



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**ENVIRONMENT AND LAND COURT AT EMBU**

**ELC CASE NO. 324 OF 2015**

DORCAS MUTHONI.....1<sup>ST</sup> PLAINTIFF  
SILAS NJERU NGARI.....2<sup>ND</sup> PLAINTIFF  
MUTURI NGARI.....3<sup>RD</sup> PLAINTIFF

**VERSUS**

MICHAEL IRERI NGARI.....DEFENDANT

**RULING**

The Applicant herein has moved the Court citing the provisions of **Order 45 Rule 122** (presumably of the Civil Procedure Rules) seeking the following orders:-

- a. That a prohibitory order do issue on land parcel number EMBU/KITHUNTHIRI/1674 pending hearing and determination of the suit herein.***
- b. That costs be awarded to the plaintiff/applicant.***

The application is based on the grounds set out in the Notice of Motion dated 4<sup>th</sup> February 2016 in which the 3<sup>rd</sup> plaintiff/applicant avers that he has reliably learnt that the defendant is in the process of selling the suit land and if that happens, the plaintiffs/applicants will suffer irreparably.

The application is resisted and in a replying affidavit, the defendant/respondent has deponed, inter alia, that he is the proprietor of the suit property i.e. EMBU/KITHUNTHIRI/1674 and has been in occupation thereof since 1984 having extensively developed the same and the plaintiffs/applicants are not entitled to the said land as they have their own land.

I must express my displeasure in the manner in which this application has been brought more so considering that it was filed by an advocate. First, the application cites **Order 45 Rule 122**. There is no **Rule 122 in Order 45 of the Civil Procedure Rules**. **Order 45 of the Civil Procedure Rules** deals with Review. Prohibitory orders under **Order 22 Rule 48 of the Civil Procedure Rules** are issued by the Court after attachment to prohibit the judgment debtor from transferring or charging the attached property. That provision does not apply here because the subject matter of this suit is yet to be attached.

Perhaps what counsel had in mind was an order of inhibition. Such an order is provided for under **Section 68 (1) of the Land Registration Act** in the following manner:-

***“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, generally until a further order, the registration of any land lease or charge”***

I say so because of paragraph 3 and 4 of the 3<sup>rd</sup> plaintiff/applicant’s supporting affidavit in which he has deponed as follows:-

**3: “That I have reliably learnt that the defendant is in the process of selling off suit land”**

**4: “That if suit land is sold, we stand to suffer irreparably”**

From the plaint that was filed herein on 21<sup>st</sup> August 2015, the plaintiffs/applicants plead that the land subject of this suit is registered in the defendant/respondent’s names in trust for them as the same was purchased by their late mother TERESIA MURINGO NGARI. The defendant filed a defence denying that averment and adding that the land subject of this suit is his property which he purchased from one KISHONI NJAUNGIRI. Whether in fact the defendant/respondent holds the suit land in trust for the plaintiff/applicants or it is in fact his property will be a matter for the trial Court.

Notwithstanding my reservations in the manner in which this application was brought, I will nonetheless consider it on its merit bearing in mind the provisions of **Article 159 (1) (d) of the Constitution** which enjoins the Court to administer justice without undue regard to procedural technicalities and also **Order 51 Rule 10 (2) of the Civil Procedure Rules** which provides that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. I am also minded that it would be harsh to punish a litigant due to procedural defects caused by an advocate whom he instructed to prosecute his case. Finally, the defendant/respondent was not prejudiced by that want of form and has elaborately responded to the application.

Looking at the substance of this application, it is, as I have indicated above, basically seeking an order of inhibition because the plaintiff/applicants fear that the land subject of this suit may be sold before the case is heard and determined. An order of inhibition issued under **Section 68 of the Land Registration Act** is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.

I have looked at the pleadings herein and the annexures which no doubt will be part of the exhibits to be produced at the trial. Some of them are agreements in Kikuyu language. There is no English transaction as required by law. No doubt this discrepancy will be sorted out before the trial but at this stage, the Court can derive no benefit from them. Both parties claim to be residing on the land subject of this suit. In my view, no prejudice will be caused to the defendant/respondent if an order of inhibition is granted as prayed. Guided by the principle that the Court should always take the course that carries the lower risk of injustice – **FILMS ROVER INTERNATIONAL & OTHERS VS CANNON FILMS SALES LTD 1986 3 ALL E.R 772** - it is my view that the injustice that would be caused to the defendant/respondent if the plaintiff/applicants were granted the prayer of inhibition and later failed at the trial outweighs the injustice that would be caused to the plaintiff/applicants if the prayer for inhibition was dismissed and they succeed in proving their case. Balancing the two competing interests, the cause of

justice will best be served if the order of inhibition is granted. Since each of the parties claim to be in possession of the property subject of this suit, an order of inhibition will not affect those rights but serve the greater interest by preserving the said land while their proprietary interests are determined.

Ultimately therefore, after considering all the matter herein, this Court makes the following orders:-

- 1. An order of inhibition is issued inhibiting the registration of any dealing such as transfer, charge etc on the land parcel No. EMBU/KITHUNTHIRI/1674 until this suit is heard and determined.**
- 2. Each party shall meet their own costs of this application as the parties are family.**

**B.N. OLAO**

**JUDGE**

**11<sup>TH</sup> MARCH, 2016**

Ruling delivered in open Court this 11<sup>th</sup> day of March, 2016

Mr. Muraguri for Plaintiff/Applicant present

Defendant/Respondent present in person

Mr. Nyaga Court clerk present.

**B.N. OLAO**

**JUDGE**

**11<sup>TH</sup> MARCH, 2016**



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