



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO E093 OF 2021

MARY WANGARI CHIRA.....1ST PLAINTIFF

FLORENCE WANJIKU MUCHAI.....2ND PLAINTIFF

REGINA WANGUI MWAURA.....3RD PLAINTIFF

VERSUS

TERESIAH WANGUI GAKUO.....1ST DEFENDANT

DENNIS MWAURA GAKUO.....2ND DEFENDANT

THE LAND REGISTRAR, KIAMBU.....3RD DEFENDANT

RULING

1. The three plaintiffs brought this suit through a plaint dated 12/8/2021. They sought the following verbatim orders against the three defendants:

i. A declaration that the title to the suit land comprised in Kiambaa/Kanunga/55 was fraudulently, irregularly and unlawfully obtained and therefore null and void.

ii. Immediate nullification or cancellation of title in respect of Title Kiambaa/Kanunga/55 and the same be registered as in the manner explained under paragraphs 17, 25 and 26 of the plaint herein.

iii. An order directing the Land Registrar, Kiambu Land Registry, do cancel, revoke or recall the title to Kiambaa/Kanunga/55 as issued to Stephen Gakuo Githua on 10th November 1975.

iv. A vesting order directing the Land Registrar, Kiambu Land Registry, to issue a title to the Plaintiffs and the 1st and 2nd defendants in Kiambaa/Kanunga/55 in the manner described in paragraphs 17, 25 and 26 of the plaint herein.

v. Costs and interest.

vi. Any other further relief as this Honourable Court may deem just and appropriate in the circumstances.

2. Contemporaneous with the plaint, they filed a notice of motion dated 18/8/2021, seeking the following interlocutory orders against the defendants:

1. The application is certified urgent and service thereof be dispensed with, in the first instance, for purposes of prayers 2 and 3.

2. There be a temporary stay of proceedings in Kiambu Chief Magistrate Succession Cause No.234 of 2015 - In the Matter of the Estate of Stephen Gakuo Githua pending the hearing and determination of this application interpartes.

3. A temporary injunction do issue restraining the 1st and 2nd defendants whether by themselves, their agents and/or servants or whomsoever acting on their behalf from whether by their agents, servants, nominees or otherwise from encroaching upon, remaining or continuing in encroachment and/or trespassing upon the plaintiffs' portion in Kiambaa/Kanunga/55 pending the hearing of this application interpartes.

4. There be a stay of proceedings in Kiambu Chief Magistrate Succession Cause No.234 of 2015 - In the Matter of the Estate of Stephen Gakuo Githua pending hearing and determination of this application.

5. There be an injunction restraining the 1st and 2nd defendants whether by themselves, their agents and/or servants or whomsoever acting on their behalf from whether by their agents, servants, nominees or otherwise from encroaching upon, remaining or continuing in encroachment and / or trespass upon the plaintiffs' portion in Kiambaa/Kanunga/55 pending the hearing of this application.

6. An injunction do issue restraining the 1st and 2nd defendants whether by themselves, their agents and/or servants or whomsoever acting on their behalf from offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with all that land known as Kiambaa/Kanunga/55 pending the hearing and determination of the suit herein.

7. There be a stay of proceedings in Kiambu Chief Magistrate Succession Cause No.234 of 2015 - In the Matter of the Estate of Stephen Gakuo Githua pending hearing and determination of this suit.

8. An injunction do issue restraining the 1st and 2nd defendants whether by themselves, their agents and/or servants or whomsoever acting on their behalf from whether by their agents, servants, nominees or otherwise from encroaching upon, remaining or continuing in encroachment and/or trespass upon the plaintiffs' portion in Kiambaa/Kanunga/55 pending the hearing of this suit.

9. Costs be provided for.

3. The said application is the subject of this ruling. The application was supported by the affidavit of **Regina Wangui Mwaura** [the 3rd plaintiff] sworn on 12/8/2021, and a supplementary affidavit sworn by the same deponent on 2/11/2021. In summary, the case of the applicants, as discerned from the plaint; the application; the two supporting affidavits; and the submissions filed by their advocates, was that they brought this suit in their capacities as beneficiaries and administrators of the estates of the **Late Peter Njuguna Mwaura** and the **Late Agnes Gachigi Mwaura**. They contended that, through an agreement dated 4/6/1964, **James Njuguna Githua**, **Peter Njuguna Mwaura**, and **Stephen Gakuo Githua** [now all deceased] jointly purchased **Land Parcel Number Kiambaa/ Kanunga/55 [the suit property]** from one **Simon Kagiri**. Upon the three purchasing the suit property, **Stephen Gakuo Githua** was assigned the duty of keeping documents relating to the suit property. Immediately after purchasing the suit property, the three purchasers subdivided the suit property into three portions; demarcated the three portions; and apportioned to themselves the three portions. The three portions demarcated out of the suit property subsist to date.

4. The plaintiffs further contended that in 1972, **Stephen Gakuo Githua** moved into his portion of the suit property. Upon moving into his portion of the suit property, **Stephen Gakuo Githua**, without the knowledge of **Peter Njuguna Mwaura** and **James Njuguna Githua**, transferred the entire parcel of land from **Simon Kagiri** to himself and was subsequently issued with a certificate of title on 10/11/1975. He proceeded to use the title deed as a collateral to secure a loan from **Agricultural Finance Corporation**.

5. It was the case of the plaintiffs/applicants that the late **Stephen Gakuo Githua** obtained registration of the title into his name through “**material and fraudulent misrepresentation.**” They itemized various particulars of fraud, irregularity, fraudulent misrepresentation, and/or illegality on the part of **Stephen Gakuo Githua**. They contended that on or about 28/7/1998, “upon realization of the fraud and the illegality committed by Stephen Gakuo Githua”, **Philomena Mugure**, the then wife of **James Njuguna Githua**, registered a caution against the title. Further, on 22/6/2010, upon realizing that **Stephen Gakuo Githua** had fraudulently obtained the said title, the 1st plaintiff, being a beneficiary of the estate of the late **Peter Njuguna Mwaura** who was her brother, caused a caution to be registered against the title.

6. The plaintiffs further contended that due to the Late **Stephen Gakuo Githua's** reluctance to formalize the subdivision of the suit property into the three portions, one **Agnes Gachigi Mwaura** [mother to the late **Peter Njuguna Mwaura**] together with the wife of the late **James Njuguna Githua**, presented the dispute to the “council of elders” and the “council of elders” considered the dispute and decided that the suit property should be apportioned as follows: **Stephen Gakuo Githua's Family – 1.5 Acres**; **James Njuguna Githua's Family – 1.2 Acres**; and **Peter Njuguna Mwaura's Family – 1.2 Acres**.

7. The plaintiffs contended that, being dissatisfied with the decision of the council of elders, **Stephen Gakuo Githua** filed **Nairobi HCCC No 112 of 1988; Stephen Gakuo v Philomena Mugure & Agnes Gachigi Mwaura**. He, however, subsequently abandoned the suit. They added that upon the demise of **Agnes Gachigi Mwaura**, she was buried on the suit property.

8. The plaintiffs contended that the family of **Peter Njuguna Mwaura** had been in possession and use of their portion of the suit property from the time the property was purchased from **Simon Kagiri**. They added that it was apparent from the foregoing that **Stephen Gakuo Githua** intended to unfairly divest and alienate the suit property from the families of **James Njuguna Githua** and **Peter Njuguna Mwaura**.

9. In their written submissions dated 4/11/2021, filed through the firm of **MBLA Advocates LLP**, the plaintiffs identified the following as the three key issues falling for determination in the application; (i) *Whether the applicants have satisfied the conditions for grant of an interlocutory injunction*; (ii) *Whether Section 4 of the Limitation of Actions Act is applicable in the present suit*; and (iii) *Whether the applicant's case is res judicata*.

10. On whether the plaintiffs had satisfied the criteria for grant of an interlocutory injunction, counsel for the plaintiffs cited the Court of Appeal decision in **Mrao Limited v First American Bank of Kenya Limited & 2 others [2003] KLR 125** and argued that through the two affidavits, the plaintiffs had established a genuine and arguable case. They contended that the plaintiffs had established that the late **Stephen Gakuo Githua** had obtained title to the suit property by way of fraud, illegality, irregularity and material and fraudulent misrepresentation. Counsel added that the suit property was in danger of being “wasted, damaged and transferred by the 1st and 2nd defendants and the plaintiffs stood to suffer irreparable harm that may not be adequately compensated by an award of damages. Counsel for the plaintiffs

submitted that given the pleadings and evidence placed before the court, the balance of convenience tilted in favour of the plaintiffs.

11. On whether **Section 4** of the **Limitation of Actions Act** was applicable to this suit, counsel for the plaintiffs submitted that Section 4 does not apply to this suit because this suit is a claim for recovery of an interest in land and the cause of action in this suit is governed by the framework in **Section 7** of the Limitation of Actions Act. Counsel contended that the cause of action arose on 22/6/2010 when the 1st plaintiff realized that the late Stephen Gakuo Githua had fraudulently obtained the title to the suit property.

12. On whether the applicant's case is barred by the doctrine of *res judicata*, counsel submitted that the dispute in this suit relates to ownership of the suit property and that issue had never been determined by any court. Counsel urged the court to grant the reliefs sought.

13. The 1st and 2nd defendants opposed the application through a replying affidavit sworn on 26/10/2021 by **Dennis Mwaura Gakuo** and written submissions dated 4/11/2021, filed through the firm of *Mwaniki Gachoka & Co. Advocates*. Their case was that this suit is barred under the doctrine of *res judicata* because the issues raised in the suit were raised and determined by the **High Court in Kiambu High Court Civil Appeal No 199 of 2017**. Secondly, they contended that the suit was barred under Section 4 of the Limitation of Actions Act. Thirdly, they contended that because a grant of letters of administration had already been issued relating to the estate of Stephen Gakuo Githua, this suit was overtaken by events. Fourthly, they contended that the plaintiffs were not privy to the contract of 1964 and were not the legal representatives of the estates of the persons alleged to have been parties to the agreement of 1964, hence they lack the *locus standi* to initiate nor prosecute this suit. Fifthly, they contended that the plaintiffs' case was based on hearsay evidence which is inadmissible. Lastly, they contended that the plaintiff's suit is barred under **Section 3(3)** of the **Law of Contract Act**.

14. In their written submissions dated 4/11/2021, counsel for the 1st and 2nd defendants identified the following as the three key issues falling for determination in the application: (i) *Whether the plaintiffs has locus standi to institute this suit;* (ii) *Whether this suit is statute barred;* and (iii) *Whether the plaintiffs are entitled to the orders sought.*

15. On whether the plaintiffs has *locus standi* to institute this suit, counsel submitted that the plaintiffs hinge their case entirely on the agreement of 1964 and it is common ground that all the parties to the alleged agreement are deceased. Counsel contended that the only persons eligible to sue on behalf of the late **Peter Njuguna Mwaura** and the late **James Njuguna Githua** are the duly appointed legal representatives of their estates. Counsel argued that the plaintiffs had not provided any evidence of letters of administration relating to the two estates. Counsel added that reliance on letters of administration relating to the estate of the late Agnes Gachigi Mwaura was ill-advised because the late **Agnes Gachigi Mwaura** was not privy to the agreement of 1964.

16. On whether the plaintiff's suit was statute-barred, counsel submitted that the plaintiff's cause of action was founded on contract and was subject to the framework in Section 4 of the Limitation of Actions Act which provided a limitation period of six years. Counsel argued that the suit and the application were statute-barred because they were brought long after the expiry of the limitation period.

17. On whether the plaintiffs were entitled to the orders sought, counsel submitted that the plaintiffs had failed to satisfy the requirements for grant of an interlocutory injunction. Counsel pointed out that the late Stephen Gakuo Githua is the sole registered proprietor of the suit property and his title is protected under Sections 24, 25 and 26 of the Land Registration Act. Counsel added that the plaintiffs had not proved fraud on part of the deceased, contending that parties to the alleged sale agreement of 1964 were still alive when the late **Stephen Gakuo Githua** was registered as proprietor of the suit property and neither of them challenged his title during their life time. Counsel contended that the alleged agreement of 1964 was hardly legible hence it was of no evidential value. Counsel added that in any event, the plaintiffs were not privy to the alleged agreement and could not purport to rely on it. Counsel urged the court not to rely on the alleged decision of the council of elders dated 4/1/1988, contending that the alleged council did not have jurisdiction to deal with disputes relating to title.

18. Counsel added that the plaintiffs had failed to demonstrate any harm which they stood to suffer that could not be adequately compensated by an award of damages. Lastly, counsel argued that the balance of convenience tilted in favour of the defendants because the suit property belonged to the estate of Stephen Gakuo Githua. Counsel urged the court to dismiss the application.

19. I have considered the application, the response to the application; the parties' respective submissions; the relevant legal frameworks; and the prevailing jurisprudence on the key issue in this application. The key issue falling for determination in this application is whether the plaintiffs have satisfied the criteria upon which our courts exercise jurisdiction to grant an interlocutory injunctive relief. Auxiliary to this issue is the question as to whether the plaintiffs have established a proper basis for grant of the order of stay of proceedings in the succession cause relating to the estate of the late Stephen Gakuo Githua.

20. The relevant criteria for grant of an interlocutory injunction was outlined in **Giella v Cassman Brown & Co. Ltd (1975) EA 358**. First, the applicant is required to demonstrate a prima facie case with a probability of success. Second, the applicant is required to demonstrate that if the plea for interlocutory injunctive relief is declined, he would stand to suffer damage/injury that may not be adequately indemnified through an award of damages. Third, if the court is in doubt on either or both of the above requirements, the application is to be decided based on the balance of convenience. Last, at this stage of interlocutory proceedings, the court does not make conclusive or definitive pronouncements on the key issues in the suit. Definitive pronouncements are reserved for the final determination of the suit.

21. In the present application, the defendants have challenged the plaintiff's *locus standi* to bring the suit and the application herein. They contend that the plaintiffs were not privy to the land purchase agreement of 1964. They further contend that the plaintiffs have not demonstrated that they have the *locus standi* to prosecute this suit on behalf of the deceased parties to the alleged agreement of 1964. The defendants did not, however, bring a motion to strike out the suit.

22. I have carefully examined the plaint upon which the present application is anchored. The plaintiffs' suit is entirely anchored on the agreement of 1964. Further, the suit is anchored on alleged acts of fraud by the Late **Stephen Gakuo Githua** against the Late **James Njuguna Githua** and the Late **Peter Njuguna Mwaura**. Thirdly, the plaintiffs contend to be suing in their capacities as beneficiaries and administrators of the estates of the Late **Peter Njuguna Mwaura** and the Late **Agnes Gachigi Mwaura**. In my view, based on the pleadings

placed before the court, the plaintiffs are obligated to place before the court evidence demonstrating that they are the legal representatives of the estates of the Late **Peter Njuguna Mwaura** and the Late **James Njuguna Githua**, duly appointed as required under the Law of Succession Act. Grant of letters of administration or probate relating to the two estates are what, in my view, would give the plaintiffs the *locus standi* to bring and prosecute this suit on behalf of the estates of the late **Peter Njuguna Mwaura** and the Late **James Njuguna Githua**. At this point, they have not exhibited evidence of any such grants.

23. Further, at paragraph 16 of the plaint, the plaintiffs have pleaded that the widow of **James Njuguna Githua** discovered the alleged fraud in 1998. At paragraph 17 of the plaint, they have pleaded that the 1st plaintiff learnt about the alleged fraud in 2010. On their part, the defendants contend that this suit is statute-barred.

24. The plaintiffs placed before this court proceedings relating to **Nairobi HCCC No 112 of 1988; Stephen Gakuo v Philomena Mugure & Agnes Gachigi Mwaura**. The said proceedings indicate that the present dispute existed as early as 1988. The official search exhibited similarly reveals that estates of the deceased may have been aware of the Late Stephen Gakuo Githua's title as far back as more than 20 years ago. Without making any conclusive finding on the issue of limitation in this application, what I can say at this point is that, based on the above observations and on the pleadings placed before the court at this interlocutory stage, the plaintiffs have not demonstrated a *prima facie* case with a probability of success.

25. For the above reasons, I find no proper basis for staying succession proceedings relating to the estate of the late **Stephen Gakuo Githua**.

26. In the end, the plaintiffs' notice of motion dated 18/8/2021 is declined on the above grounds. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF JANUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Situma for the Plaintiffs

Mr Muchiri for the Defendants

Court Assistant: Phyllis Mwangi