



**REPUBLIC OF KENYA**

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

**E.L.C. NO 224 OF 2014**

**(FORMERLY KERUGOYA E.L.C 820 OF 2013)**

**MARY NJERI NYAGA.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**SAMUEL MUYI NYAGA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

*(Suing as legal representatives of the estate of NYAGA MUNYI .....(DECEASED))*

**VERSUS**

**ERASTUS NJUE GITANGUTHI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JUSTUS J. GATUMUTA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE PRESBYTERIAN FOUNDATION.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a plaint dated 3<sup>rd</sup> December 2013 and filed on 5<sup>th</sup> December 2013 the Plaintiff sought a declaration that the transfer and registration of Title No. Ngandori/Kiriari/3208, 3209 and 3210 (hereinafter referred to as the “suit properties”) in the name of the 3<sup>rd</sup> Defendant was null and void. They also sought cancellation of the transfer and a permanent injunction to restrain the 3<sup>rd</sup> Defendant from undertaking any activities thereon or from developing the suit properties.

2. The basis of the said reliefs was pleaded in paragraphs 5, 6 and 7 of the plaint. It was pleaded that the suit properties were fraudulently acquired by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who then transferred the same to the 3<sup>rd</sup> Defendant. The suit property was originally owned by one Nyaga Munyi (deceased) who was the father of the Plaintiffs.

3. On or about 8<sup>th</sup> December 2016, the Plaintiffs filed a Notice of Motion dated 6<sup>th</sup> December 2016 seeking an interlocutory injunction against the Defendants to restrain them from destroying, felling trees and clearing coffee bushes on delete parcel No. Ngandori/Kiriari/3208 pending the hearing and determination of the suit. The Plaintiffs were seeking to preserve the coffee bushes and other trees growing thereon pending resolution of the suit.

4. The said application was supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff on 6<sup>th</sup> December 2016. In the said affidavit, it was stated that the Plaintiffs had discovered that the Respondents were destroying and felling trees and coffee bushes on parcel No. 3208 while the suit was still pending. It was stated that the damage was irreversible hence the Defendants should be restrained from continuing with such acts.

5. The 2<sup>nd</sup> Defendant filed a replying affidavit in opposition to the said application. He stated that the suit properties were registered in the name of the 3<sup>rd</sup> Defendant which took possession in 1996 and erected a church thereon. It was admitted that some trees and coffee bushes were cleared in November 2016 after which there was no further felling.

6. The main issue for determination in this application is whether or not the Plaintiffs have met the requirements for the grant of an order of interlocutory injunction as set out in the case of **Giella v. Cassman Brown & Co Ltd [1973] EA 358.**

7. The court has considered the material evidence on record and I am satisfied that the Plaintiffs have made out a *prima facie* case with a probability of success at the trial. There is ample evidence on record to show the suit properties were once the property of Nyaga Munyi who is now deceased. There is also evidence to show that at least two of the parcels i.e. parcel No. 3208 and 3209 were transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants after the death of the deceased. I need not say more on the validity of the transfers at this interlocutory stage suffice it to state that a *prima facie* case has been made out.

8. The second principle relates to the nature of the damage which is sought to be prevented. The Plaintiffs are required to demonstrate that unless the injunction is granted they shall suffer irreparable damage which cannot be adequately compensated by an award of monetary damages. It has been alleged that some trees and some coffee stems were destroyed. The Defendants have admitted having cleared some areas by felling trees and coffee stems in November 2016. The impression created by the 2<sup>nd</sup> Defendant's replying affidavit is that it was a one off event hence there would be no need for restraining orders.

9. The nature of the trees which were felled were not disclosed by either the Plaintiffs or the Defendants. There is no indication if they were exotic or indigenous trees. Exotic trees may be easily replaceable unlike indigenous ones which are difficult to cultivate and which take a relatively long period to mature. In some cases, it may not be possible to assess the value of trees destroyed in monetary terms. But it must be borne in mind that trees are not just useful for their monetary value. They also have other environmental and non-monetary value. None of the parties to the application submitted on this aspect.

10. In the circumstances of this case, the court has some doubt with regard to the second principle and shall therefore decide this application on a balance of convenience. The court is of the view that the lesser hardship lies in restraining any further felling or destruction of trees and coffee bushes on the suit property. If the 3<sup>rd</sup> Defendant has been in occupation for several years without destroying them, then there will be no harm in maintaining that status until this suit is heard and concluded.

11. The upshot of the foregoing is that the Plaintiffs' Notice of Motion dated 6<sup>th</sup> December 2016 has merit and the same is hereby allowed. Accordingly, a temporary injunction shall issue in terms of prayer No. 5 of the said motion pending the hearing and determination of the suit. Costs of the application shall be in the cause.

12. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **13<sup>th</sup>** day of **JULY, 2017.**

In the presence of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff in person and Mr Muthoni holding brief for Ms Ndorongo for the Defendants.

Court clerk Njue/Leadys

**Y.M. ANGIMA**

**JUDGE**

**13.07.17**