



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI**  
**FAMILY DIVISION-MILIMANI LAW COURTS**  
**SUCCESSION CAUSE NO. 306 OF 2013**  
**IN THE MATTER OF THE ESTATE OF ELIZABETH NDUTA NGORU**

**(DECEASED)**

ESTHER WAMBUI KANYI.....1<sup>ST</sup> APPLICANT

TERESIA WANJIKU KAMAU.....2<sup>ND</sup> APPLICANT

MATY NDUNGU.....3<sup>RD</sup> APPLICANT

**AND**

NJERI NGORU.....1<sup>ST</sup> RESPONDENT

JACINTA WANJIRU NDUNGU.....2<sup>ND</sup> RESPONDENT

**RULING**

**Introduction:**

1. The application for determination is dated 20<sup>th</sup> February, 2017. It is a Chamber Summons brought under **Section 47** of the **Law of Succession Act** and **Rules 59** and **73** of the **Probate and Administration Rules**. It seeks, in the main, that the court do issue conservatory/preservatory orders against the parcels of land Numbers:

a) **Dagoretti/Waithaka/818**

b) **Dagoretti/Waithaka/T.128**

c) **Dagoretti/Waithaka/T.120**

pending the hearing and determination of the application dated 4<sup>th</sup> March, 2016.

2. The application is premised on grounds that a search conducted by the Applicant's Advocate at the Land Registries, reveals that one of the properties, subject of the aforementioned Succession Cause, known as Dagoretti/Waithaka/818 has two title deeds in original form; one registered in the name of the deceased and the other in the name of the Respondents. That Dagoretti/Waithaka/T.128, also has two title

deeds in original form; the first registered in the name of one Ngoru Thotho and the second in the name of the 1<sup>st</sup> Respondent.

3. It is also alleged that the title deed to Dagoretti/Waithaka/818 was acquired by the Respondents without going through the due process of the law, while title deed to Dagoretti/Waithaka/T.128 was acquired by the 1<sup>st</sup> Respondent without administering the estate of the deceased. That green card entries of Dagoretti/Waithaka/T.128 and Dagoretti/Waithaka/T.120, reveal that the deceased was the proprietor to both properties at one time before the 1<sup>st</sup> Respondent was issued with title deeds of the two parcels of land without following the due process of the law.

4. The application is brought at the instance of Esther Wambui Kanyi and Teresia Wanjiku Kamau (hereinafter the Applicants). They swore identical affidavits on 20<sup>th</sup> February, 2017 in which they averred that on 28<sup>th</sup> July 2014, a grant of probate to the estate of the deceased Elizabeth Nduta Ngoru was issued to Njeri Ngoru and Jacinta Wanjiru Ndungu the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively. That the parcels of land were first registered in the deceased's name as follows:

a) **Dagoretti/Waithaka/818** – 16<sup>th</sup> April 1975

b) **Dagoretti/Waithaka/T.128** – 18<sup>th</sup> November 1993

c) **Dagoretti/Waithaka/T.120** – 14<sup>th</sup> July 1981

#### **THE APPLICANTS' CASE**

5. M/s. Badia learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants has relied on the decision in **MRAO LIMITED VS FIRST AMERICAN BANK OF KENYA LIMITED AND 2 OTHERS, CIVIL APPEAL NO. 39 OF 2002** on the principles that should guide the court, in this matter. Counsel urges that the applicant must show that there is a prima facie case with probability of success and that the damage to be suffered would be irreparable by payment of damages and lastly, that the court should consider the balance of convenience.

6. Prima facie case is one such as a the material placed before it the court or tribunal properly directing itself would conclude that there does exist a right which has been infringed and that the Respondent needs to give an explanation in rebuttal. This position counsel urges, was reinforced in **ELC SUIT NO. 882/2012**.

7. Counsel submits that the main issues to note are that Dagoretti/Waithaka/818 belonged to the deceased Elizabeth Nduta Ngoru who, during her lifetime and several years prior to her death, gifted it to her daughter Grace Kanyi. Subsequently Grace Kanyi gifted the same property to her children the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, in 1999 who have substantially developed it. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents obtained the grant of letters of administration to the estate of the deceased unprocedurally.

8. To support the application the Applicants annexed the green card entries and title deeds to the parcels of land subject of the Succession Cause. M/s. Badia argued that the 1<sup>st</sup> Respondent has not in any way replied to the application dated 20<sup>th</sup> February 2017 and no reason has been given why the deceased's aforesaid three properties, should not be restricted pending the hearing of the main application dated 4<sup>th</sup> March 2016.

9. Counsel states that the Applicant will suffer irreparable damage if this application is not granted. She made reference to the decision in **ELC No. 882 of 2012** where the court said that the only question to determine is whether damages would be adequate compensation. The court in that case took judicial notice of the fact that land is a scarce commodity and it was unlikely that the applicant would be adequately compensated. Counsel asserts that the Applicants have met the threshold in the Mrao case.

10. Counsel opines that the application is not opposed because their reply deals with other issues not pertinent to the application. Counsel prays for orders sought lest the Applicants are rendered to hold a text book judgment where there is nothing to show for it when the suit is finally determined. That there is no prejudice to be suffered by any beneficiary as these orders will preserve the estate.

11. For the foregoing reasons M/s. Badia urges the court to allow the application as it is in the interest of justice that conservatory orders be issued preserving the three parcels of land pending the hearing and determination of the application dated 4<sup>th</sup> March 2016.

### **The Respondents' Case:**

12. M/s. Macharia learned counsel for the Respondents observes that this is an application they would have consented to set for two issues raised out in the /Replying affidavit. The two issues are first, that the application does not include all the properties in the main application dated 4<sup>th</sup> March 2016. That the deceased only had three properties only, being Dagoretti/Waithaka/818, Dagoretti/Waithaka/T.128 and Gatamayu/Kagaa/512. The 1<sup>st</sup> Respondent is not aware of the property described as Dagoretti/Waithaka/T.120.

13. The second issue is that the details in the green card concerning the parcel of land known as Dagoretti/Waithaka/T.120 contain an error of entry at the lands office. According to counsel, the said plot does not and has never belonged to the deceased. It is instead owned by one Hanna Wanja who is not related to the deceased.

14. M/s. Macharia's contention is that the fact that the applicants have developed Dagoretti/Waithaka/818 is not a bar to their being evicted should the court establish the proper property owners. Furthermore, all the parties have all along been living in the suit properties and no one is about to disposed of them to third parties. That the Respondents obtained another title to Dagoretti/Waithaka/818 because the 1<sup>st</sup> title was said to be lost.

15. Counsel argues that the Applicants who took the title to parcel No. Dagoretti/Waithaka/818 from their late mother were hostile when asked about the title by the area chief and the District Officer. They denied being in possession of any title deed. After the petitioners were granted letters of administration, the administrator applied for and was issued with another title and it is only in the application of 4<sup>th</sup> March 2016 that the Applicants owned up to having the title in their possession.

16. Counsel asserts that the property that was bequeathed to the mother of the applicants is Gatamayu/Kagaa/512 and that it would be unfair for the mother of the applicants to have inherited two properties, while the deceased had two other daughters, Jacinta and Susan, one of whom has not been given any property. The Respondents propose that Dagoretti/Waithaka/818 should be bequeathed to Jacinta and Wairimu.

17. Counsel submits that Dagoretti/Waithaka/818 which has the two titles had been registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 1<sup>st</sup> Respondent is ready to surrender her share to her first sister who did not get a share. She contends that an injunction against a third person who is not a party in this suit would be wrong in law and urges that instead the court should order the Land Registrar to produce records to establish who the rightful owner is. That in the alternative if the orders sought are allowed, they should be inclusive of all the estate.

18. Counsel prays that the current application be dismissed as a witch hunt and the main application dated 4<sup>th</sup> March 2016 be set down for hearing since all the parties have filed their replies.

### **The Applicants' rejoinder:**

19. M/s. Badia reiterates her earlier assertions, that the applicants have substantially developed Dagoretti/Waithaka/818; that the 1<sup>st</sup> Respondent unprocedurally acquired title to

Dagoretti/Waithaka/T.128 and 818; that Plot No. Dagoretti/Waithaka/T.120 was not only at one time registered in the deceased's name but also in the 1<sup>st</sup> Respondent's name; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have severally over the years tried to evict the applicants from plot No. Dagoretti/Waithaka/818 as can be seen in suit No. **ELC SUIT NO. 60/2016** annexed.

20. Counsel also reiterates that Dagoretti/Waithaka/818 belonged to Grace Kanyi, a daughter of the deceased, having been gifted to her as annexed in the application dated 4<sup>th</sup> March 2016. Further that the deceased and the 1<sup>st</sup> Respondent have been joint proprietors of Dagoretti/Waithaka/T.120 and there is no proof of any error as alleged by the Respondents.

21. It is counsel's argument that the issue of Gatamaiyu/Kagaa/512 has not been pleaded and the property does not form part of the deceased's estate. Further that the Respondents' reply gives no direct reason why the application should not be granted and no documentary evidence has been supplied to show that plot number Dagoretti/Waithaka/T.120 is not the property of the deceased as demonstrated by the applicants.

**Disposition:**

22. I have considered the holdings in **ELC No. 882 of 2012** and the **Mrao** case to which M/s Badia referred the court. This is an interlocutory injunction pending the hearing and determination of the application dated 20<sup>th</sup> February, 2017. The principles upon which an injunction may be granted are first, that the applicant has shown a prima facie case with a probability of success. Secondly, that he might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages if the injunction does not issue. Lastly, if in doubt the court will normally decide on a balance of convenience – See **Adalja v Hilton International (K) Ltd & Anor (1987) KLR pg. 624.**

23. Having considered the parties' respective submissions, I note that the application is intended for the preservation of the subject properties belong to the estate of the deceased. There is also evidence that the Respondents have severally tried to evict the Applicant on plot No. Dagaorretti/Waithaka/818. The issue of the rightful owners of any of the properties shall be ventilated at the main hearing. I therefore find that this application meets the threshold enunciated in the Adalja case and restated in the Mrao case.

There being merit in the application dated 20<sup>th</sup> February 2017 it is hereby granted with no orders as to costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 27<sup>th</sup> DAY OF June, 2017.**

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**L. A. ACHODE**

**JUDGE**