



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 289 OF 2014

CATHERINE NJERI.....APPLICANT

VERSUS

GEOFFREY WANJOHI NDATHI...1ST RESPONDENT

CYRUS MAINA.....2ND RESPONDENT

RULING

I have before me a Notice of Motion filed by the plaintiff/applicant under the provisions of **Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking the following orders:-

- a. *Spent*
- b. *That the Respondent and or their servants or agents be restrained from picking coffee or conducting any farming activities on the suit land or the land the applicant is claiming within land parcel KIINE/RUIRU/1 till this application is heard and determined.*
- c. *The applicant or her servants or agents be allowed to farm and conduct agricultural activities on land the applicant is claiming within the suit land KIINE/RUIRU/1 till this suit is heard and determined.*
- d. *Alternatively, the respondents be ordered to pay a certain quantified amount monthly for maintenance of the applicant's children.*
- e. *Any other directions ordered by the Court.*
- f. *Costs be awarded.*

The application is grounded on the following:-

1. *The applicant is the wife of the deceased who was a son and brother to the respondents.*
2. *That the applicant and the deceased had children who are of tender age and need to be maintained.*

In her affidavit in support of the application, the applicant depones that she needs to utilize the assets of her late husband in order to maintain herself and the children. That these assets include coffee and other crops as well as trees which she and her late husband used to utilize.

The application is opposed and in his replying affidavit sworn on behalf of the 1st Respondent, the 2nd Respondent has stated, inter alia, that the applicant is not the legal wife of the deceased MICHAEL MUTUGI WANJOHI and therefore lacks the capacity to act on his behalf and this Courts lacks the capacity to issue orders regarding maintenance of children. Further, that the 1st Respondent is the

absolute registered proprietor of the parcel of land No. KIINE/RUIRU/1 (herein the suit land) and therefore an injunction cannot be issued against him. It is also deponed that the applicant ceased living with the deceased in 2012 and has not been on the suit land since then.

I have considered the application, the rival affidavits and the submissions of counsels.

From the wording of the application, it is clearly seeking injunction orders to restrain the Respondent from utilizing the suit land. That remedy is within the jurisdiction of this Court. However, the remedy sought in paragraph (c) which amounts to an order of maintenance is not within this Court's jurisdiction.

From what I can glean in these pleadings, the applicant was the wife of one MICHAEL MUTUGI WANJOHI (now deceased) who was the son to the 1st Respondent and a brother to the 2nd Respondent. It would appear from the replying affidavit that the deceased was only a licensee on the suit land which licence terminated upon his death. From the annexures herein, it is not in doubt that the suit land is registered in the names of the 1st Respondent to whom a land certificate was issued on 29th September 1970 under the now repealed **Registered Land Act** (see respondent's annexure CM 2).

This being an application for injunction, it has to be determined in line with the principles set out in the case of **GIELLA**

VS CASSMAN BROWN & CO. LTD (1973) E.A. 358 which are:-

1. ***The applicant must show that he has a prima facie case with a probability of success***
2. ***The applicant must show that if the injunction is not granted, he will suffer irreparable loss that may not be compensated by an award of damages and,***
3. ***If in doubt, the Court will determine the application on a balance of convenience.***

A prima facie case was defined by the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA & TWO OTHERS 2003 K.L.R. 125** as follows:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case 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”

Further, as was held in the case of **FILMS ROVER INTERNATIONAL**

1986 3 ALL E.R., the Court should take the course that appears to carry the least risk of injustice. Finally, being an equitable remedy, an injunction will not be granted where the applicant has not approached the Court with clean hands.

As indicated above, the suit land is registered in the names of the 1st Respondent. The registration is under the now repealed **Registered Land Act** and under **Sections 27 and 28** of the said Act, such registration vests in the registered proprietor all the rights and privileges that go with such registration. Such registration can only be impugned as provided by law which could include where it is demonstrated that it was acquired through fraudulent means. There is no such evidence or even a pleading that would cast doubt as to the validity of the said title issued to the 1st Respondent. It is also not demonstrated what interest the deceased had in the suit land. The respondent's case is that the deceased was only a licensee whose license terminated upon his death. It appears to me that what the applicant seeks is maintenance of her children and whereas she deserves sympathy from this Court and better treatment from her in-laws, I am afraid there would be no basis upon which this Court can injunct the owner of property from utilizing it. The applicant has therefore not established a prima facie case with a probability of success which is the first hurdle that she has to surmount as set out in the **GIELLA** case (supra). I therefore need not consider the other tests set out in the said case.

Ultimately therefore, I find no merit in the application dated 7th October 2014 and the same is dismissed with costs being in the cause.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015

COURT: Ruling delivered, dated and signed this 4th day of December, 2015 in open Court.

Ms Kiragu for Defendant/Respondent present

Applicant present in person.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015