



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ELC CIVIL SUIT NO 245 OF 2008**

**LEAH WANJIKU NJOROGE**

**(Suing as Legal Representative**

**of the estate of the Late**

**Daniel Njoroge Ringiria).....1<sup>ST</sup> PLAINTIFF**

**BERNARD NDUNGU GITAU**

**(Suing as Legal Representative**

**of the estate of the Late**

**Stephen Gitau Ringiria).....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PAUL NJAU NJENGA**

**HANNAH WANJIKU NJENGA.....DEFENDANTS**

**(Being sued as the administrators of the Estate of the Late Peter Njenga Ringiria)**

**RULING**

The applicants approached this court through a Notice of Motion dated 14<sup>th</sup> January 2014 brought under ***Order 45 Rule 1 and 2 Order 40 Rule 1,2 and 3 of the Civil Procedure Rules and Section 3A,63 (e) of the Civil Procedure Act*** seeking for orders that pending the hearing and determination of this application there be a temporary injunction to restraining the defendants by themselves, their agents, servants, employees, proxies and any other person claiming under them from alienating ,selling, transferring, trespassing, evicting, trading on and or interfering in any manner with the land parcel known as **LR No Dagoretti/Ruthimitu/460**.The applicants also want a review of the court’s orders issued on 7<sup>th</sup> June 2013.

This application is premised on the grounds stated on the face of the application and the supporting Affidavit of Leah Wanjiru Njoroge who deposed her affidavit on 14<sup>th</sup> January 2014.She averred that she was the wife and administrator of the estate of the Late Daniel Njoroge Ringiria who was a brother to the

late Peter Njenga Ringiria .She further stated that she had lived on the suit property since 1960 and the demarcation was done by elders in 1978 but separate titles were never issued and the eldest brother the Late Peter Njenga Ringiria held the land in trust for them. She stated that she was aware that the administrators to the Estate of the late Peter Njenga Ringiria were in the process of transferring the suit to 3<sup>rd</sup> parties and she has been summoned to attend a land board meeting on 15<sup>th</sup> January 2014 at the District Office in Dagoretti where the defendants have applied for consent to transfer the parcel of land to a third party. She also averred that when they filed the initial application dated 16<sup>th</sup> October 2012 they did not have a copy of the sale agreement despite applying due diligence to get a copy of the same and came across the sale agreement on 3<sup>rd</sup> January 2014 after being informed by the Dagoretti District Officer of the land consent application. She averred that if an urgent temporary order is not granted the defendants will suffer as the parcel to the 3<sup>rd</sup> parties will defeat their claim.

This application is opposed. Paul Njau Njenga the Co –Administrator of the Estate of **Peter Njenga Ringiria** deposed that the plaintiff had no intention of setting down this matter for hearing but is intended to frustrate the defendants from discharging their duties as administrators of the estate of Peter Njenga Ringiria by making this application. That the plaintiffs were parties and were aware of the succession cause No 1500 of 1995 at the High Court in Nairobi that issued and confirmed the Grant having filed affidavits of protest against the issue of grant which was dismissed. That the applicants further filed a suit HC ELC No 245 of 2008 raising the same issues but failed to disclose to the court that the issues had been addressed in Succession Cause No 1500 of 1995. The deponent believes that if the applicants are dissatisfied with the decision of the High Court they should appeal against it rather than filing multiple suits addressing the same issues. He prays that the court dismisses this application with costs.

Parties filed their written submissions in which they recapped the contents of their affidavits. I have considered the pleadings and the submissions. The applicant is seeking a review of the orders on 7<sup>th</sup> June 2013 and a temporary injunction on LR No **Dagoretti/Ruthimuti/460** pending the hearing and determination of the application and the suit.

The application is brought under **Order 45 Rule 1 of the Civil Procedure Rules** which provides that an Order for review can be entertained when there is discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made. It is also expected that an applicant seeking for review of orders must extract and attach the order in his application. I am in agreement with the case of **Evans Bwire Vs Andrew Ngida, Kisumu High Court, Civil Appeal No.103 of 2000**, where the court held that,

***“an application for review cannot be entertained if the Order sought to be reviewed has not been extracted.”***

The applicant herein has not extracted the order she is seeking to review and there is no attachment to the instant application. **Order 45 Rule 1** of the **Civil Procedure Rules** applies where there are discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge or could not be produced by the applicant at the time the order was made. I am in agreement with the case of **Daniel Macharia Karagacha Vs Monicah Watithi Mwangi, Civil Appeal No.159 of 2000** where the Court of Appeal held that,

***“Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter of evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application”.***

The applicant has stated that by the time they filed their application 16<sup>th</sup> October 2013 they did not have a copy of the sale agreement and that was the reason the court dismissed their application. The applicants are therefore using discovery of the sale agreement dated 17<sup>th</sup> September 2012 as a discovery of new and important evidence which was not produced at the time order was passed. I have considered this and do not think that the discovery of this sale agreement amounts to discovery of new and important evidence as

the applicants had stated that the Respondents were in the process of selling the property they therefore ought to have come with evidence at that time and therefore making a design based on this agreement will be as good as sitting on an appeal.

I now turn to the determination of the issue of whether or not this court can grant the prayer of temporary injunction as sought in the Notice of Motion dated **14<sup>th</sup> January 2014**.

An injunction is a Court order requiring an individual to do or omit doing a specific action. It is an extraordinary remedy that courts utilize in special cases where preservation of the **Status Quo** or taking some specific action is required in order to prevent possible injustice. Choosing whether to grant temporary injunctive relief is a discretionary power of the court. In the case of **State v. Odell, 193 Wis.2d 333 (1995)**, Court stated that an injunction is a prohibitive, equitable remedy issued or granted by a Court in an applicant's suit directed at a Respondent forbidding the respondent from doing some act which the respondent is threatening or attempting to commit or restraining a Respondent in continuance thereof, such act being unjust, inequitable or injurious to the applicant and not such as can be addressed by an action at law.

In deciding whether or not to grant an injunction, courts have been guided by the consideration that unless the injunction is granted, the damage so occasioned is such that the applicant would not be adequately compensated by an award of damages. Secondly, the Applicant must show that his case has a probability of success. Thirdly, if the court is in doubt it will decide the application on the balance of probability. In ordinary situations, the principles governing the grant of a temporary injunction are well settled although each case must be considered upon its own peculiar facts. In the case of **American Cyanamid Co v Ethicon Ltd [1975] AC 396, Lord Diplock** laid down guidelines for the grant of temporary injunctions. These principles are that;

- a. *The Applicant must show that there is a substantial question to be investigated with chances of winning the main suit on his part otherwise known as prima facie case ;*
- b. *The Applicant would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied and the Status Quo not maintained; and*
- c. *The balance of convenience is in the favour of the Application.*

Having outlined the said principles I will now decide on the issues in this case. This is a dispute emanating from a succession cause **No 1500 of 1995** which has already been determined and a certificate of confirmation of grant was issued on 8<sup>th</sup> July 2010. The applicants herein claim to be the owners of suit property by virtue of the fact that the deceased Peter Njenga held the same in trust for them. I have had a look at the plaint filed on **22nd May 2008** seeking a declaration that parcel number **Dagoretti/Ruthimitu/460** is ancestral land. An order directing the defendants herein to include the plaintiffs as beneficiaries in respect of parcel of **LR No Dagoretti/Rithimutu/460** registered in the name of Peter Njenga Ringiria and consequently the same be divided into three (3) equal shares and the families of **Peter Njenga, Daniel Njoroge Ringiria and Stephen Gitau Ringiria** or their respective legal representatives be issued with a search share each. They have however not declared that there was a succession matter pending in court in which the subject matter was among of the assets in the succession case.

The respondent on the other hand has raised the issue of resjudicata and stated that the issue raised by the applicants was already determined in the succession case. The applicants (Daniel Njoroge Ringiria) herein had initially an application for revocation of grant on the grounds that he along with three others was also beneficiaries in **LR No. Dagoretti/Ruthimitu/ 460** claiming to be family land held in trust for the family by the deceased. I have read the ruling delivered by Rawal J as she then was on 3<sup>rd</sup> November 2006 at page 6 paragraph 2 of the said ruling and this is what she said,

***“I thus reject the contention that the land was held in trust by the deceased (Peter Njenga Ringiria).I declare that the said land was a property owned by the deceased who left two wives and his***

**children”**

This ruling has not been appealed against, set aside or reviewed. There is another application filed by the applicants herein in the form of affidavit of protest and sought that the families of the brothers of the deceased be included as beneficiaries of the estate in the succession cause and were protesting against the division of the estate. The respondent claimed *rejudacta* and in a ruling delivered by Rawal J (as she then was) on **25<sup>th</sup> June 2008** agreed with the Respondent that the matter was *resjudicata*.

It should be noted that this court is a court of concurrent jurisdiction with the court that confirmed the grant to Paul Njau Njenga and Hannah Wanjiku Njenga the Respondents herein otherwise known as the High Court, Family division. If the applicants are aggrieved by the decision made in Succession Cause **No 1500 of 1995** they have the right to appeal and not file another suit in the same High Court as they have done in this present suit.

Consequently, I find the applicant’s application dated 14<sup>th</sup> January 2014 is not merited. The same is dismissed entirely with costs to the Respondents.

It is so ordered.

Dated, signed and delivered this **23<sup>rd</sup> day of May , 2014**

**L.GACHERU**

**JUDGE**

In the Presence of:-

Mr. Mageria holding brief for Mr. Kariuki for the Plaintiff/Applicant

Mr. Gatumuta for the Respondent.

Lukas: Court Clerk

Application is dismissed.

**L.GACHERU**

**JUDGE**

**23/5/2014**