



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO 149 OF 1997

IN THE MATTER OF THE ESTATE OF

MARGARET NYAWIRA MAINA.....(DECEASED)

VERSUS

MWANGI MAINA.....OBJECTOR

AND

JANE MUTHONI GACHATHAI.....1ST INTERESTED PARTY/APPLICANT

ANDERSON NGANGA.....2ND INTERESTED PARTY/APPLICANT

RULING

1. This ruling is in respect of the application dated 6/3/19 in which Jane Muthoni Gachathi and Anderson Ng'ang'a seeks orders;

1. Spent

2. Spent

3. Spent

4. **THAT** pending the hearing and determination of this application, the honorable court be pleased to issue a preservative order to restrain the Respondents from subdividing, alienating, leasing, selling and/or in any other manner, transferring land parcel No. **Kiambogo Settlement Scheme Plot No 348**.

2. The same is premised on 7 grounds namely;

1. **THAT** the interested parties/applicants herein have purchase and own 1½ acres respectively which were to be excised from land parcel No **KIAMBOGO SETTLEMENT SCHEME PLOT NO 348**.

2. **THAT** the suit property is also at risk of being disposed of or alienated.

3. **THAT** the applicants are in occupation of the suit land and been in occupation since 2002.

4. **THAT** the summons for revocation of grant is still pending for hearing and has a hearing dated for 26th June 2019 and the issue of ownership is to be substantively determined at the conclusion of the suit.

5. **THAT** the applicants have a prima facie case with likelihood of success.

6. **THAT** unless the orders of injunction is granted to restrain the respondents from the suit land, the applicant's stand to suffer irreparable loss.

7. **THAT** the balance of convenience tilts in favour of the applicants.

3. It is further supported by the affidavit of Jane Muthoni Gachathi (1st Applicant).
4. The gist of the application, the supporting grounds and affidavit is that the applicants purchased 1½ acres and 2 acres of land from one Maina Gachau (Deceased) which has to be excised from land parcel No Kiambogo Settlement Scheme Plot No 348.
5. An annexed agreement shows that the 2nd applicant entered into a sale of land agreement with Maina Gachau (Deceased) in which the 2nd applicant was to buy land known as Kiambogo Settlement Scheme Plot No 348 measuring 2½ acres from the said Maina Gachau (Deceased). The purchase price was kshs 100,000.
6. A 2nd annexed agreement dated 30/12/98 shows that the 2nd applicant entered an agreement to buy 2 acres of land from land Kiambogo Settlement Scheme Plot No 348 for kshs 80,000.
7. Curiously the agreement marked “JMG1” and stated by the 1st applicant as evidence of her purchase of 1½ acres of land from Maina Gachau and the 2nd applicant for purchase of 2 acres of land.
8. Annexure “**JMG2**” produced is a 2nd Sale agreement still in the names of Maina Gachau and the 2nd applicant.
9. There is thus no evidence at all supporting any sale agreement between the 1st applicant and Maina Gachau.
10. The application is opposed and in a replying affidavit Peter Njoroge Mwangi depones that the purported sale was done fraudulently and without the knowledge of other beneficiaries to the Estate of Margaret Nyawera Maina (Deceased).
11. The said sale is impugned for having taken place before the confirmation of grant which violated **Section 45 (1), 2(a), 2(b)** and **Section 55 (1)** as read together with **Section 71** of the **Law of Succession Act**. Whereas the agreement is dated 26th day of May 1997, the Certificate of confirmation of grant is dated 30/11/98.
12. The deceased Margaret Nyawera was survived by 5 children as evidenced by letter from Chief Marked “**PMN 2**”.
13. The application was disposed off by way of written submissions.
14. The principles for the granting of an injunction are well set out in the **Giella Vs Cassman Brown Case**. I summarise them as hereunder;
 1. Is there a prima facie case established?
 2. Does the applicant stand to suffer irreparable harm?
 3. On which side does the balance of convenience lie?
15. At this stage, it is not my duty to delve into whole merits or demerits of the entire case. That is the task better left to the trial court.
16. In our instant case, serious short comings in the evidence adduced have greatly watered down the existence of a prima facie case with a probability of success.
17. The 1st applicant has not laid any evidence in support of that alleged purchase of land and instead has exhibited annexures which only support the 2nd applicants’ case.
18. On his part too, the 2nd applicants’ case is wrought with ambiguity and uncertainty. The 1st agreement marked “**JMG1**” states that “**...whereas the vendor is the registered owner of parcel of land known as Kiambogo Settlement Scheme Plot No 348 measuring 2½ acres and whereas he has agreed to sell the aforesaid parcel of land to the purchaser...**”
19. The subsequent agreement states that the 2nd interested party was purchasing on 30/12/98 “**...two acres of land from Kiambogo Settlement Scheme Plot No 348...**”
20. The 1st agreement refers to the sale of the entire parcel No Kiambogo Settlement Scheme 348 yet the 2nd agreement talks of 2 acres to be sold from parcel 348.
22. The unfolding scenario fails to support a prima facie case in favour of the applicants.
23. An issue arises too about the legality of the sale(s) given that the grant herein is confirmed on 30/11/98 yet the 1st sale is said to have taken place on 26/5/97. This borders on intermeddling with the estate of Margaret Nyawera Maina.
24. The ingredients for the grant of an injunction operate adjunctively and without establishing a prima facie case, the applicants fail to show they would suffer irreparable harm and the balance of convenience certainly tilts in favour of the respondents.

25. With the result that, the application dated 6/3/19 is dismissed with costs to the respondent.

Dated and Delivered at Nakuru this 20th day of JUNE 2019.

A. K. NDUNG'U

JUDGE