



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 305 OF 2014**

**MATHEW LAWRENCE NDURU GICHURU & CHRISTOPHER**

**CHEGE GICHURU (Suing as Administrators of the Estate of**

**ARTHUR GICHURU CHEGE (DECEASED).....PLAINTIFFS**

**VERSUS**

**THE REGISTRAR**

**KIRINYAGA DISTRICT LANDS REGISTRY.....1<sup>ST</sup> DEFENDANT**

**DANIEL MUKURIA GICHURU.....2<sup>ND</sup> DEFENDANT**

**RULING**

By their plaint filed herein on 27th November 2014, the plaintiffs, suing as the Administrators of the Estate of **ARTHUR GICHURU CHEGE** (deceased) sought judgment against the defendants in the following terms:-

*(a) That the 1st defendant be restrained by way of an injunction from registering any further transactions on land parcel No. KIINE/RUKANGA/2249.*

*(b) An order declaring that land parcel No. KIINE/RUKANGA/2249 belongs to ARTHUR GICHURU CHEGE (deceased).*

*(c) An order directing the 1st defendant to cancel the transaction conferring land parcel No. KIINE/RUKANGA/2249 to the 2nd defendant and revoke the title document issued to the 2nd defendant and to revert title to land parcel No. KIINE/RUKANGA/2249 to read the name of the deceased.*

*(d) Costs of this suit.*

*(e) Interest.*

*(f) Any other relief that this Court deems fit and just to grant.*

The basis of the plaintiff's claim is that at all times relevant to this suit, the land parcel No. KIINE/RUKANGA/2249 belonged to the deceased but the 1st defendant fraudulently caused it to be transferred to the 2nd defendant. Particulars of the fraud are pleaded in paragraph four (4) of the plaint

and include a claim that the transfer was done without the necessary letters of Administration and was also back-dated to December 2013 when the deceased was too sickly to sign any documents of transfer.

Simultaneously with the filing of that suit, the plaintiffs filed a Notice of Motion seeking the substantive orders that pending the hearing of this suit, the Registrar, Kirinyaga District Lands Registry be restrained from processing and/or registering any transaction on land parcel No. KIINE/RUKANGA/2249 and KIINE/RUKANGA/556 and that costs of the application be provided for.

The application is based on the grounds set out therein and supported by the affidavit of **MATHEW LAWRENCE GICHURU** the 1st plaintiff/applicant in which it is deponed, inter alia, that the transfer of land parcel No. KIINE/RUKANGA/2249 to the 2nd defendant by the 1st defendant was fraudulent since there was no grant of letters of Administration to facilitate such transfer and the 2nd defendant is now in the process of selling the said parcel of land. The 1st plaintiff has deponed that the land parcel No. KIINE/RUKANGA/2249 (originally KIINE/RUKANGA/1185) belonged to their late father (deceased) yet the 2nd defendant had it fraudulently registered in his names without taking out proper letters of Administration and attempts to lodge a caution at the Kirinyaga Lands Registry have been un-successful as he has been frustrated by officials at the Registry. He is therefore apprehensive that the 2nd defendant who is the plaintiffs' brother will sell of land parcel No. KIINE/RUKANGA/2249.

The application is opposed.

**MUTHEE J. KIRIMO** the District Land Registrar Kirinyaga has sworn an affidavit deponing that following the ex-parte order issued by this Court on 3rd December 2014, a caution was placed on land parcel No. KIINE/RUKANGA/2249. However with regard to parcel No. KIINE/RUKANGA/556, no caution could be placed since that land parcel was closed back in November 1971 following a sub-division and no longer exists.

On his part, the 2nd defendant deponed that the land parcel No. KIINE/RUKANGA/2249 was transferred to him by his deceased father during his lifetime as a gift sometime in December 2013 before his death on 10th May 2014. Before that, his late father had called a family meeting on 22nd January 2014 where issues concerning his properties were discussed in the presence of the plaintiffs.

Submissions have been by the firm of **MANDELA K. CHEGE** Advocates for the plaintiffs and **BWONWONGA** Advocates for the 2nd defendant.

I have considered the application, the rival affidavits and annexures thereto and the submissions by counsel.

This is an application for temporary injunction pending the hearing of the suit. It has to be determined in line with the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are that the applicant must show a prima facie case with a probability of success and that if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages. If in doubt, the Court will decide the application on the balance of convenience.

A prima facie case on the other hand was defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS 2003 e K.L.R** as "*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*".

The powers of a Court in an application for interlocutory injunction are discretionary and therefore have to be exercised on the basis of law and evidence. Being an equitable remedy, the party approaching the Court must do so with clean hands and as was held in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILMS SALES LTD 1986 ALL E.R 772**, a fundamental principle in such an application is that the Court should take whichever course appears to carry the lower risk of injustice should it turn out to be wrong.

The plaintiffs' application which is the subject of this ruling shall therefore be considered in light of the above broad principles and the material placed before me.

It is not in dispute that land parcel No. KIINE/RUKANGA/2249 which is among the properties for which the interlocutory injunction is sought is registered in the names of the 2nd defendant. He says that the said land parcel was gifted to him by the deceased in 2013 prior to his death in May 2014. It is also not disputed that the deceased was father to both the plaintiffs and the 2nd defendant. As the registered proprietor of the land parcel No. KIINE/RUKANGA/2249, the 2nd defendant is entitled to enjoy all the rights and privileges that go with such registration subject only to any other rights, liabilities and interests recognized by law. **Section 25 of the Land Registration Act** provides also that the registration of a person as proprietor of land does not relieve him of any duty or obligation to which he is subject to as a trustee. See **MUMO VS MAKAU 2004 1 K.L.R 13** and also **MUKANGO VS MBUI 2004 2 K.L.R 256**.

Given the above un-disputed facts, what this Court has to establish at this stage is whether the plaintiffs have shown a prima facie case with a probability of success to warrant the orders of temporary injunction. What therefore is the plaintiffs' case? From the plaint, the Notice of Motion and the supporting affidavit of the 1st plaintiff, their case is that the land parcel No. KIINE/RUKANGA/2249 belonged to their deceased father but the defendants fraudulently transferred it to the 2nd defendant without the necessary grant of letters of Administration with respect to the Estate of the deceased. It is also the plaintiffs' case that the said transfer was back-dated to December 2013 when their late father was too sickly to sign any documents. The issues of fraud are of course a matter to be determined at the trial and to be proved to the required standard. However, at this stage and going by the evidence on record which are the annexures herein, it is clear that the transfer of land parcel No. KIINE/RUKANGA/2249 from the deceased to the 2nd defendant was done on 17th December 2014 during the life time of the deceased who died on 10th May 2014. The 2nd defendant has also produced minutes of the Land Control Board meeting held on 21st November 2013 and under minute 178 the transfer of land parcel No. KIINE/RUKANGA/2249 from **ARTHUR GICHURU CHEGE** (deceased) to the 2nd defendant as a gift was approved. As that transfer was done during the life time of the deceased, no grant of letters of Administration was required. Therefore, the 1st plaintiff's assertion in paragraph nine (9) of his supporting affidavit that

***"... It is lost to us how my aforesaid brother has successfully had my late father's parcel of land transferred to him without taking out proper letters of administration as provided by law"***

is not factually correct. The deceased transferred the land parcel No. KIINE/RUKANGA/2249 during his life time and the transaction was authorized by the Land Control Board as indicated above. It is not the plaintiffs' case as per their pleadings that the said land parcel is held by the 2nd defendant in trust for them. Therefore, in so far as the plaintiffs' case is based on the claim that the transfer of the land parcel No. KIINE/RUKANGA/2249 to the 2nd defendant was fraudulent since no grant of letters of Administration in respect of their late father's Estate had not been taken out, they have not, in my view, established a prima facie case with a probability of success to warrant the grant of the injunctive relief sought herein. On the evidence before me, I do not discern what **"right"** of the plaintiffs has been **"infringed"** by the defendants that calls for **"an explanation or rebuttal"** as defined in the **MRAO** case (supra).

And as regards land parcel No. KIINE/RUKANGA/556, it is not among the land parcels subject of this suit. The main suit confines itself to land parcel No. KIINE/RUKANGA/2249 and a plain reading of **Order 40 of the Civil Procedure Rules** shows that the grant of an interlocutory injunction can only be allowed where the property is the subject of a pending suit. Land parcel No. KIINE/RUKANGA/556 is not the subject of this suit. Most significantly, the District Land Registrar Kirinyaga Mr. **MUTHEE J. KIRIMO** has deponed in paragraph six (6) of his replying affidavit as follows:-

***"That parcel No. 556 was closed on sub-division way back on 25th November 1971 and hence ceased to exist"***

It follows therefore that no injunction can be issued with respect to land parcel No.

KIINE/RUKANGA/556 as the same no longer exists. Indeed the Green Card for that parcel (annexture **MJK 2**) shows that the said parcel was sub-divided on 25th November 1971 resulting to parcels numbers 812 and 813 and it is clear that prior to that sub-division, it was registered in the names of one **ELIUD PIUS KIBUCHI MARINGA MUCHUNGU** who is not even a party to those proceedings. It would be against the law to issue injunctive orders with respect to land registered in the names of persons who are not parties in a litigation.

It is clear from all the above that the plaintiffs have not surmounted the first hurdle in the ***GIELLA*** case (supra) of establishing a prima facie case with a probability of success. In the circumstances and as was held in the case of ***NGURUMAN LTD VS JAN BONDE NELSON & 2 OTHERS C.A CIVIL APPEAL No. 77 of 2012.***

***“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration”***

As the plaintiffs have failed in establishing a prima facie case as defined in the ***MRAO*** case (supra) and which is the first test in the ***GIELLA*** case (supra), the plaintiff’s Notice of Motion filed herein on 27th November 2014 must collapse and I need not consider the other two tests.

Ultimately therefore, the plaintiff’s Notice of Motion filed on 27th November 2014 is dismissed. As the plaintiffs and the 2nd defendant are siblings, each shall meet their own costs.

**B.N. OLAO**

**JUDGE**

**30<sup>TH</sup> SEPTEMBER, 2016**

Ruling dated, signed and delivered in open Court this 30<sup>th</sup> day of September 2016.

Plaintiffs absent

1st Defendant absent

2nd Defendant present.

**B.N. OLAO**

**JUDGE**

**30<sup>TH</sup> SEPTEMBER, 2016**