



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 967 OF 2014**

**HUMPHREY IHUGOH KANG'ETHE.... PLAINTIFF**

**-VERSUS-**

**JOHN MUTISYA MUMO.....DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 21<sup>st</sup> July 2014 in which the Plaintiff/Applicant seeks for an order prohibiting any alienation, sale, disposition, any dealings, transfer or any other manner of interference with the parcel of land known as Donyo Sabuk/Komarock Block 1/20030 (hereinafter referred to as the "suit property") pending the hearing and determination of this suit. He also seeks that costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Humphrey Ihugoh Kang'ethe sworn on 21<sup>st</sup> July 2014 in which he averred that in the year 2009 he entered into a sale agreement with the Defendant/Respondent in which he bought 10 acres from the Defendant which was to be hived off from the suit property. He averred further that he paid the mutually agreed consideration in the sum of Kshs. 3 million. He then stated that this notwithstanding, the Defendant/Respondent refused and /or failed to effect transfer of the suit property to him, leading him to lodge a caution restricting any transactions with the suit property. He averred further that the Defendant/Respondent has entered into other transactions to sell the suit property in total disregard of his interest therein, a fact which is attested by the Notice of Intention to remove Caution dated 15<sup>th</sup> July 2014 which was served upon him by the Land Registrar Machakos, a copy of which he annexed. He stated further that unless this court issues the order of prohibition, he stands to suffer irreparable losses and prejudice.

The Application is unopposed. Though the Defendant/Respondent was served with the Application, he did not file any response thereto.

The Plaintiff/Applicant filed his written submissions.

A prohibition is defined in Black's Law Dictionary as "a law or order that prohibits a certain action". What in essence the Plaintiff is seeking from this court is a prohibitory injunction stopping any dealings with the suit property pending the hearing and full determination of this suit. To my mind, a prohibitory injunction is the same as a restraining order or an interlocutory injunction and therefore, the principles

guiding the award or denial of a prohibition is the same as for an interlocutory injunction. In deciding whether or not to grant an interlocutory injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled 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 be normally 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.”**

The question I have to answer is whether the Plaintiff/Applicant has met those conditions. As to whether the Plaintiff/Applicant has established a prima facie case, I note that he claims to be entitled to a purchasers’ interest in a portion of 10 acres hived off from the suit property having paid a sum of Kshs. 3 million for it. At this juncture, it is not clear whether or not the suit property is itself 10 acres in size or is a larger parcel of land from which a portion of 10 acres was to be hived off and transferred to the Plaintiff/Applicant. The Plaintiff/Applicant relies on various sale agreements that he has annexed to this Application as proof of the transaction between him and the Defendant/Respondent. In the absence of any controverting response from the Defendant/Respondent, I see no reason to disbelieve the Plaintiff/Applicant. For this reason, I do arrive at the finding that the Plaintiff/Applicant does, indeed, have a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

**“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”**

Further, land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff’s rights.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

**SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF OCTOBER 2015.**

**MARY M. GITUMBI**

**JUDGE**