rectify the anomaly.

On 19th December 2014 the plaintiffs filed a Notice of Motion citing **Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules** and **Sections 68 and 69 of the Land Registration Act** seeking the following orders:-

**1. Spent.**

**2. Spent.**

**3. That a temporary injunction be issued restraining the defendant/respondent, his agents, servants and/or employees from interfering with, dressing and selling of, picking the 1st applicant's miraa produce from his land parcel No. NTHAWA/RIANDU/4607 pending hearing and determination of this application.**

**4. That this Honourable Court do issue an order to the Land Registrar of Mbeere Land Registry and District Surveyor authorizing them to rectify the register in respect of the land parcel No. NTHAWA/RIANDU/2949 and NTHAWA/RIANDU/2951 and or sub-divisions therefrom with a view to rectify the anomaly pending hearing and determination of the suit.**

**5. That a prohibition order be issued against land parcel No. NTHAWA/RIANDU/2951 prohibiting all dealings until this suit is heard and determined.**

## **6. That costs be provided for.**

The application is supported by the affidavits of the 1st plaintiff **MICHAEL KIMANI THUO** and the 2nd plaintiff **NJAGI METHA** and based on the grounds set out therein. The gist of the plaintiffs' application is that they are the registered proprietors of land parcels No. NTHAWA/RIANDU/4607 & 4608. 1st plaintiff is the proprietor of NTHAWA/RIANDU.4607 while the 2nd plaintiff is the registered proprietor of land parcel No. NTHAWA/RIANDU/4608. Copies of their respective title deeds to those land parcels are annexed (annextures **MKT 1** and **MKT 3** respectively). Both plaintiffs purchased their respective parcels of land from one **PAUL MWANIKI NJERU** which were excised from land parcel No. NTHAWA/RIANDU/3110 who had purchased it from the defendant. That the plaintiffs thereafter developed their respective portions with the 1st plaintiff planting over 1000 miraa trees on his portion and the 2nd plaintiff planting food crops since 2012. That the defendant has not interfered with the plaintiffs' occupation and use of their respective portions until 2014 when he started claiming that the plaintiffs were interfering with his land. That upon visiting the Land office, the plaintiffs discovered that infact there was an error and that their portions on the ground are land parcels No. NTHAWA/RIANDU/2949 and NTHAWA/RIANDU/2951. That the defendant has taken advantage of this error and intends to evict the plaintiffs from the portions they occupy and is denying the 1st plaintiff access to his miraa crop. Hence this application.

In opposing the application, the defendant filed a replying affidavit in which he deponed, inter alia, that he is the proprietor of land parcels No. NTHAWA/RIANDU/2951, 2949 and 2780 and on 12th May 2013, his step brother **FACILIO MUGO** trespassed thereon and started fencing it and so he reported to Siakago Police Station. On the same day, the 1st plaintiff also filed a case of trespass against the said **FACILIO MUGO** and it was on that day that he discovered that the 1st plaintiff was claiming ownership of land parcel No. NTHAWA/RIANDU/4607 which has allegedly been excised from land parcel No. NTHAWA/RIANDU/2951. The defendant told him that no such land had been excised from land parcel No. NTHAWA/RIANDU/2951. The matter was referred to both the District and Provincial surveyors Embu who were un-able to confirm from their records that land parcel No. NTHAWA/RIANDU/2951 was ever sub-divided to give rise to land parcels No. NTHAWA/RIANDU/4607 and 4608 as alleged by the plaintiffs. That any alleged sub-division of land parcel No. NTHAWA/RIANDU/2951 and 2949 was therefore irregular, fraudulent and unlawful and the plaintiffs have infact caused degradation and wastage on his land parcel No. NTHAWA/RIANDU/2951 and have no cause of action against him as he never transferred any land to them and their application dated 16th December 2014 is unfounded, lacks merit and should be dismissed.

Submissions were filed both by the firm of **ASIANI OJIJO & CO. ADVOCATES** for the plaintiffs and **DUNCAN MUYODI & CO. ADVOCATES** for the defendant.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by counsel.

The applicants seek three substantive orders by their Notice of Motion dated 16th December 2014 and filed herein on 19th December 2014. These are:-

- 1. An order directed at the Land Registrar and District Surveyor Mbeere authorizing them to rectify the register in respect of the land parcels No. NTHAWA/RIANDU/2949 and NTHAWA/RIANDU/2951 and/or sub-divisions therefrom with a view to rectify the anomaly pending the hearing and determination of this suit.***
- 2. An order of injunction restraining the defendant, his agents, servants and/or employees from interfering with dressing and selling of the 1st plaintiff's miraa produce from his land parcel No. NTHAWA/RIANDU/4607 pending the hearing and determination of this suit.***
- 3. A prohibitory order be issued against land parcel No. NTHAWA/RIANDU/2951 prohibiting all dealings until this suit is heard and determined.***

I will consider the application in that sequence.

With regard to the prayer directing the Land Registrar and the District Surveyor Mbeere to rectify the register in respect to the land parcels No. NTHAWA/RIANDU/2949 and NTHAWA/RIANDU/2951 and/or sub-divisions therefrom with a view to rectify the anomaly, it must be remembered that at this stage, this Court is dealing with an interlocutory application pending the hearing and determination of this suit. At this point in this trial, this Court cannot say with any certainty that there was any anomaly in the register with regard to any sub-divisions of land parcels No. NTHAWA/RIANDU/2949 and NTHAWA/RIANDU/2951. Those are issues that will be determined by the trial Court after hearing the evidence by both parties. To grant such prayer would amount to making a final decision without hearing the parties. That is not within the province of a Court hearing an interlocutory application. I must therefore decline any invitation to do so by dismissing that prayer.

And with regard to the order for temporary injunction restraining the defendant from interfering with the 1st plaintiff's crop of miraa on land parcel No. NTHAWA/RIANDU/4607, I must start by stating that the prayer was badly drafted but that defect is not fatal neither has it prejudiced the defendant. I will consider it as an application for temporary injunction pending the hearing and determination of this suit. Such an application must be considered in light of the principles laid down in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** where the Court held as follows:-

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience”.***

As to what amounts to a prima facie case, the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)** said 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. Further, and as was held in the case of **FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALE LTD 1986 3 ALL E.R 772**, the Court in considering an application for temporary injunction should take the course that appears to carry the lower risk of injustice should it turn out to have been wrong.

It must also be remembered that an injunction is an equitable remedy and the Court therefore has the discretion whether or not to grant it. The Court will take into account whether it is fair and equitable to grant such a remedy taking into account all the circumstances obtaining in each case. A party approaching the Court for such a remedy must also do so with clean hands.

Taking all that into account, it is not in doubt that the plaintiffs are currently the registered proprietors of land parcels No. NTHAWA/RIANDU/4607 and NTHAWA/RIANDU/4608. They have annexed to their application copies of the title deeds for those parcels of land issued under the now **repealed Registered Land Act. Section 27 (a) and (b)** of that Act provides that:-

***(a) “the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.***

***(b) “the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of lease”***

Similar provisions are found in **Section 24 (a) and (b) of the new Land Registered Act 2012**. Under **Section 26 (1)** of this Act, a certificate of title issued by the Registrar “***shall be taken by all Courts as***

***prima facie evidence that the person named as proprietors of the land is the absolute and indefeasible owner, subject to the encumbrances easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge***” except on grounds of fraud, misrepresentation to which the person was a party or where it was acquired illegally, un-procedurally or through a corrupt scheme. The defendant has pleaded in paragraphs 18 and 19 of his replying affidavit that there was no sub-division of land parcels No. NTHAWA/RIANDU/2949 and 2951 to give rise to land parcels No. NTHAWA/RIANDU/4607 and 4608 and any sub-division was irregular and fraudulent. That may very well be so. However, at this stage, this Court has not heard evidence to that effect. That will be for the trial Court. All that the plaintiffs are required to establish at this stage is the existence of a prima facie case which in my view they have done because as is clear from **Section 26 (1) of the Land Registration Act**, the production of the title deeds to land parcels No. NTHAWA/RIANDU/4607 and 4608 by the plaintiffs is “***prima facie evidence***” that they are the “***absolute and indefeasible***” owners of those parcels of land subject only to what is provided for under the law. The 1st plaintiff has deponed that he has a crop of miraa on land parcel No. NTHAWA/RIANDU/4607 which was not rebutted by the defendant. The 2nd plaintiff on his part deponed that he started developing land parcel No. NTHAWA/RIANDU/4608 in 2012 and has been cultivating crops thereon. That means that apart from being the registered proprietors of land parcels No. NTHAWA/RIANDU/4607 and 4608, the plaintiffs are also in possession thereof. Prima facie therefore, they are the owners of those parcels of land and until those titles are set aside, there would be no basis for dispossessing them of that land. And since the main purpose of an injunction such as the one sought here is to preserve the subject property pending the hearing and determination of this suit, the denial of an injunction would amount to dispossessing the plaintiffs of the said land parcels to which they hold titles issued by the Land Registrar. The plaintiffs have therefore established a prima facie case with a probability of success which is the first hurdle that they are required to surmount.

With regard to the second test set out in the **GIELLA** case (supra), which requires the plaintiffs to show that they might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, I have already found above that the plaintiffs are the registered proprietors of the land parcels No. NTHAWA/RIANDU/4607 and 4608 on the basis of the title deeds that they now hold. Until those title deeds are cancelled for whatever reasons, the plaintiffs are entitled to all the protection that go with such registration. If an injunction is not granted and the defendant, as is alleged, interferes with the plaintiffs quiet enjoyment of land parcels No. NTHAWA/RIANDU/4607 and 4608, that would amount to a clear transgression of the law and in such circumstances, it cannot be said that damages would be a sufficient remedy – **MOHAMED VS COMMISSIONER OF LANDS & OTHERS K.L.R (E & L) 1**. I am also guided by the Court of Appeal’s decision in the case of **MUIRURI VS BANK OF BARODA LTD 2001 K.L.R 183** where it said:-

***“Besides, disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”.***

It is not also an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction will not be granted – **WAITHAKA VS I.C.D.C 2001 K.L.R 374**. I am therefore persuaded that the plaintiffs have surmounted the second principle set out in the **GIELLA** case (supra).

As the plaintiffs have met the second principle set out in the **GIELLA** case (supra), I need not consider the balance of convenience but even if I did so, the balance would tilt in favour of the plaintiffs who are not only the registered proprietors of the land parcels No. NTHAWA/RIANDU/4607 and 4608 but are also in possession thereof. The rule in applications of this nature is that as far as is appropriate, the status quo obtaining on the land in dispute should remain especially where the failure to grant an injunction may result in the forceful eviction of a party in occupation. In view of all the above, I am satisfied that the plaintiffs are entitled to the order of interlocutory injunction with respect to land parcels No. NTHAWA/RIANDU/4607 and 4608.

Finally, the plaintiffs seek the order of prohibition against land parcels No. NTHAWA/RIANDU/2951 prohibiting all dealings thereon until this suit is heard and determined. A prohibitory order is like an injunction in that it preserves the property in dispute until further orders or until the suit in which the said

property is the subject is disposed off. The Court issuing such an order must be satisfied that the applicant has good grounds for the grant of the same. **Section 68 (1) of the Land Registration Act** provides for such orders and states that:-

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

In considering such an application, the Court will take into account several factors including:

Whether the land in dispute is in danger of being alienated, whether the suit may be rendered nugatory unless the order is issued, whether the applicant has made out an arguable case, the conduct of the parties and any prejudice that may be caused to the respondent. From what I can glean in the plaintiff’s affidavit, the defendant being the registered proprietor of the parcels No. NTHAWA/RIANDU/2949 and 2951 **“erroneously”** caused the registration of the two parcels in such a manner that on the ground, the land that was sub-divided is land parcel No. NTHAWA/RIANDU/2951 but on the register in the Lands office, the sub-division is registered on land parcel No. NTHAWA/RIANDU/2949. It is the plaintiffs’ case that the defendant intends to dispose the land parcel No. NTHAWA/RIANDU/2951 before this suit is heard and determined. Since one of the prayers in the plaintiffs’ plaint is to have the Land Registrar Mbeere rectify that anomaly, it is obvious that if a prohibitory order is not issued and land parcel No. NTHAWA/RIANDU/2951 is alienated to other parties, the plaintiffs’ suit will be rendered nugatory. The plaintiffs have made out an arguable case for the grant of an order of prohibition and the only prejudice that the defendant will suffer is that no registration of any dealings can be done on that parcel of land. He can wait a little longer while this case is heard and finally determined and the anomaly, if any, is sorted out. In my view, the wider interests of justice are served by the granting of an order of prohibition which I hereby do.

Ultimately therefore and upon considering all the matters herein, I make the following orders with respect to the plaintiffs’ Notice of Motion dated 16th December 2014 and filed herein on 19th December 2014:-

- 1. An order of temporary injunction is issued restraining the defendant, his agents, servants or employees from interfering with the plaintiff’s quiet possession of land parcels No. NTHAWA/RIANDU/4607 and 4608 including interfering with the 1st plaintiff’s crop of miraa on land parcel No. NTHAWA/RIANDU/4607 until this case is heard and determined.***
- 2. A prohibitory order is issued against land parcel No. NTHAWA/RIANDU/2951 prohibiting all dealings thereon until this suit is heard and determined.***
- 3. The prayer that this Court do issue an order to the Land Registrar Mbeere and the District Surveyor to rectify the register in respect of land parcel No. NTHAWA/RIANDU/2949 and NTHAWA/RIANDU/2951 and/or sub-divisions therefrom with a view to rectifying any anomaly is denied. This will await the full trial.***
- 4. The parties to comply with all pre-trial directions and have this suit heard and determined in the next 12 months.***
- 5. Costs shall be in the cause.***

**B.N. OLAO**

**JUDGE**

**3<sup>RD</sup> MARCH, 2017**

**Ruling dated, delivered and signed in open Court this 3<sup>rd</sup> day of March 2017**

Mr. Macharia holding brief for Mr. Okwaro for the Defendant present

No appearance by the firm of Asiani Ojijo Advocates for the Plaintiffs though notified by letter dated 24th February 2017.

**B.N. OLAO**

**JUDGE**

**3<sup>RD</sup> MARCH, 2017**