



**REPUBLIC OF KENYA**

**High Court at Kerugoya**

**Environmental & Land Case 19 of 2012**

**PETER GACHOKI MBURIA .....PLAINTIFF**

**VERSUS  
THE BOARD OF GOVERNORS**

**KUTUS SECONDARY SCHOOL .....DEFENDANT**

**RULING**

The plaintiff/applicant herein filed this suit against the defendant/respondent on 13<sup>th</sup> November 2012 seeking the following remedies:

(a) A declaration that he is the registered absolute proprietor of land parcel registration numbers:-

- KABARE/NYANGATI/2890
- KABARE/NYANGATI/2906
- KABARE/NYANGATI/2893
- KABARE/NYANGATI/2891
- KABARE/NYANGATI/2894
- KABARE/NYANGATI/2907
- KABARE/NYANGATI/2909
- KABARE/NYANGATI/2900
- KABARE/NYANGATI/2910
- KABARE/NYANGATI/2908 and
- KABARE/NYANGATI/2899

(b) A permanent injunction against the defendant/respondent itself, its servants and/or agents from trespassing on, fencing around or otherwise adversely interfering with the plaintiff/applicants quiet possession of the aforementioned parcels of land.

- (c) Any further or better relief that the court may deem fit and just.
- (d) Costs of the suit.

Contemporaneously with the filing of the suit, the plaintiff/applicant filed an application seeking an injunction to issue against the defendant/respondent restraining it by itself, its agents and/or servants from trespassing on, fencing around or otherwise adversely interfering with the plaintiff/applicant's quiet possession of the said parcels of land and also a declaration that the plaintiff/applicant is the registered absolute proprietor of the said parcels of land pending the hearing and determination of this suit. It is this application vide Notice of Motion, which did not indicate the enabling provisions of the law under which it was brought, that is the subject of this ruling.

I must remind counsels that notwithstanding the liberal provisions of Article 159 of the Constitution, it is a good practice to always cite the legal provisions under which any application is brought.

The application was supported by the affidavit of the plaintiff/applicant herein in which he deponed, inter alia, that he is the registered proprietor of all the aforesaid parcels of land and annexed thereto copies of the title deeds of the said parcels of land adding that when he went to supervise the planting on 4<sup>th</sup> October 2012, the principal of Kutus Secondary School and who is also the secretary to the defendant/respondent alleged that the land belonged to the school.

The application was opposed and by her replying affidavit dated 5<sup>th</sup> December 2012, CHRISTINE NGARI who is the Chairperson of the defendant/respondent deponed, inter alia, that the parcels of land referred to about were all sub-divisions of title No. KABARE/NYANGATI/703 which was originally owned by one MBURIA NGARANGARI (deceased) and was transferred to the plaintiff/applicant and one STEPHEN R.G.G MUNYI by way of transmission on 13<sup>th</sup> December 1994 and the title deed was issued in their names but was later closed on 3<sup>rd</sup> April 1996 after the new title deeds for KABARE/NYANGATI/2890, 2906, 2893, 2891, 2894, 2907, 2909, 2900, 2910, 2908 and 2899 and which are the dispute properties herein were issued. She further deponed that on or before 1974, the then Kirinyaga County Council acquired land from various individuals by way of exchange and others through compulsory acquisition for purposes of expanding Kutus town and were compensated by land elsewhere and that MBURIA NGARAGARI was one such individual whose parcel of land No.KABARE/NYANGATI/703 was acquired and he was allocated land in Marurumo being MWEA/MARURUMO/165 and that land No. KABARE/NYANGATI/703 was allocated to the defendant/respondent and that infact the letter allocating KABARE/NYANGATI/703 to the defendant/respondent was signed by its clerk S.R. Munyi (plaintiff in Kerugoya E.L.C No. 20 of 2012) who, together with the plaintiff/applicant herein were the joint transferees of KABARE/NYANGATI/703. The said letter dated 2<sup>nd</sup> February 1983 together with extract of the resolution of the Kerugoya/Kutus Urban Council were annexed to her affidavit. That since then, the defendant/respondent has been in occupation of the suit land and this application therefore has no merit and not only is the defendant/respondent capable of compensating the plaintiff/applicant but also, the balance of convenience does not tilt in favour of the plaintiff/applicant who has not even provided any undertaking as to damages.

However, in a supplementary affidavit, the plaintiff/applicant denied that the late MBURIA NGARAGARI was ever given any land in Marurumo in exchange of KABARE/NYANGATI/703 or that defendant/respondent was thereafter allocated that parcel of land.

I have considered the submissions filed by both parties together with the affidavits and other documents.

This being an application for a temporary injunction, the plaintiff/applicant must demonstrate that:-

- (a) He has a prima facie case with a probability of success and

(b) That he would suffer irreparable injury which is un-compensable in damages, and

(c) If the court is in doubt, it will decide the case on a balance of convenience – **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358.**

The dispute property is registered in the names of the plaintiff/applicant and the titles issued under the then **Registered Land Act (Chapter 300)** now repealed. It is not a first registration as it is a sub-division of the original KABARE/NYANGATI/703 and therefore, under **Section**

**143 (1)** of the then **Registered Land Act**, it may be impugned on the grounds of fraud or mistake. And in the defence and counter claim filed herein, the defendant/respondent is alleging fraud and illegality on the part of the plaintiff/applicant whose particulars include:-

- ***Holding onto the title No. KABARE/NYANGATI/703 after being***

***compensated with alternative land in Marurumo.***

- ***Failure to surrender title deed No. KABARE/NYANGATI/703 and causing***

***himself to be registered as owner by way of transmission while knowing that the said land no longer belonged to MBURIA NGARAGARI***

***(deceased).***

- ***Colluding with Stephen Munyi (plaintiff in E.L.C. No. 20/2012) to illegally obtain title No. KABARE/NYANGATI/703 and sub-dividing it into the various parcels subject matter of this suit.***

The letter dated 2<sup>nd</sup> February 1983 annexed to the replying affidavit of CHRISTINE NGARI and addressed to the Headmaster of Kutus Secondary School reads as follows:-

***“ADDITION OF LAND TO KUTUS SECONDARY SCHOOL***

***Enclosed please find the Urban Council resolution which added more land to the school”***

The said letter, according to CHRISTINE NGARI’s replying affidavit, was signed by Stephen R.G.G. Munyi who was a joint transferee of the parcel NO. KABARE/NYANGATI/703 together with the plaintiff/applicant herein. Of course the issue of fraud and illegality will be fully canvassed at the trial but on the material before me, that complaint is not entirely hollow. Fraud is capable of vitiating the plaintiff/applicant’s title to the suit properties and one of the issues that will definitely come up during trial is whether the letter dated 2<sup>nd</sup> February 1983 allocating additional land to the defendant was infact in reference to the suit property. For now, all I can say is that I am not satisfied that the plaintiff/applicant has established a prima facie case to warrant the grant of the orders of injunction.

And on the issue of irreparable injury that is un-compensable in damages and which is the second limb in the ***GIELLA*** case (supra), the plaintiff/applicant has deponed in paragraph six (6) of his supporting affidavit that if the defendant/respondent is allowed to trespass on his land, he will ***“suffer great loss, hardship and prejudice”***. No where is it suggested that such ***“loss”*** and ***“hardship”*** cannot be compensated in damages should the plaintiff/applicant eventually succeed in his claim. That requirement is mandatory for the grant of an injunction and clearly, the applicant has not met it and on that basis again, he does not merit the grant of that remedy.

Finally, if I was in doubt (which I am not) and were to decide this case on the balance of convenience, it is obvious from the evidence before me that the defendant/respondent are currently in occupation of the suit property and are cultivating it no doubt to the benefit of the school. The

defendant/respondent is a public institution and I will take judicial notice of the fact that it must be catering for a large student population. The balance of convenience would tilt in its favour.

I would therefore dismiss the plaintiff/applicant's Notice of Motion dated 12<sup>th</sup> November 2012. I would make no order as to costs but order that the status quo obtaining on the suit property remains and none of the parties should do any developments on the same or change its ownership until this suit is heard and determined.

Orders accordingly.

29/4/2013  
Before B.N. OLAO – JUDGE  
CC – Muriithi

B.N. OLAO  
JUDGE  
29/4/2013

Ms Kiragu for Plaintiff/Applicant – present

Mr. Wainaina for Defendant/Respondent – absent

COURT: Ruling delivered this 29/4/2013 in open Court.

Ms. Kiragu for plaintiff/applicant present

Mr. Wainaina for defendant/respondent absent

B.N. OLAO  
JUDGE  
29/4/2013