



REPUBLIC OF KENYA

IN THE HIGH COURT AT OF KENYA AT MERU

E & L 85 OF 2012

GRACE KARIMI & ANOTHER.....PLAINTIFF

VS

JAMES WAICUNGA & OTHERS.....DEFENDANT

RULING

This application is dated 10th September, 2012 and seeks orders that;

- 1. This application be certified as urgent and be heard on priority basis.***
- 2. This Honourable court be pleased to issue an order of injunction against the defendants jointly and severally or any of them, their agents, employees, or for any or each of them from interfering, entering, threatening, intimidating that (sic) or collecting rent due or/and payable by tenants in respect of plots No. 5 “A” and 30”A” Kiengu market pending the hearing of this application.***
- 3. This Honourable court be pleased to issue an order of injunction against the defendants jointly and severally or any of them, their agents, employees, or for any or each of them(sic) from interfering, entering, threatening, intimidating that (sic) or collecting rent due or/and payable by tenants in respect of plots no. 5 “A” and 30”A” Kiengu market pending the hearing and determination of this suit.***
- 4. The costs of this application be provided for.***

Prayer 1 is spent.

The plaintiffs, who it was claimed were, minors when this suit was filed, claim that they own plot Nos. 5 “A” and 30 “A” within Kiengu market. They referred to a confirmation letter dated 17th July, 2012 written by the County Council of Nyambene. They have claimed that the defendants had forcefully and unlawfully taken over the management of the suit plots.

The plaintiffs claim that they had been using the rent collected from the suit premises to meet school fees and other needs. The defendants had admitted that this was the position but, according to the plaintiffs, their claim that the suit plots had been fraudulently transferred to the plaintiffs was most casual, and indeed they had not shown any steps or any legal action they had taken against the plaintiffs and any other involved party upon their alleged discovery of the fraud.

Counsel for the plaintiff submitted that their father had died and they depended on the care of their

mother who used rent from the suit premises to meet their needs. As school going young girls, they would suffer irreparable damage that could not be compensated in monetary terms should the orders sought not be granted.

The plaintiffs contended that they had established a prima facie case, that irreparable damage would be occasioned if the orders they seek are not granted and that the balance of convenience tilts in their favour as no harm or prejudice however would befall the defendants.

The defendants in their submissions have stated that Harriet Karimi Gitonga is the wife of their deceased brother. They agree that the two parties for whom this suit is brought by their mother are the children of their deceased brother. They argue that the estate of their father, the children's grandfather, one Justice Munoru who died in 1966, is the subject of Maua Succession Cause No. 12 of 2006 which is yet to be finalized.

They further submitted that injunctive orders cannot issue as the plaintiffs for whom this suit was filed were not even born in 1966 when the original owner of the suit plots died and hence they could not have taken possession of the same.

The defendants have disputed that at least one of the plaintiffs was not a minor when this suit was filed by their mother on their behalf. They submit that an adult could not file a suit on behalf of another adult. They further submit that the plaintiffs had fraudulently obtained titles to the suit plots, adding that the suit plots belonged to their father, the grandfather of the children of their brother who are the plaintiffs herein. They further argue that the suit was not prosecuted within one year as required by order 40, rules 6. They conclude their submissions by opining that the plaintiff's case does not satisfy the requirements enunciated by the case of **Giella vs Cassman Brown**.

The suit involves family members. The defendants have agreed that they had allowed the plaintiff to make use of rent proceeds from the suit plots for sometime.

From the averments it seems as if one Sarah Nculubi Muniru, the stepmother of the defendants, had been made the administrator of their father's estate around 1977.

She is the person the county Council of Nyambene claims vide its letter dated 31/3/2012 who transferred the original plot to Grace Karimi Gitonga (half as 30 "A") and to Peter Muriithi (Half as 30 "B"). The defendants have agreed that they had allowed the plaintiffs to collect rent from the premises in dispute, at least for some time.

The parties herein have postulated assertions and counter assertions. Many of the issues they have raised including inter-alia claims of fraud, succession issues and the age of the children the mother Grace Karimi, filed this suit on behalf of, can only be determined after the hearing and final determination of the main suit. I do not need to reinvent the wheel. The Court of Appeal in the case of **MBUTHIA VS JIMBA CREDIT CORPORATION & ANOTHER (1988) KLR1** opined.

“ The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of facts, but rather to weigh up the relevant strength of each side's propositions. The lower court judge in this case had gone far beyond his proper duties and made final finding of facts on disputed affidavits ”

I do find that the plaintiffs have raised prima a facie case with a probability of success as enunciated by the classic case of **Giella Vs Cassman Brown & Co. Ltd (1973) E.A 358**.

I also find that having been reliant upon the rent that was being collected from the disputed premises for their education's fees and up keep, they stand to suffer irreparable damage should the orders prayed for not be granted.

In the circumstances, the application is allowed in terms of prayers 2 and 3. Costs shall be in the cause.

Dated, signed and delivered in upon court at Meru this 27th day of February 2014 in the presence of:

Cc Daniel

Ngunjiri for the applicant

Mbogo and Muriuki for Respondent - Absent

P. M. NJOROGI

JUDGE