



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 95 OF 2014**

**JOHN KIMANI MAINA.....1<sup>ST</sup> PLAINTIFF**

**JECINTA WANJIRU MAINA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PETER MUIGA WANGECHU.....1<sup>ST</sup> DEFENDANT**

**PETER MUIRURI KIRAGU.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiffs filed an application dated 31/1/2014 seeking an order of injunction restraining the Defendants from further sub-dividing, fencing, offering for sale, transferring, interfering or otherwise dealing with the suit properties known as L.R. LOC16/Kiarutara/1054 measuring 6.35Ha and L.R. LOC 16/Kiarutara/1052 measuring 1.01Ha pending the hearing and determination of the suit. The application is premised on grounds outlined in the application and supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff on 31/1/2014. The 1<sup>st</sup> Plaintiff deposed that the suit properties herein are as a result of a sub-division of L.R. LOC 16/Kiarutara/40 originally owned by Gakuru Muiguia (deceased) the father of Maina Gakuru (deceased) and the grandfather of the 1<sup>st</sup> Plaintiff. He deposed further that his late father inherited part of L.R. LOC 16/Kiarutara/40 and that he died on 27/5/2010 during the pendency of an appeal **NRB HCCA No. 42 of 2002** following his dissatisfaction of the mode of distribution of his father's estate.

It is his disposition during the pendency of the appeal the servants and/or agents of Rahab Wangechu Gakuru (deceased) a sister of Maina Gakuru caused the sub-division of L.R. LOC 16/Kiarutara/1006 into four portions, namely: L.R. LOC 16/Kiarutara/1051, 1052, 1053 and 1054 yet prior to the sub-division, the Plaintiffs cultivated on the property. That 1<sup>st</sup> Plaintiff deposed that this action prompted them to institute a suit **ELC No. 138 of 2013** seeking orders of injunction against further sub-division but that the suit cannot proceed until substitution of Rahab Wangechu Gakuru is done. The deponent stated that a caveat placed against the title after the sub-divisions were irregularly removed by the officers at the Lands Registry, Thika when after parcels 1054 and 1052 were transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's respectively.

The deponent states that he does farming on the sub-divided portions and had been cultivating tea thereon before sub-division, a fact the Defendants had knowledge of before the transfer. The deponent contends that the appeal is still pending before court, but that the same could be rendered nugatory if the Defendants continue to interfere with the suit properties.

Kamau Kinga & Co. Advocates for the Plaintiff filed submissions dated 28/3/2014 wherein counsel reiterated the contents of the application. Counsel urged the court to grant the orders sought submitting that the properties continue to be in danger of further sub-division without the Plaintiff's knowledge despite the pendency of the appeal. Counsel also submitted that the delay in prosecuting the pending cases is due to factors beyond the Plaintiff's control.

The application is unopposed since the Defendants neither filed a Replying Affidavit nor Grounds of Opposition. The Court record reveals that the Defendants were served with the application and granted time within which to file a response to the application as well as submissions. There is a Notice of Appointment dated 17/2/2014 and filed on the same date showing that M/s. Wangari & Co. Advocates came on record for the Defendants. There is also an affidavit of service sworn on 11/4/2014 by Edward Njuguna Kihara detailing how a mention notice dated 2/4/2014 was served upon M/s. Wangari & Co. Advocates. I therefore find that the Defendants are aware of this suit and that there was proper service effected upon their Advocates.

Though the application is unopposed, this court must satisfy itself that the Plaintiff has established a case to warrant the grant an order of injunction as pronounced in the case of **Giella vs Cassman Brown & Co Ltd (1973) EA 358** that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. Thirdly, in the event the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question is whether the Plaintiff has established a *prima facie* case which chances of success. The Plaintiffs annexed a copy of a certificate of Confirmation of Grant dated 8/10/2013 which indicates that they are the representatives of the estate of Maina Gakuro which informs this court that they have capacity to institute this suit on behalf of the deceased's estate. The Plaintiffs also availed copies of Official Search for parcels Nos. 1052 and 1054 which reveal the Defendants as the registered owners thereto. It is the Plaintiffs' claim that parcels are sub-divisions of L.R. LOC 16/Kiarutara/1006 emanating from L.R. LOC 16/Kiarutara/40. It is their averment that the deceased was part of the beneficiary of L.R. LOC 16/Kiarutara/40 and being dissatisfied with the distribution of Gakuru Muiguia's estate, lodged an appeal that is pending before the High Court. In the foregoing, it is my view that any further sub-division of the properties of estate of the deceased will render the appeal nugatory. I therefore find that the Plaintiffs have established a *prima facie* case with chances of success. I also opine that they stand to suffer irreparable loss which may not be adequately compensated by an award of damages in the event that the subsequent registered owners sale, dispose off or in any way alienate the sub-divisions thereof.

The Plaintiffs have disclosed that there is another suit, **ELC No. 138 of 2013** against Rahab Wangechu Gakuru who is now deceased. They aver that they opted to institute this suit against the Defendants for reasons that substitution of the deceased by the representatives of her estate had not taken place. It is trite, that a suit cannot proceed against a dead person. The Civil Procedure Rules at Order 24 allows for the suit to survive or continue upon the death of either a Plaintiff or Defendant in the event that substitution is done. Order Rule 4(3) thereof states a suit shall abate against a deceased Defendant in the event that an application for substitution is not done within 1 year. Rule 7 is to the effect that where a suit is abates or is dismissed under Order 24, no fresh suit shall be brought on the same cause of action. My understanding of this application is that it is filed to curtail any mischief by the representatives of the estate of the Rahab Wangechu Gakuru from seeking substitution, as a result of which the suit abates. Evidently, the injunction sought in this application is to stop further action on parcels No. 1052 and 1054 in view of a pending appeal **NRB HCCA No. 42 of 2002**. Taking this into consideration, I allow the Plaintiffs' application and order that:

1. ***The Defendants are restrained from further sub-dividing, fencing, offering for sale,***

*transferring, interfering or otherwise dealing with the suit properties known as L.R. LOC16/Kiarutara/1054 and L.R. LOC 16/Kiarutara/1052 for a period of 1 year from the date hereof or if the appeal in NRB HCCA No. 42 of 2002 is determined before the lapse of the 1 year.*

*2. Costs of the application be in the cause.*

**Dated, Signed and Delivered this 25<sup>th</sup> day of June 2014**

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiffs

.....For the Defendants

.....Court Clerk

**L.N. GACHERU**

**JUDGE**