



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (COMMERCIAL & TAX DIVISION – MILIMANI)
CIVIL CASE NO. 263 OF 2010

RACHAEL
MUAKA.....PLAINTIFF
(The duly appointed Attorney of JAFRED ANGALUKI MUAKA

VERSUS

KAHAWA SUKARI LTD.....1ST DEFENDANT
MARGARET WAIRIMU NJUGUNA.....2ND
DEFENDANT

R U L I N G

This application is brought by way of a chamber summons dated 27th April, 2010, and taken out under **Order XXXIX Rules 1 and 2 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act**. By the application, the applicant seeks from the court the following orders –

- 1) That an injunction do issue restraining the Defendants whether by themselves, their servants or authorized agents and/or any other person claiming under them from entering, trespassing, occupying, possessing, cultivating and/or interfering in any manner whatsoever with all that property known as Plot No. 3471 situated in Kahawa Sukari Estate, Nairobi and/or from building, constructing or putting any structure on the subject land pending the hearing and determination of this suit.**

- 2) That an injunction do issue restraining the Defendants and each of them whether by themselves, their servants or authorized agents and/or any other person claiming under them from selling, leasing, transferring, sub-dividing or alienating all that property known as Plot No. 3471 Kahawa Sukari Estate, Nairobi pending the hearing and determination of this suit.**

- 3) That pending the hearing of this application *inter partes*, interim orders be made in terms of prayers 2 and 3 above to ensure that the orders finally made herein are not rendered nugatory.**

4) That the costs of this application be borne by the Defendants.

The application is supported by the annexed affidavit of Rachael Mwaka, and is based on the grounds that –

- a) The Plaintiff is the duly appointed Attorney of Jafred Angaluki Muaka vide a Power of Attorney registered as No P/A 42981/1 and registered at the Lands Registry, Nairobi, on 6th June 2006.**
 - b) The subject land is the lawful property of Jafred Angaluki Muaka (hereinafter called the “the donor”) having purchased the same from the 1st Defendant in 1993.**
 - c) The 1st Defendant has breached the agreed terms of sale and declined to sign a transfer and/or process the Title Deed in favour of the donor to date and despite numerous demands and promises to comply.**
 - d) The Defendants have colluded and fraudulently sold and/or transferred the suit property to the 2nd Defendant without the donor’s knowledge, approval and/or consent.**
 - e) The Defendants have jointly colluded and altered and/or interfered with the official record and documents pertaining to the property so as to substitute the name of the donor with that of the 2nd Defendant as the true owner of the property.**
 - f) The 2nd Defendant has illegally trespassed and taken possession and use of the donor’s property and has built a Septic Tank on the property wherein she is draining waste products without the donor’s knowledge, consent and/or approval. The 2nd Defendant is also cultivating the property.**
 - g) The actions of both Defendants are manifestly illegal, fraudulent and amount to trespass on the donor’s lawful property.**
 - h) The actions of the Defendants are intended to defraud the donor of a substantial life time investment in the suit property.**
 - i) Unless the orders sought herein are granted, the Defendants are likely to alienate the property to a Third Party and/or continue with the acts of trespass aforesaid and the donor being the lawful owner thereof will suffer substantial loss and irreparable damage.**
 - j) It will suit the interest of justice and the balance of convenience to grant the prayers sought herein.**
- The 1st Respondent opposed the application on the grounds that -
- i) The present suit properly belongs to the Land and Environment Division of the High Court and**

therefore the commercial and Tax Division is not properly seized of the matter.

ii) The 1st Defendant/Respondent has not entered, trespassed upon or occupied the suit property nor threatened to do so and therefore prayer No. 2 in the application does not lie against the 1st Defendant/Respondent.

iii) The 1st Defendant/Respondent has not threatened to sell, lease, alienate or sub-divisive the suit property and therefore prayer No. 3 in the application does not lie against the 1st Defendant/Respondent.

iv) The 2nd Defendant is not the registered proprietor of the suit property and therefore the present suit is incurably defective for misjoinder of parties and causes of action.

It is to be noted that the above grounds were filed exclusively by the 1st Defendant and that the 2nd Defendant has not responded to the application in spite of having been duly served. Of these grounds, I need not say more than that ground 1 is a thinly veiled attempt to challenge the jurisdiction of this court in respect of this matter. The High Court of Kenya is only one court with unlimited original jurisdiction in civil and criminal matters, and such jurisdiction and powers as may be conferred on it by The Constitution or any other law. The divisions in High Court are purely administrative and do not erode the Constitutional jurisdiction conferred on the court. This court is therefore empowered to handle, hear and determine this matter.

As I understand it, the Plaintiffs case is that he purchased all that property known as Plot No. 3471, Kahawa Sukari Estate, Nairobi, from the 1st Defendant in 1993 and paid the full purchase price thereof. In breach of the agreed terms of sale, the 1st Defendant declined to sign the transfer and/or process the title deed in the Plaintiff's favour and instead allegedly transferred the property to the 2nd Defendant as the true owner thereof. Consequently, the 2nd Defendant allegedly trespassed onto the property, took possession thereof, and constructed a septic tank on that property.

In its written statement of defence, the 1st Defendant denies that it has transferred the suit property to the 2nd Defendant, and instead avers that the 2nd Defendant is not the registered proprietor of the suit property as alleged by the plaintiff. Furthermore, in its 3rd ground of opposition, the 1st Defendant denies having threatened to sell, lease, alienate or subdivide the suit property. It also denies that the 2nd Defendant is a registered proprietor of the suit property. The 2nd Defendant herself, in spite of having been served, has not filed any documents in denial of the allegations against her. Her silence denotes that she is either guilty as alleged, or that she is not the registered proprietor of the suit property in which event she would not be bothered by the suit against her. Against that background, the main issue for determination is whether the Plaintiff is entitled to the injunction order sought by this application. As laid out in the case of **GIELLA v CASSMAN BROWN & Co. Ltd** [1973] EA 358, to be entitled to the grant of an interlocutory injunction, first, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury which would not be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

Having denied that it has threatened to sell, lease, or alienate, or sub-divide the suit property, and with the 2nd Defendant having decided to keep aloof of this matter, the Defendants have thereby facilitated the establishment by the Plaintiff of a prima facie case with a probability of success. Indeed, the averments

by the 1st Defendant suggest that it still stands by the agreement between the parties and that there is no change of heart. If that were the case, the 1st Defendant would have proceeded to execute the agreement between it and the Plaintiff in order to have the Plaintiff registered as the proprietor of the suit property. Having failed to do so, the Plaintiff genuinely feels threatened and fears that the 1st Defendant is reluctant to execute the agreement to its conclusion, which would be a breach of contract

I note that this application is brought, *inter alia*, under **Order XXXIX Rule 2** of the **Civil Procedure Rules**. That **Rule** states as follows –

“In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit...apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the said contract, or relating to the same property or right.”

In my considered view, the Plaintiff has satisfied not only the conditions laid out not only in GIELLA’s Case, but also those set out in above paragraph which thereby entitles him to a grant of the orders sought in this application.

I accordingly grant an injunction in terms of prayer 2 of the application and hereby restrain the Defendants whether by themselves, their servants or authorized agents and/or any other person claiming under them from entering, trespassing, occupying, possession, cultivating and/or interfering in any manner whatsoever with all that property known as Plot No. 3471 situated in Kahawa Sukari Estate, Nairobi, and/or from building, constructing or putting any structure on the subject land pending the hearing and determination of this suit. This injunction however, will be conditioned on the Plaintiff filing undertaking to pay damages, if any, to the Defendant in the event that it is found at the trial that the injunction ought to not to have been issued. The said undertaking to be filed within 7 days from today. The Plaintiff will also have the

costs of this application.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 9th day of December, 2010.

L NJAGI

JUDGE