



**REPUBLIC OF KENYA**

**High Court at Kerugoya**

**Environmental & Land Case 48 of 2012**

DISHON MAREKO NGINE .....

NYAGA

BURANA.....)

NDAMAN IRERI SIGANA.....) APPLICANTS

EZEKIEL

NDARA .....

GILBERT KIURA MATHOROKO

VERSUS

FAUSTION NJERU NJOKA .....) RESPONDENTS

FRANCIS NJERU NYAGA

**RULING**

On 17<sup>th</sup> December, 1999 Justice Etyang delivered judgment in High Court of Kenya Civil Appeal No. 52 of 1996 which involved the parties herein. Being dissatisfied with that judgment, the applicants herein lodged Civil Appeal No. 42 of 2001 in the Court of Appeal at Nyeri which was struck out with costs on 5<sup>th</sup> November, 2004.

By a Notice of Motion dated 16<sup>th</sup> November, 2004 the applicants herein sought to review and/or set aside Justice Etyang's judgment delivered on 17<sup>th</sup> December, 1999. From the evidence available before me, that application to set aside or review Justice Etyang's judgment aforesaid has not been prosecuted to date.

On 26<sup>th</sup> November, 2012 the applicants filed this Notice of Motion under **Order 40 Rule 1 (a) 2 (i) and 3 (3)** of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act seeking an injunction restraining the respondents from transferring, sub-dividing selling, alienating, disposing, charging or in any way whatsoever dealing with some parcels of land known as NTHAWA/GITIBURU/886 to 2034 as specifically identified in the said Notice of Motion. This Notice of Motion is the subject of this ruling.

When the parties appeared before me on 13/12/2012 following the transfer of this case from Embu Court, it was agreed that the said application be canvassed by way of written submissions. Both parties

have filed their submissions.

I have considered the application, the supporting and supplementary affidavits of FRANCIS MBAKA the chairman of Mbuya Ya Andu A Nyaga sworn on 26<sup>th</sup> November, 2012 by virtue of the Power of Attorney No. 028/2003 as well as the replying affidavit of the 1<sup>st</sup> respondent FAUSTINO NJERU NJOKA. I have also considered the submissions by the parties' advocates.

As indicated earlier, judgment in this case was delivered by Justice Etyang on 17<sup>th</sup> December, 1999 and the applicants herein filed Civil Appeal No. 42 of 2001 which was struck out by the Court of Appeal on 5<sup>th</sup> November, 2004. There is therefore no suit pending in this matter. The suit was heard and determined some seven (7) years ago when the Court of Appeal delivered its judgment. What is pending is an un-prosecuted application to review or set aside Justice Etyang's judgment delivered on 17<sup>th</sup> December, 1999. That application is not the subject of this ruling and I must resist all temptations to comment on it.

Having found that there is no suit pending herein, can the applicants seek recourse in the provisions of **Orders 40 Rule 1 (a), 2 (i) and 3 (3) of the Civil Procedure Rules** or **Section 3A of the Civil Procedure Act** to obtain the injunctive orders as sought. That route does not appear to be available to the applicants. **Order 40 Rule 1 of the Civil Procedure Act** that donates to the court the power to issue injunctions and other temporary orders makes it clear that such orders can only be issued where it is proved that any property is likely to be wasted, damaged, alienated, sold, removed or disposed pending "..... ***the disposal of the suit or until further orders***". There is no pending suit before me and therefore, the remedy of a temporary injunction which is an interlocutory order cannot be available to the applicants herein.

I have also looked at the provisions of Order 40 Rule 2 (i) of the Civil Procedure Act and find that the subject matter herein did not involve breach of contract or other injury and even if it did, an application for injunction could only have been made "***either before or after judgment***". As stated earlier, judgment herein was delivered on 17<sup>th</sup> December, 1999 and the appeal that followed was struck out by the Court of Appeal on 5<sup>th</sup> November, 2004. In the circumstances, the provisions of Order 40 Rule 2 (i) of the Civil Procedure Act cannot, in any view, aid an applicant in a situation where the judgment was delivered some 14 years ago.

The respective rights of the parties herein with respect to the subject matter of this suit were settled as far back as 1999 and I do not think that this is the right forum for the applicant's advocate to submit, as he has now done, that the respondents acquired the parcels of land "***unlawfully***" and have therefore infringed upon the applicants rights guaranteed under **Article 40 (i)** of the Constitution.

The application before me being one of injunction, the guiding principles are as laid down in the case of **GIELLA VS CASSMAN BROWN 1973 E.A. 358** the first of which is that the applicants must show that they have a prima case with a probability of success. This matter having been finalized by the Court of Appeal, the applicants have not met the threshold set out in the **GIELLA CASE** (supra). And if any damages will follow, they will be damages arising out of a decision of a superior court.

Upon consideration, of all the matters herein, I find that the applicants' application dated 26/11/2012 is lacking in merit. The same is accordingly dismissed with costs to the 1<sup>st</sup> respondent.

Orders accordingly.

B.N. OLAO

JUDGE  
2/4/2013  
2/4/2013

Before B.N. OLAO – JUDGE

CC – Muriithi

Mr. Mugambi for Okwaro for respondent present

Respondent present

Mr. E.K. Mutua for applicants absent

Ruling delivered this 2<sup>nd</sup> day of April, 2013 in open Court.

B.N. OLAO

JUDGE  
2/4/2013