



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 323 OF 2015**

LINCOLN MUTHUI .....

JOHN NJUGUNA.....)

LAURENZIA MANGO.....)

GEOFFREY NJIRU.....)

NAHASHON MUGO.....)

PATRICK NDUGU.....)

ELIZABETH GICHANGI.....)

PATRICK NJERU.....)

MARY MURIITHI.....)

PATRICK NYAGA.....)

JACOB KINYUA.....)

CHARLES NJERU.....)

ANN MBUTHIA.....)

PATRICK MWANIKI.....) PLAINTIFFS/APPLICANTS

VERSUS

HELLEN MUTHONI MURIUKI.....DEFENDANT/RESPONDENT

**RULING**

On 18<sup>th</sup> August 2015 the plaintiffs/applicants herein namely:-

**LINCOLN MUTHUI - 1<sup>st</sup> plaintiff/applicant**

**JOHN NJUGUNA - 2<sup>nd</sup> plaintiff/applicant**

LAURENZIA MANGO) - 3<sup>rd</sup> plaintiff/applicant  
GEOFFREY NJIRU - 4<sup>th</sup> plaintiff/applicant  
NAHASHON MUGO - 5<sup>th</sup> plaintiff/applicant  
PATRICK NDUGU - 6<sup>th</sup> plaintiff/applicant  
ELIZABETH GICHANGI - 7<sup>th</sup> plaintiff/applicant  
PATRICK NJERU - 8<sup>th</sup> plaintiff/applicant  
MARY MURIITHI - 9<sup>th</sup> plaintiff/applicant  
PATRICK NYAGA - 10<sup>th</sup> plaintiff/applicant  
JACOB KINYUA - 11<sup>th</sup> plaintiff/applicant  
CHARLES NJERU - 12<sup>th</sup> plaintiff/applicant  
ANN MBUTHIA - 13<sup>th</sup> plaintiff/applicant  
PATRICK MWANIKI - 14<sup>th</sup> plaintiff/applicant

filed this suit against the defendant/respondent HELLEN MUTHONI MWANIKI seeking a declaration that they are the lawful owners of all various parcels of land comprised within parcel No. GATURI/WERU/423 and a permanent injunction to restrain the defendant/respondent whether by herself her servants, agents, personal representatives or transferees from doing any of the following acts that is to say, claiming ownership and/or title in any way interfering with the plaintiffs/applicants ownership, occupation, possession and use of the suit property known as GATURI/WERU/423 and that that order be served and do bind all concerned authorities including the Embu Land Registrar and be noted on its respective register or records. The plaintiffs/applicants also sought an order for costs and interest thereon.

The basis of the suit was that the plaintiff/applicants are proprietors of various parcels of land comprised in the land parcel No. GATURI/WERU/423 (the suit property) having purchased the same from the previous owners and having assumed possession thereof and developed them by putting up residential homes and other amenities such as water and electricity. However, the plaintiffs/applicants have now learnt that following the judgment in Embu Chief Magistrate's Court Civil Case No. 135 of 2011, the defendant/respondent obtained an order that she is entitled to three (3) acres of the suit property and execution of that judgment, to which they were not parties will put their possession and occupation of the suit property in jeopardy.

Simultaneously with the filing of the said suit, the plaintiffs/applicants filed a Notice of Motion citing the provisions of **Sections 3 and 3A of the Civil Procedure Act** and **Orders 40 and 51 of the Civil Procedure Rules** seeking the following orders:-

***(a) Spent***

***(b) Spent***

***(c) That pending the hearing and determination of this application inter parte or further orders of this Honourable Court, the defendant/respondent either by herself and/or through her agents, servants and/or assignees or any of them be restrained by a temporary injunction from evicting the plaintiffs from the suit premises or otherwise interfering with the plaintiff's ownership and***

***possession of or in any way adversely dealing with the suit property pending trial.***

***(d) Costs of the application be in the cause.***

The application is based on the grounds set out therein and supported by the affidavit of the 1<sup>st</sup> plaintiff/applicant **LINCOLN MUTHUI** sworn on behalf of the other plaintiffs/applicants in which it is deponed, inter alia, that the suit property was owned by **NJIRU KAGERA** Alias **NJIRU MUGERA** (deceased) and upon his death, the same was bequeathed to his children with **MICHAEL NJERU NJIRU** being the administrator as per copy of Grant of letters of administration and Certificate of Confirmation of Grant – annexures **LMM-1** and **LMM-2** respectively. That after the beneficiaries of the deceased's Estate were allocated various acreages in the suit property, they proceeded to sub-divide and share the same – see annexures **LMM-3** and **LMM-4** and thereafter entered into various sale agreements with third parties including the 1<sup>st</sup> plaintiff/applicant who purchased parcel No. GATURI/WERU/2984 a sub-division of the suit property. That the other plaintiffs/applicants also entered into multiple sale agreements with the beneficiaries of the deceased's Estate – annexure **LMM-5**. The new owners took possession of and proceeded to develop their various portions as shown in the photographs – **LMM 6**. Recently, however, they learnt that the defendant/respondent had obtained judgment in Embu Chief Magistrate's Civil Case No. 135 of 2011 (**MICHAEL NJERU NJIRU VS HELLEN MUTHONI MURIUKI**) to the effect that she is entitled to three (3) acres out of the suit property and implementation of that judgment will interfere with the plaintiffs/applicants' ownership and possessory rights over their share of the suit property hence this application.

The defendant/respondent filed a replying affidavit in opposition to the application in which she deponed, inter alia, that the suit property was a subject of Succession Cause No. 240 of 2009 in which the plaintiffs/applicants were not beneficiaries and neither are they purchasers for value known in law neither have they demonstrated a prima facie case. The defendant/respondent deponed further that she is a bone fide member of the family of the deceased and therefore a beneficiary of his Estate. She sought to refer to the various Court orders and agreements – annexure

**HMM 1.**

Submissions have been filed both by the firm of D.M. Kariuki Advocates for the plaintiffs/applicants and the firm of Mungai Kivuti Advocates for the defendant/respondent.

I have considered the application, the rival affidavits and annexures and the submissions by counsel.

I must begin by pointing out that the drafting of the application left a lot to be desired and indeed I did point this out to counsel at the hearing. This has also been pointed out by the defendant/respondent's advocate in his submissions. Notwithstanding the defect in the pleadings, it is clear that the parties all proceeded in the knowledge that this application seeks an injunctive relief pending trial. No prejudice was therefore caused to the defendant/respondent and in any event, it is clear from the provisions or **Order 51 (10) (12) of the Civil Procedure Rules** that an application shall not be defeated only on account of want of form. Further, the defect herein was one that is curable by invoking the provisions of **Article 159 (2) (d) of the Constitution**. While counsels are at liberty to delegate the drafting of pleadings to their students (to help them learn the ropes of drafting pleadings), they must remember to counter-check all such pleadings before filing them because the ultimate responsibility for imperfect pleadings rests with them as the legal advisors of their clients. Rules of procedure were meant for a purpose and must be adhered to.

This is an application for a temporary injunction which must therefore be determined in line with principles laid down in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

***(a) The applicant must show a prima facie case with a probability of success.***

***(b) An interlocutory injunction will not normally be granted unless the applicant might***

*otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, and;*

*(c) If the Court is in doubt, it will determine such an application on the balance of convenience.*

A prima facie case on the other hand was defined by the Court of Appeal in **MRAO VS FIRST AMERICAN BANK OF KENYA LTD 2003 K.L.R 125** as a case in which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. It must also be remembered that an interlocutory injunction is an equitable remedy to be granted at the discretion of the Court and therefore a party approaching the Court for such an order must do so with clean hands. Finally, as was observed by **Hoffman J.** in **FILMS ROVER INTERNATIONAL LTD & OTHERS VS CANNON FILMS SALES LTD (1986) 3 ALL ER 772**, the Court should take the course that appears to carry the lower risk of injustice. I shall bear in mind the above guidelines in determining this application.

It is clear from the Certificate of Confirmation of Grant in respect of the Estate of the deceased herein (Plaintiffs/applicants' annexure **LMM-2**) that the suit property was bequeathed to the following beneficiaries:-

- 1. JOSEPH MURIITHI NJIRU - 2.67 Ares**
- 2. MICHAEL NJERU NJIRU - 2.67 Acres**
- 3. MORRIS MUGENDI NJIRU - 2.67 Acres**
- 4. PURITY MARIGU NJIRU - 1.00 Acre**
- 5. EDITA KARIMI NJIRU - 1.00 Acre**
- 6. PRISCA WAMBUI NJIRU - 1.00 Acre**
- 7. JULIET RWAMBA NJIRU - 1.00 Acre**
- 8. CATHERINE KANINI NJIRU - 1.00 Acre**
- 9. LUSIA GICUGU NJIRU - 1.00 Acre**

It is also not in dispute that the suit property was sub-divided among the said beneficiaries some of whom sold their shares to some of the plaintiffs/applicants herein. The defendant/respondent was also a beneficiary of part of the sub-division of the suit property. According to the agreement annexed to her replying affidavit, the three beneficiaries namely **MICHAEL NJERU NJIRU, JOSEPH MURIITHI NJIRU** and **MORRIS MUGENDI NJIRU** were each to transfer to her one (1) acre out of the suit property thus making her entitlement three (3) acres out of the suit property. Therefore, the defendant/respondent's claim to three (3) acres of the suit property is not in dispute. That explains why in Embu Chief Magistrate's Civil Case No. 135 of 2011, a decree was drawn confirming her entitlement to that acreage. However, her claim to the three (3) acres out of the suit land is not, as she has deponed in her replying affidavit, by virtue of being a member of the deceased's Estate but rather, by virtue of the agreement entered into between her and the above named three beneficiaries. Indeed the agreement states that should the beneficiaries fail to transfer to her the said three (3) acres, they will jointly and severally pay to her liquidated damages of Kenya shillings eight hundred and forty thousand (Ksh. 840,000) being the value thereof.

What are the plaintiffs/applicants interest in the suit property? According to the supporting affidavit of the 1<sup>st</sup> plaintiff/applicant **LINCOLN MUTHUI**, he and his co-plaintiffs/applicants entered into various sale agreements with the beneficiaries for portions of the suit properties which they have proceeded to develop. Their interests, in the suit property is therefore derived from the sale agreements which were

annexed to his supporting affidavit – annexure **LMM-5**. Paragraph 16 of his supporting affidavit is instructive and he depones therein as follows:-

***“That my co-applicants and I acquired a valid and indefeasible title to our share of the suit property by virtue of the above sale agreements and paid valuable consideration and I am informed by my advocates on record, which I verily believe to be true, that the applicants are in the circumstances innocent purchasers for value without notice of any prior arrangements or agreements between the previous owners/beneficiaries and any third party and therefore entitled to protection of the law”.***

Whether or not those agreements are enforceable will be a matter for trial. What is not in dispute, however, is that by virtue of those agreements, some of the plaintiffs/applicants herein have gone into possession and developed their respective portions as is clear from the photographs – see annexure **LMM 6**. On that basis, those plaintiffs/applicants who entered into such sale agreements with the beneficiaries of the Estate of the deceased over portions of the suit property have a prima facie case to warrant an order for injunction. However, it is only some of the plaintiffs/applicants that are entitled to such an order as will be clear later in this ruling.

On the issue of irreparable damage, the 1<sup>st</sup> plaintiff/applicant has deponed that not only have the plaintiffs/applicants done considerable development on the suit property including putting up residential and commercial buildings, they have also brought in electricity and water. Further, it is deponed in paragraph 21 of the supporting affidavit as follows:-

***“That the suit property is of a unique character and peculiar location within Embu County. It is therefore of great business and personal value to the applicants and therefore difficult to replace in the event of loss. The applicants would not be adequately compensated by damages”***

That averment was not contradicted and what I hear the applicant to be saying is that the aesthetic and other features of the environment within the area where the suit property is located are unique and therefore difficult to quantify in damages. In my view the applicants have also surmounted the second principle in the **GIELLA** case (supra) and I need not consider the balance of convenience but even if I did so, it would lie in favour of the plaintiffs/applicants as the interests of justice will best be served by conserving the suit property which they are in occupation of and have even made developments thereon as the suit awaits trial. I am therefore persuaded that the plaintiffs/applicants (at least some of them) are entitled to the order of temporary injunction as prayed.

Having said so, I have already found above that some of the plaintiffs/applicants have taken possession of portions of the suit property by virtue of sale agreements (annexture **LMM-5**) entered into between them and some of the beneficiaries of the Estate of the deceased NJIRU KAGERA Alias NJIRU MUGERA. Those agreements are therefore the basis upon which they lay a claim to various portions of the suit property. I have therefore examined the said sale agreements and regrettably, not all of the plaintiffs/applicants herein have established that they entered into any sale agreements over portions of the suit property with the said beneficiaries of the Estate of the deceased. From my examination of the bundle of sale agreements, I can confirm that only the following six (6) plaintiffs/applicants out of the fourteen (14) plaintiffs/applicants had their sale agreements produced to support their cases. The six (6) plaintiffs/applicants whose sale agreements were annexed to the supporting affidavit of **LINCOLN MUTHUI** the 1<sup>st</sup> plaintiff/applicant are:-

1. 1<sup>st</sup> plaintiff/applicant - **LINCOLN MUTHUI**
2. 3<sup>rd</sup> plaintiff/applicant - **LUAURENZIA MANGO**
3. 4<sup>th</sup> plaintiff/applicant - **GEOFREY NJIRU**
4. 5<sup>th</sup> plaintiff/applicant - **NAHASHON MUGO**

5. 6<sup>th</sup> plaintiff/applicant - PATRICK NDUNGU

6. 8<sup>th</sup> plaintiff/applicant - PATRICK NJERU

There were also other purchasers such as **GRACE WAWIRA KINYUA, GLADYS WANGUI MUGO** and **BRACE MWANGI NJERU** who are not among the plaintiffs/applicants in this suit. Some of them appear to be spouses of the plaintiffs/applicants and perhaps that explains why they are not parties to this suit. **LAURENZIA WARUE NJAGI** appears as among those who purchased part of the suit property as per the sale agreements but since it is not clear if she is the same **LAURENZIA MANGO** who is listed as the 3<sup>rd</sup> plaintiff/applicant, this Court has given her the benefit of that doubt and included her name. It is therefore clear that not all of the persons listed in this suit as plaintiffs/applicants can actually lay claim to the suit property by virtue of the said sale agreement. Perhaps that explains why in paragraphs 4 and 9 of her replying affidavit, the defendant/respondent referred to them as “*strangers*” who lack the “*locus to prod this matter*”.

Ultimately therefore, upon considering all the matters herein, I am satisfied that only the following six (6) plaintiffs/applicants namely 1<sup>st</sup> plaintiff/applicant, 3<sup>rd</sup> plaintiff/applicant,

4<sup>th</sup> plaintiff/applicant, 5<sup>th</sup> plaintiff/applicant, 6<sup>th</sup> plaintiff/applicant and 8<sup>th</sup> plaintiff/applicant are entitled to the following orders:-

*1. An order of temporary injunction restraining the defendant/respondent either by herself and/or through her agents, servants and/or assignees or any of them from evicting the six plaintiffs/applicants from the suit property or otherwise interfering with the six plaintiffs/applicants ownership and possession or in any way adversely dealing with the suit property pending the hearing of this suit.*

*2. Costs in the cause.*

*3. The parties are directed to move with speed and take steps to comply with Order II Civil Procedure Rules and fix this suit for hearing and final determination as the injunction will, unless the Court directs otherwise, lapse after twelve months from today.*

Before I leave this matter, I wish to observe that this suit was commenced when the defendant/respondent asserted her right to the three (3) acres out of the suit property in accordance with the agreement between her and **MICHAEL NJERU NJIRI, JOSEPH MURIITHI NJIRI** and **MORRIS MUGENDI NJIRI** who are not parties to this suit. The defendant/respondent did this by filing Embu Chief Magistrate’s Court Civil Case No. 135 of 2011 and obtained a judgment and decree which remains good unless and until over-turned on appeal. I can see from paragraph 13 of the supporting affidavit of **LINCOLN MUTHUI** that **MICHAEL NJERU NJIRI** who was a party to Embu Chief Magistrate’s Court Civil Case No. 135 of 2011 intends to appeal that decision. I would, in the circumstances, advise counsel for the parties to reach out to all concerned and try and settle this matter out of Court. I must also make it clear that this ruling does not affect the decree in Embu Chief Magistrate’s Court Civil Case No. 135 of 2011 which can only be over-turned on appeal.

It is so ordered.

**B.N. OLAO**

**JUDGE**

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

Ruling delivered this 17<sup>th</sup> day of March 2016 in open Court

Mr. Gathirwa for Muriuki for Plaintiff/Applicant present

Mungai Kivuti for Defendant/Respondent absent.

**B.N. OLAO**

**JUDGE**

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