



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 243 OF 1999**

**IN THE MATTER OF THE ESTATE OF THE LATE MUBIA WAIRIUKO**

**NJUGUNA NJIHIA..... 1<sup>ST</sup> APPLICANT**

**KAMAU NJIHIA .....2<sup>ND</sup> APPLICANT**

**NDIRANGU NJIHIA .....3<sup>RD</sup> APPLICANT**

**MWANGI NJIHIA .....4<sup>TH</sup> APPLICANT**

**MAINA NJIHIA.....5<sup>TH</sup> APPLICANT**

**VERSUS**

**JACKSON NJUGUNA NDIRANGU.....RESPONDENTS**

**RULING**

1. The application before this court is dated the 2<sup>nd</sup> February 2016. The applicants later amended the said summons and filed the same on 20<sup>th</sup> September 2016. The applicant seeks the following orders.

i. Spent

ii. That this Honourable court be pleased to issue an order prohibiting Naftari Ndubi Kihara, Jane Njeri Kimani, Beatrice mumbi Kariuki and Jackson Ndirangu, the current registered proprietors of Loc 2/Makomboki/1875; Loc 2/Makomboki/1882 and Loc 2/Makomboki/1976 formerly Loc 2 Makomboki/116( hereinafter the property.) their servants, agents, employees or personal representatives from transferring, sub dividing and otherwise dealing with the property pending the heading and determination of this application inter-parties.

iii. That this Honourable court be pleased to issue an order prohibiting Naftari Ndubi Kihara, Jane Njeri Kimani, Beatrice mumbi Kariuki and Jackson Ndirangu, their servants, agents, employees or personal representatives from transferring, sub dividing and otherwise dealing in any way with the property, pending the hearing and determination of the summons for revocation.

iv. That this Honourable court be pleased to issue an order prohibiting Jane Njeri Kimani, Beatrice mumbi Kariuki and Jackson Ndirangu, their servants, agents, employees or personal representatives from evicting the applicants from the property pending the hearing and determination of this application inter-parties.

v. That this Honourable court be pleased to issue an order prohibiting Jane Njeri Kimani, Beatrice mumbi Kariuki and Jackson Ndirangu, their servants, agents, employees or personal representatives from evicting the applicants from the property pending the hearing and determination of the summons for revocation of Grant.

vi. That this Honourable court be pleased to give a date for hearing of the summons for revocation of Grant

vii. That the costs of this application be awarded to the applicants.

2. The application was grounded on the grounds that Daniel Ndirangu Mubia was conformed as an administrator of the deceased estate vide an order issued on 26<sup>th</sup> July 2000 and that Loc 2 Makomboki/116 which has since been subdivided into Loc 2/Makomboki/1883, Loc 2/Makomboki/1882, Loc 2/Makomboki/1881, Loc 2/Makomboki/1875, Loc 2/Makomboki/1877 and Loc 2/Makomboki/1876, on which the applicants and their families have resided for over 40years. That the applicants father, who was a son of the deceased, had purchased the beneficial interest of his brothers in the property, hence he is the only one entitled to it and that the grant was obtained through fraud and concealment of material facts as the applicants were not listed as beneficiaries nor where they informed of the succession proceedings. The applicants state that due to the lack of proper legal representation and due to the court file missing, the application for revocation of grant filed on 13<sup>th</sup> December 2000, has not been prosecuted and remains pending to date and that the applicants live in constant fear of eviction from the only property they have resided on and from which they earn their daily bread. They submitted that unless the orders sought are granted, there is imminent danger of the applicants being evicted from the property.

3. The application is supported by the affidavit of Francis Mwangi Njihia. He reiterates what is stated in the grounds giving more details on how his father who is the deceased son purchased beneficial interests of his brothers in the property Loc 2 Makomboki/116. He also narrates the dispute of the parcels of land stating that their problems over the said parcels of land arose after their father died. He claims that his father having bought the beneficial interest of his brothers his uncles have no claim to the property and it should not have been distribute to them. That he only came to know of the confirmation of grant through the area Chief and subsequently they sought a revocation of the grant. That though he launched the caution of the property the same remained in force until June 2012 when he was informed of its removal by the letter dated 25<sup>th</sup> June 2012 from the District Land Registrar. However by a letter dated 15<sup>th</sup> October 2015 the Chief Land Registrar directed the Murang'a District Land Registrar to place restriction on the property until the matter was resolved. That by a letter dated 15<sup>th</sup> October 2015, the firm of Kivuva Omuga & Co. Advocates asked the Chief Land Registrar to lift the restriction in light of the ruling of Mshila J of 26<sup>th</sup> August 2015.

4. Jackson Njuguna, the 1<sup>st</sup> respondent, having authority from his fellow respondents, filed a reply dated 26<sup>th</sup> March 2016 and filed on 25 April 2016 to the summons dated 2<sup>nd</sup> February 2016 together with its supporting affidavit and state that the applicants application for revocation is invalid as the same does not in any way demonstrate any valid reason why the grant issued and confirmed on 26<sup>th</sup> July 2000 should be revoked and as such it is made in bad faith as it is an abuse of the court process since the applicants had also made a similar application for revocation of the grant issues, an application which is still pending due to the applicants abandoning it. The respondents also state that the applicants cannot sustain the current application when the application dated 13<sup>th</sup> December 2000 still remains pending. The respondents further submitted that the deceased died intestate on 16<sup>th</sup> January 1967 and as such the law of succession Act does not apply to the distribution of his estate. He states that the deceased was survived by the following sons; Daniel Ndirangu Mubia, Mwangi Mubia, Mwangi Murima and Joel Njihia Mubia. That Daniel Ndirangu Mubia, Mwangi Mubia, and Mwangi Murima petitioned for a grant of letters of administration to which Daniel Ndirangu Mubia was named and confirmed as the administrator of the estate of the deceased on 26<sup>th</sup> July 2000. He states that he is now the administrator of the estate of Daniel Ndirangu Mubia and that through the certificate of grant, which has never been challenged, allowed him to sell 0.25 Acres in Loc 2 Makomboki/116 to Naftari Numb Kihara. That Under Nauru Succession

Cause 500 of 2010, the certificate of confirmation of grant authorized the administrators to sell 5/6 and 1/6 of her share in Loc 2/Makomboki/116 to Naftari Numb Kihara and Jane Njeri Kimani respectively. The two purchasers are protected by the law and their rights can only be challenged in the respective Succession Causes. That the applicants took out Summons for Revocation of the grant in Succession Cause 500 of 2010 but were unsuccessful. They however, did not appeal to the decision of the court in the matter. That Beatrice Mumbi Kariuki got her title in Loc 2 Makomboki/116 through Succession Cause 34 of 2010 at Nyahururu Senior Principal Magistrate's court in which the administrator gave the whole of his share in loc 2 Makomboki/116 to her. The grant was also never challenged and as such the applicants can only challenge the rights of Beatrice Mumbi Kariuki through Succession Cause 34 of 2010. The applicants are sons to Joel Njiha Mubia who died on 3<sup>rd</sup> December 1979 having acquired Loc 2 Makomboki/117 from the deceased herein.

5. The respondent depones further that the deceased had during his lifetime expressed that he wished his three sons who were yet to get any property would acquire Loc 2 Makomboki/116. He also pointed out that the applicants claim that their father bought the beneficial interest in Loc 2 Makomboki/116 could not stand as letters of administration were yet to be taken to authorize anybody to purport to deal in Loc 2 Makomboki/116, it is not logically possible that the father of the applicants could have entered into an agreement in 1995 as he died in 1979 and that the consent of the land control board was never sought. He further pointed out that the applicants filed a civil suit no. 2080 of 2000 in which they sought to enforce the alleged contractual rights of their father but the same was dismissed for want of prosecution on 1/10/2007. The applicants have never applied to set aside the order dismissing the suit. In conclusion, he states that the summons for revocation cannot be relied on as the administration of the deceased estate has been completed and distributed to its rightful beneficiaries.

6. The applicants filed a further affidavit dated 24<sup>th</sup> March 2017 and filed in court on 3<sup>rd</sup> May 2017 where, Francis Mwangi Njihia depones that both his parents are buried on the suit property. The respondent filed a further reply to the applicant's affidavit dated 24<sup>th</sup> March 2017 where he states that the graves appearing on the suit property are graves of close family members to the subject estate and that the last person to be buried on the suit property was buried in 1979 and as such when the letters of administration were issued and the grant confirmed the graves were still on the suit property. He further states that the respondents have no problem with the graves and the applicants have the option of exhuming and relocating the graves to other parcels if not contested with the current status of title to the land.

7. From the court record, the court issued an order; that by consent the status quo pertaining to Loc 2 Makomboki/116 as at 15<sup>th</sup> March 2016 be maintained pending the hearing and determination of the application dated 2<sup>nd</sup> February 2016.

8. The applicants filed written submissions filed in court on 20<sup>th</sup> September 2016 where they pointed out that the main issues for determination were;

a. To prohibit any dealings in respect of Loc 2 Makomboki/1883, Loc 2 Makomboki/1882, Loc 2 Makomboki/1881, Loc 2 Makomboki/1875, Loc 2 Makomboki/1877, Loc 2 Makomboki/1876 and any other property that forms part of the former Loc 2 Makomboki/116.

b. To prohibit the eviction of the applicants from the property.

The applicants in their submissions stated that they sought orders to prohibit interference with their residence on the property and to prohibit further dealings in respect of the suit property. They pointed out that they were not included in the Succession Cause filed in court and that the death of administrators are not bars to revocation. They also submitted that the averments by the respondents that the deceased estate cannot be subjected to the Law of Succession Act but instead to the customs of the land at the time of the deceased death were inaccurate as section 2 (2) of the Law of succession Act. The section stipulates;

*The estates of persons dying before the commencement of this Act are subject to the written laws*

*and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.*

The applicants submitted that according to kikuyu customary law, property was divided only to the deceased male children and if one of the male children is deceased and had a family, the property was to devolve to his family.

9. The respondents filed written submissions on 15<sup>th</sup> February 2017. They submitted that the applicants do not deserve the prayers so sought in the amended summons. They relied on a number of cases in support of their case. They highlighted their main issues for determination as.

- a. Have the applicants established their case at a prima facie level?
- b. Have the applicants demonstrated that they would suffer irreparable injury if a temporary injunction is not granted.
- c. Does the balance of convenience lie in favour of the applicants?

They also prayed that the court should consider whether the conduct of the applicants merit the exercise of discretion/equitable power like the injunction sought. They relied on the case of ***Nguruman Limited V Jan Bonde Nielsen and 2 others*** where the court reiterated the principles for granting an injunction. On the first point, they submitted that with reliance on the above case that the applicants have failed to prove that their father bought the beneficial interest from his brothers. The applicants also submitted that they were not informed of the succession cause but it's the respondent's case that by the cautions placed on the suit property, the applicants were aware of the suit as the caution remained in effect from 11/1/2000 to 2012. To this effect the respondents submitted that the applicants are yet to establish that they have a prima facie case. The respondent submitted that it was incumbent for the applicants to show that an award of damages would not be an adequate remedy should they succeed in their summons for revocation. It was submitted that the applicants can be compensated by way of damages as the subject matter is land which can be easily valued. As such they submitted that whatever injury the applicants may suffer can be adequately compensated by way of damages. On the question of balance of convenience, the respondents submitted that the applicants filled the summons for revocation 17 years ago and have been reluctant to peruse the same.

#### **DETERMINATION.**

10. The applicants seek an injunction against the respondents so as to stop them from dealing in any manner with the suit property and from evicting them from the suit property. I have considered the amended summons, the supporting and further affidavits by the applicants, as well as the reply and further reply by the respondents. In order for an injunction to be granted the applicants must satisfy the requirements as set out in the celebrated case of ***GIELLA -VS- CASSMAN BROWN (1973) EA. 358***; that an applicant must show a prima facie case with a probability of success, that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and when the court is in doubt, it will decide the application on the balance of convenience. The court in *Mbuthia vs. Jimba Credit Corporation Ltd {1988} KLR 1*, echoed the above principles and noted that,

*“in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the parties’ cases.”*

The applicants through their amended summons seek orders to preserve the subject matter pending revocation of the grant issued to the estate of the deceased. They also seek orders to prohibit the respondents from evicting them from the suit property. I will proceed by determining if the applicants have met the threshold imposed by precedents to the granting of an injunction.

- i. Whether the applicants have established a prima facie case with a probability of success.

The applicants submitted that their late father was a son to the deceased. The submitted that entire family of Joel Njihia, their father, was completely excluded from the succession proceedings filed in court with respect to the deceased estate. A prima facie case has been defined as one which on the material presented before a court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed and which calls for a rebuttal from the opposing party. The applicants claim they have beneficiaries to the estate of the deceased. I find that there exists a prima facie case. On the second element of the test, on whether damages may be insufficient as compensation for any loss, the respondent submitted that the subject matter of the suit was land which can capable of being assessed and valued. Issues to do with land are very emotive and merely stating that one can be compensated by way of damages is not sufficient in my view. On the third limb of the principles as established in Giella Vs Cassman Brown, on the question of where does the balance of convenience lie, the applicants submitted that they have resided on the suit property for a period of over 40 years, the applicant, also swore a further affidavit stating that his father and mother are buried on the suit property, a statement that was not denied or challenged by the respondents.

Having taken the above into consideration. I therefore grant the following orders;

ii. An order of prohibition shall issue against Naftari Ndubi Kihara, Jane Njeri Kimani, Beatrice Mumbi Kariuki and Jackson Ndirangu, their servants, agents, employees or personal representatives from transferring, sub dividing and otherwise dealing in any way with the property.

iii. An order of prohibition shall issue against Naftari Ndubi Kihara Jane Njeri Kimani, Beatrice Mumbi Kariuki and Jackson Ndirangu, their servants, agents, employees or personal representatives from evicting the applicants from the property.

iv. Parties to directions on the said Summons for Revocation within 30 days from the date of this ruling. The prohibition orders shall be in force for 90 days from the date of this ruling. Costs in the cause. It is so ordered

**Dated, signed and delivered this 29<sup>th</sup> day of August 2017**

**R. E. OUGO**

**JUDGE**

**In the Presence of:**

Miss Kogai For the Applicants

Respondents Absent

Charity Court Clerk