



REPUBLIC OF KENYA

High Court at Kerugoya

Environmental & Land Case 42 of 2012

**MUGO MICHAEL NJAGE & OTHERS .....PLAINTIFFS/APPLICANTS**

**VERSUS**

**NYAGA GICHINDANO .....DEFENDANT**

**RULING**

This is in respect to the Notice of Motion dated 26/9/2011 filed by the plaintiff/applicant and seeking orders that the defendant/respondent be restrained from making bricks, digging quarries for building stones and hardcore, cutting trees or doing any other activity that will interfere with the natural vegetation and natural geological status of land parcel No. EVURORI/EVURORI/17 pending the hearing and determination of this suit.

The application is based on the grounds inter alia, that the suit property was registered in the defendant/respondent's names to hold in trust for the Mururi clan members but he has refused to subdivide it and transfer to the said clan and is instead interfering with the natural status of the land hence this application.

The application is supported by the plaintiff/applicant's affidavit sworn on behalf of the clan members. The same was opposed and by his replying affidavit, the defendant/respondent deponed that the dispute property was registered in his names and that of the late Kirege Kirungia as sole owners and that at no time was it ever registered in their names to hold in trust for the Mururi clan.

I have considered the application, the submissions by counsel and all the other relevant annexures in this matter.

The conditions for the grant of an injunction are now well settled and they are:-

- 1. The applicant must show a prima facie case with a probability of success.***
- 2. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.***
- 3. If in doubt, the Court will decide the application on a balance of convenience - see GIELLA VS CASSMAN BROWN & COMPANY LTD 1973 E.A. 358.***

On the first condition, the defendant/respondent has demonstrated that the suit property is indeed registered in his names and also the names of another party now deceased. The Court has also gained sight of an affidavit sworn by the defendant/respondent on 21/5/1986 in respect to Land Appeal Case No. 291 of 1985 wherein he depones with respect to the suit land as follows in paragraph 2

**“ That I shall not treat the lands the subject of this appeal as my property but shall hand it over to Mururi clan and the 13 members”.**

In the same affidavit, the defendant/respondent had deponed that the members of the said clan had appointed him to represent them in an appeal which involved the suit land among others. Under the circumstances, the plaintiff/applicant’s claim that the land was **“registered in the names of the defendant and Kirege Kirungia now deceased as trustee of the clan members”** - see paragraph 3 of his supporting affidavit – is well founded and indeed supported by the defendant/respondent’s own affidavit sworn in 1986. In **GATHIBA VS GATHIBA 2001 2 E.A 342**, it was held by Justice Khamoni (as he then was) that registration of a parcel of land under **the Registered Land Act** (now repealed) does not relieve a proprietor from any duty or obligation to which he is subject as a trustee. The Court of Appeal in **MUKANGU VS MBUI K.L.R (E & L) 1 at Page 622** approved the findings in the **GATHIBA** case (supra). The land subject matter of this case is registered under the **Registered Land Act** (now repealed) and the plaintiff/applicant in his plaint filed herein on 23/11/2006 was seeking the determination of a trust and division of the suit property. In my view, the plaintiff/applicant has satisfied the first limb of the **GIELLA** case (supra).

It is also the plaintiff/applicant’s case that defendant/respondent in digging quarries for building stones and hardcore and generally carrying out activity that is interfering with the natural vegetation and geological status of the suit land. The defendant/respondent’s response to this assertion is that he cannot be enjoined from using his land in a manner that he deems fit. If indeed the defendant/respondent is carrying out the said activity on the said land indiscriminately, it may very well amount to a transgression of the law under the **Environmental Management and Cordination Act** in which case damages may not be an adequate compensation.

Having considered all the issues herein, I am satisfied that the plaintiff/applicant has made out a case to warrant the grant of the orders sought in the Notice of Motion dated 26/9/2013 and I grant them. Costs in the cause.

**B.N. OLAO**

**JUDGE**

**27/5/2013**

27/5/2013

Before B.N. OLAO – JUDGE  
CC – Kariuki

Njenga for Njeru for Plaintiff – present

Wamai for Momanyi for Defendant – present

COURT: Ruling delivered this 27<sup>th</sup> day of May 2013 in open Court.

Mr. Njenga for Njeru for plaintiff present

Ms Wamai for Momanyi for defendant – present

**B.N. OLAO**

**JUDGE**

**27/5/2013**