



MARIA NJERI KARIUKI.....PLAINTIFF

VERSUS

MARY WAMBUI KANYINGI.....1ST DEFENDANT

MARY WAMBUI NDUNGU.....2ND DEFENDANT

ALICE WANGARI NJOROGE.....3RD DEFENDANT

GEORGE KAGIRI KARIUKI.....4TH DEFENDANT

RULING

The Plaintiff has moved the court by way of a Notice of Motion dated 28th March 2012 brought under Order 40 Rule 1(a), (b) and 4(1) of the Civil Procedure Rules. She is seeking an order that the Defendants jointly and severally be prevented from alienating, charging or transferring L.R. Githunguri/Kimathi/1856, 1857, 1858 and 1859, being subdivisions of L.R. Githunguri/Kimathi/362 (hereinafter referred to as the suit property) to any person whatsoever pending the hearing of this suit inter parties.

The application is supported by the Plaintiff's affidavit sworn on 28th March 2012. The main ground of the application is that the Defendants fraudulently transferred to themselves the suit property that was initially registered in the name of Paulina Gachambi Kariuki, the Plaintiff's deceased mother. Further, that the Defendants used a fraudulent decree of a non-existent Nairobi High Court case to remove the Plaintiff's caution on the land register, and proceeded to subdivide the suit property into L.R. No. Githunguri/Kimathi/1856, 1857, 1858 and 1859. The Plaintiff alleges that the Defendants are planning to sell the land to third parties before a succession cause is filed to determine heirs of the deceased. The deceased is said to have died on 15th March 2011.

According to the Plaintiff, the suit land was registered in the name Paulina Gachambi Kariuki on 24/7/81 to hold in trust for her 9 children including the Plaintiff, pursuant to a certificate of succession issued by the Githunguri District Magistrate Court following the death of Mr. Kariuki Kabere, the Plaintiff's father. The Plaintiff has attached evidence of the Certificate of Succession, a copy of the land register as well as certificates of official searches.

Further, the Plaintiff states that after Pauline Gachambi Kariuki was registered as owner of the land, she prevented the Plaintiff from cultivating the land prompting the Plaintiff together with her sister Hannah Wanjiku Kiri, now deceased, to file Nairobi High Court case No. 457/2005 for the transfer of 2.2 Acres of the suit land to them. The Plaintiff also states that she placed a caution on the suit land to prevent alienation pending the hearing of the case. The Plaintiff now states that the Defendants removed the caution on 19.08.08 and alleges that the Defendants were registered as owners of the land on 10/5/2011, 55 days after the death of Pauline Gachambi Kariuki without first going through a succession case. The Plaintiff further referred the matter to the C.I.D in Kiambu and investigations are ongoing.

The application is opposed. The 4th Defendant's replying affidavit was sworn on behalf of the Defendants on 14th May 2012, and filed in court on the same date. The 4th Defendant and the Plaintiff are siblings

and the 4th Defendant has admitted that the suit land was inherited by Pauline Gachambi Kariuki from their late father. According to the 4th Defendant, Pauline Gachambi Kariuki was registered as the absolute proprietor of the suit land and had the right to sell and gift the land as she wished, since neither the register nor the certificate of succession indicated she was being registered as trustee for her children.

The 4th Defendant averred that the Plaintiff had been given land in Ruiru and Githunguri by Pauline Gachambi Kariuki and that this was the finding of a panel of elders, the Chief and the District Officer. Dissatisfied with this finding, the Plaintiff is said to have filed Githunguri Land Dispute Tribunal No. 18 of 1990 which Tribunal found that her claim was not valid, and the Tribunal award was adopted as a judgment of the court in Githunguri Senior Resident Magistrate Court. Further, that the Plaintiff then lodged High Court Civil Appeal No. 69 of 2006 as well as High Court Civil Suit No. 457 of 2005. The 4th Defendant attached the elder's deliberations, Tribunal proceedings, ruling and order as well as the pleadings filed by the Plaintiff.

It is the 4th Defendant's case that the award of the Tribunal was never stayed and the deceased applied for the decree to the High Court at Nairobi where the records of the tribunal and the related court case No. 6 of 2005 had been sent. The deceased is said to have registered the decree on 28th February 2007, and the caution placed by the Plaintiff was removed. Further, that the deceased applied for and was granted Land Control Board consent to transfer the suit land to the Defendants by way of gift on 22.10.08. The 4th Defendant further stated that the deceased executed the transfer in favour of the Defendants, which was not registered until 10th May 2011 owing to lack of stamp duty even though the deceased had died on 15th March 2011. The 4th Defendant maintained that the transaction to transfer the land to the Defendants was lawful, above board and denied the allegations of fraud.

The Plaintiff in a supplementary affidavit sworn on 27th June 2012 Plaintiff stated that the caution registered on the suit land was removed through a forged decree issued by a panel of elders on 16th December 2004 and which was allegedly issued by the Deputy Registrar of the High Court of Kenya at Nairobi on 28th February 2007. Further, the Plaintiff denied having been given property by the deceased Pauline Gachambi Kariuki stating that she bought the land at Githunguri Constituency using her salary and has attached evidence of share certificate from Githunguri Constituency Ranching Co. Ltd. The Plaintiff maintains that it was illegal for the Defendants to alienate Githunguri/Kimathi/362 after the death of the deceased as per section 45 of the Law of Succession Act.

Parties relied on submissions filed during the hearing of the application on 23rd January 2013. The Plaintiff's Counsel in submissions dated 28th June 2012 stated that the Plaintiff had established a *prima facie* case with a probability of success. Counsel made reference to section 132(2) of the Registered Land Act which provides that no dispositions which are inconsistent with a registered caution ought to be registered except with the consent of the cautioner or by a court order. The Plaintiff submitted that there is no court order removing the caution and therefore, that the caution lodged by the Plaintiff should be reinstated, and the new subdivisions namely Githunguri/Kimathi/1856,1857,1858,1859 should be reverted to the original land reference number Githunguri/Kimathi/362 in the name of Paulina Gachambi Kariuki.

While referring the court to section 45 of the Law of Succession Act, counsel for the Plaintiff submitted that the Defendants had no capacity to be registered as owners of Githunguri/Kimathi/362 on 10th May 2011 when the registered owner died on 15th March 2011 stating that the Defendants should not be allowed to benefit from intermeddling with the deceased's property. The Plaintiff's counsel submitted that the Plaintiff has fulfilled the test specified in the case of **Giella –vs – Cassman Brown & Co. Ltd (1973) E.A 358.**

The Defendants' Counsel in his submissions dated 23rd October 2012 argued that the Plaintiff had not proved that the decree issued in Nairobi HCCA no. 69 of 2006 was fraudulent, and further, that the records in HCCA no. 69 of 2006 are public records available for scrutiny by the Plaintiff as well as this court. Counsel for the Defendants also submitted that the Plaintiff had not shown a *prima facie* case with

a probability of success as she had not shown that she has any legal right in the land.

It was further submitted for the Defendants that there was no disposition from the Plaintiff's supporting affidavit as to what loss she will suffer and how such loss if any, cannot be compensated by damages. The Defendants' counsel submitted that unlike the Defendants, the Plaintiff has never utilized the suit land, has never owned it and has lost previous judicial attempts to establish any right to the land. Therefore, that the balance of convenience tilts in favour of not interfering with the rights of the Defendants who are the registered owners.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The issue to be determined is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are 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. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The Plaintiff contends that the suit property belonged to her deceased mother, and that the Defendants have used a fraudulent decree to intermeddle with the deceased's estate. The Defendants have however given a detailed history of the proceedings and court orders leading to the issue of the contested decree, and provided evidence of the same. The Defendants in addition admit to transferring the suit property on 10th May 2011 after the deceased's death on 15th March 2011.

The Defendants did not bring any evidence to show that they were at the time of the said transfer the appointed legal representative of the deceased. It was held by the Court of Appeal in **Troustik Union International & Another vs Mrs Alice Mbeyu & Another, Nairobi Civil Appeal Number 145 of 1990**, that nobody has capacity to act with regard to a deceased's estate without first applying for letters of administration, and I therefore do find merit in the Plaintiff's argument that the Defendants have intermeddled with the deceased's estate without following the proper procedure.

I therefore find that the Plaintiff has established a *prima facie* case to this extent, and that I cannot make any finding as to the adequacy of damages as such an order would affect the deceased's estate in the absence of letters of administration. I therefore allow the Plaintiff's Notice of Motion dated 28th March 2012 and order that the Defendants jointly and severally be and are hereby restrained from alienating, charging or transferring L.R. Githunguri/Kimathi/1856, 1857, 1858 and 1859 being subdivisions of L.R. Githunguri/Kimathi/362 to any person whatsoever pending the hearing of this suit inter parties or until further orders.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____12th____ day of ____March____, 2013.

P. NYAMWEYA
JUDGE