



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 341 OF 2011**

**MARY WANJIRU NJONJO**

**(Suing as Rep. of Estate of John Njonjo Njubi ).....PLAINTIFF**

**VERSUS**

**NJOBI NJONJO.....1<sup>ST</sup> DEFENDANT**

**SIMON NDUNGU KINGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff/Applicant is the widow and the legal representative of the estate of John Njonjo Njubi who died on 2/07/2001. She was granted a limited Grant of Letters of Administration Ad Litem issued on 15<sup>th</sup> June 2011 in **High Court P&A Cause number 1115 of 2011 - In the Matter of the Estate of John Njonjo Njubi (Deceased)**, a copy which she has provided as evidence. The Plaintiff/Applicant has filed an application dated 11<sup>th</sup> July 2011 wherein she is seeking the following substantive prayers:

1. That an injunction do issue against the 1<sup>st</sup> Defendant/Respondent by himself, his agents, servants and/or employees from further sub-dividing, charging or selling or in any way alienating or dealing with the parcels of land known as LR. Number KABET/LOWER KABETE/2848, 2849, 2851, 2852, 2853, 2854 and 2855 being sub-division of L.R. Number KABETE/ LOWER KABETE/746 pending the hearing and determination of this suit.
2. That an injunction do issue against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents, their agents, servants and/or employees restraining them from interfering with the applicant's quiet possession of parcels subject matter of this suit until the hearing and determination of this application.

The grounds for the Plaintiff's/Applicant's application are that L.R. Number KABETE/LOWER KABETE/746 which has now been sub-divided into 9 parcels was registered in the name of the 1<sup>st</sup> Defendant/Respondent as the family trustee. That the 1<sup>st</sup> Defendant/Respondent has sub-divided the said parcel of land and sold two of the sub-divided parcels to the 2<sup>nd</sup> Defendant/Respondent without giving the Plaintiff/Applicant the share due to her late husband who was a brother to the 1<sup>st</sup> Defendant/Respondent. The Plaintiff/Applicant is apprehensive that unless the 1<sup>st</sup> Defendant/Respondent is stopped by an order of this Court he may dispose of the remaining 7 parcels in his name. Further, that the 2<sup>nd</sup>

Defendant/Respondent has started to harass and threaten the Plaintiff/Applicant with eviction from the parcels which are the subject matter of this suit, and unless restrained may carry out his threat.

The Plaintiff/Applicant gives a detailed account of the facts leading upto her application in a supporting Affidavit sworn on 11<sup>th</sup> July 2011, wherein she states that the 1<sup>st</sup> Defendant/Respondent and her late husband are brothers, being the two sons of Susan Karungari, the elder daughter of Wangui Njubi nee King'atua who was the 4<sup>th</sup> wife of Njubi Njonjo. Further, that she was informed by her late husband that in the 1950's the said Wangui nee King'antua was given her share of the family land by her husband Njubi Njonjo, which she passed over to her three daughters, Susan Karungari, Marion Njoki and Gladwell Wanuri. That the land was later sub-divided and Marion Njoki was given her share but Gladwell Wanuri decided that her share be left together with that of Susan Karungari's, and in keeping with Kikuyu tradition, the land was registered in Susan Karungari's eldest son's name, Njubi Njonjo the 1<sup>st</sup> Defendant/Respondent herein. The land was registered in the Lands Registrar's Office, Kiambu, as KABETE/LOWER KABETE/504, on 7/07/1958 in the name of Njubi Karungari, and the Plaintiff/Applicant has annexed a copy of the extract of title (Green Card) issued on 23/10/1990 showing the same.

The Plaintiff/Applicant also states that on 28/05/1989, the said parcel of land L.R. Number KABETE/LOWER KABETE/504 was sub-divided into two parcels namely L.R number KABETE/LOWER KABETE/746 and 747, after a Court order decreed that the land to be sub-divided between the 1<sup>st</sup> Defendant/Respondent and Gladwell Wanuri respectively, following the institution of a suit by the said Gladwell Wanuri demanding her share of the said property. The Plaintiff/ Applicant avers that L.R number KABETE/LOWER KABETE/746 is the subject matter of this suit, and she has annexed a copy of the title deed in respect of L.R. KABETE/LOWER KABETE/746 showing that the same is registered in the name of Njubi Njonjo.

The Plaintiff/Applicant gives an account of the various attempts made to have the 1<sup>st</sup> Defendant/Respondent sub-divide and or partition the L.R. Number KABETE/LOWER KABETE/746 and transfer to her the said ½ share that he held in trust. The evidence she has annexed with regard to these attempts are an award of elders dated 28/4/2008 that the land reference number KABETE/LOWER KABETE/746 was registered in the name of the 1<sup>st</sup> Defendant/Respondent as a trustee of his brother; a complaint the Plaintiff/Applicant lodged with the Land Disputes Tribunal Kikuyu on 6/5/2008 referenced KW/LND/9/6/43 of 2008; and a letter of the same date written by the District Officer of Kikuyu to the Land Registrar, Kiambu District, confirming land reference number KABETE/LOWER KABETE/746 belonged to the family even though registered under the 1<sup>st</sup> Defendant/Respondent's name, and requesting the Registrar, Kiambu Lands Office not to allow any dealings thereon until he had heard from the said District Officer's office.

The Plaintiff/Applicant states that the tribunal matter did not proceed as the 1<sup>st</sup> Defendant/Respondent obtained an order stopping the hearing of the matter, and thereafter embarked on sub-dividing the land, firstly into two parcels namely KABETE/LOWER KABETE/2777 AND 2778, and later on further subdividing Land Reference number KABETE/LOWER KABETE/2777 into 8 parcels namely L.R. number KABETE/LOWER KABETE/2848, 2849, 2850, 2851, 2852, 2853, 2854 and 2855. The Plaintiff/Applicant claims that on 21/09/2010 and 25/02/2011 respectively, L. R. Number KABETE/LOWER KABETE/2778 and KABETE/LOWER KABETE 2850 were illegally and unlawfully sold to the 2<sup>nd</sup> Defendant/Respondent, and title deeds issued to him. Further, that the remaining parcels namely L.R. Number KABETE/LOWER KABETE/2848, 2849, 2851, 2852, 2853, 2854 AND 2855 are still registered in the name of the 1<sup>st</sup> Defendant/Respondent herein. She has annexed a bundle of certificates of official searches for all the above-stated parcels of land.

The Plaintiff/Applicant avers that both the 1<sup>st</sup> Defendant/Respondent and her late husband lived on the subject parcel of land, and after her marriage she set up her matrimonial home there to date. Further, that she is a widow who derives her livelihood from the disputed parcel of land and has lived there for the past 21 years, and will suffer irreparable damages if she does not get her rightful share of the dispute land

namely, L.R. Number KABETE/LOWER KABETE/2778, 2849, 2850, 2851, 2853, 2854 and 2855, or ½ the share of land reference number KABETE/LOWER KABETE/746 measuring 1.3 acres.

The above facts are reiterated in written submissions filed by the Plaintiff/Applicant's Advocate dated 11<sup>th</sup> January 2012 wherein it is contended that the Plaintiff/Applicant has demonstrated a case with a probability of success as required in the case of **Giella v Cassman Brown & Co Ltd, (1973) EA 358** for a temporary injunction to issue. The Plaintiff/Applicant argued that this has been shown by the decision by a court of competent jurisdiction in **HCCC Number 185 of 1977 – Gladwell Wanuri v Njubi Karungari** that a trust existed in relation to the original parcel of land, namely KABETE/LOWER KABETE/504; the Elders award signed on 28<sup>th</sup> April 2008; and the fact that the Plaintiff has been in possession of part of the parcel of land L.R Number KABETE/LOWER KABETE/746.

The Plaintiff/Applicant's Advocate also argued that the 1<sup>st</sup> Defendant/Respondent's claim that the Plaintiff/Applicant's husband refused to pay costs did not extinguish her right to the parcel of land, and the fact that there was no express registration of trust against the title does not defeat the Plaintiff/Applicant's claim for ½ share of L.R Number KABETE/LOWER KABETE/746 or its subdivisions. The Advocate relied on various authorities including the decisions in **Gathiba v Gathiba 2001 (2) EACA 366**, and **Muthiuta v Wanoe 1982 KLR 166** in this respect.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents oppose the application in Replying Affidavits sworn on 22<sup>nd</sup> July 2011 and 23<sup>rd</sup> July 2011 respectively. The 1<sup>st</sup> Defendant/Respondent states that the land he owns was an inheritance from his grandfather and the same was registered in his name as a first registration in the year 1958 as L.R. No. Kabete/Lower Kabete/504, before it was later sub-divided. Further, that he does not hold the land in trust for anybody as his was absolute ownership on first registration.

The 1<sup>st</sup> Defendant/Respondent also states that by the time of demarcation, his aunts Marion Njoki and Gladwell Wanuri were married, but Marion Njoki had parted company with her husband. Further, that during demarcation in 1958, Marion Njoki got land which was registered in her name but Gladwell Wanuri got no land and she took him to court and got one acre unfairly, resulting in the land being sub-divided and L.R. No. KABETE/LOWER KABETE/746 being registered in the 1<sup>st</sup>

Defendant/Respondent's name. The 1<sup>st</sup> Defendant/Respondent states that he was ordered to pay costs for the court case, and since he had no money and the Plaintiff/Applicant's late husband also refused to pay the costs, he was ordered by the Court that L.R. No. KABETE/LOWER KABETE/746 be sold in execution of the decree. He has annexed a copy of the notice to show because why the land should not be sold.

The 1<sup>st</sup> Defendant/Respondent further states that his late brother and the Plaintiff sold a piece of land his late brother owned in Naivasha, and the 1<sup>st</sup> Defendant/Respondent only allowed them to occupy his land because they had nowhere to go. Further, that the Plaintiff/Applicant who brings this suit as the personnel representative of her deceased husband has failed to disclose that her husband had brought a suit against the 1<sup>st</sup> Defendant/Respondent on the same subject matter being Nairobi High Court Civil Case No. 5530 of 1990(O.S), which abated and has never been revived, and is incapable of being revived rendering the current case untenable. The 1<sup>st</sup> Defendant/Respondent has annexed the pleadings in the said case as evidence. Finally, the 1<sup>st</sup> Defendant/Respondent states that he had no property to transfer as his late brother had no legal interest, and that the sale of the two parcels of land to the 2<sup>nd</sup> Defendant/Respondent was open and lawful and he had indefeasible title to them

The 2<sup>nd</sup> Defendant/Respondent in his replying affidavit states that that he bought land parcels KABETE/LOWER KABETE/2778 and L.R. No. KABETE/LOWER KABETE/2850 from the 1<sup>st</sup> Defendant/Respondent. Further, that prior to the said purchase he had made a search in lands office and found that the 1<sup>st</sup> Defendant/Respondent had clear titles. The 2<sup>nd</sup> Defendant/Respondent also states that he attended the land board where he obtained consents for the two transactions, and that he is a buyer for valuable consideration with no notice of any claims adverse to the 1<sup>st</sup> Defendant/Respondent's titles. He

denies having harassed the Plaintiff/Applicant, and states that if she should pursue her claim against the 1<sup>st</sup> Defendant/Respondent who still holds the other parcels of land.

The Defendants/Respondents' Advocate in written submissions dated 19<sup>th</sup> January 2012 argued that the Plaintiff/Applicant has not demonstrated a *prima facie* case, as articulated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358** and in **Aikman v Muchoki (1984) EA 353**, because her case has no chance of succeeding. The reason given by the Defendants/Respondents is that the suit brought by the Plaintiff/Applicant's late husband Njonjo Njubi, in HCCC No 5530 of 1990 (O.S) was claiming the subject property on trust, and under Order 24 Rule 7 of the Civil Procedure Rules, where a suit abates or is dismissed, no fresh suit shall be brought on the same cause of action. Further, as no application for substitution was made within one year of Plaintiff/Applicant's late husband death, the said suit abated. The Defendants/Respondents also submit that there is no judgment in favour of the Plaintiff/Applicant or her late husband either arising from the decision of the court in **HCCC Number 185 of 1977 – Gladwell Wanuri v Njubi Karungari** or from the elder's award signed on 28<sup>th</sup> April 2008.

I have read and carefully considered the pleadings, evidence and written submissions by the parties to this application. I will proceed with the determination of the application on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358**, and as elaborated upon in **Benir Investments Ltd v Commissioner General & Anor (2010) eKLR**. The Plaintiff has referred to a judgment of this court in **HCCC Number 185 of 1977 – Gladwell Wanuri v Njubi Karungari** made with respect to the suit properties herein that is not disputed by the 1<sup>st</sup> Defendant/Respondent, and an elder's award signed on 28<sup>th</sup> April 2008, that both indicate a possibility that the 1<sup>st</sup> Defendant/Respondent holds L.R Number KABETE/LOWER KABETE/746 and its subdivisions in trust.

I however agree with the Defendants/Respondents that despite this evidence, the Plaintiff/Applicant is barred under Order 24 Rule 7 of the Civil Procedure Rules, from bringing this suit. I therefore find that the Plaintiff has not shown a *prima facie* case and I have to decide the application on the basis of a balance of convenience. In this respect I find that the Plaintiff/Applicant has established her home on the subject parcels of land and she is in possession of the same, which fact is not disputed by the 1<sup>st</sup> Defendant/ Respondent. She is therefore the one likely to be more prejudiced if the injunctions sought are not granted, and the balance of convenience tilts in her favour. I am also obliged to apply the principle in Article 159(2) of the Constitution that justice should be administered without undue regard to procedural technicalities.

For the reasons given in the foregoing, I hereby conditionally allow the Plaintiff/Applicant's application and grant the orders herein below only on condition that the Plaintiff/Applicant files and serves the Defendants/Respondents with an application within 30 days of the date of this ruling for extension of time to be made a party to **High Court Civil Case No. 5530 of 1990(O.S) - Njonjo Njubi v Njumbi Karungari**, failing which the following orders will lapse.

1. That the 1<sup>st</sup> Defendant/Respondent by himself, his agents, servants and/or employees are restrained from further sub-dividing, charging or selling or in any way alienating or dealing with the parcels of land known as LR. Number KABETE/LOWER KABETE/2848, 2849, 2851, 2852, 2853, 2854 and 2855 being sub-divisions of L.R. Number KABETE/ LOWER KABETE/746 pending the hearing and determination of this suit.
2. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents, their agents, servants and/or employees are restrained from interfering with the Plaintiff/Applicant's quiet possession of the portions of the above-stated parcels of land that are in her actual possession at the date of this ruling, until the hearing and determination of this application.

Orders accordingly.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 29<sup>th</sup> day of March, 2012.

**P. NYAMWEYA**  
**JUDGE**