



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 590 OF 2010 (O.S)

MICHAEL MUNGAI KIMANI

STEPHEN NJUGUNA KIMANI

ELIUD MBUGUA KIMANI

JOHN CHEGE KIMANI

JAMES WAITITU KIMANI

DENNIS MURIITHI KIMANI

(Suing in their own rights and as

Administrators of the Estate of

Elizabeth Njeri Gituanja)PLAINTIFFS/RESPONDENTS

VERSUS

KIMANI GITUNJA.....1ST DEFENDANT

JANE NJOKI GITUNJA2ND DEFENDANT

RULING

The 2nd Defendant/Applicant has filed an application dated 26th August 2011 seeking orders that the Plaintiffs/Respondents by themselves, their servants, agents, employees, or any other person acting for or on their behalf be restrained from ingressing, trespassing, carrying on any construction, or erecting structures (permanent or otherwise), cultivating, utilizing, selling, transferring, disposing, wasting or in any other way dealing with the parcel of land known as Kabete/Nyathuna/1115 (hereinafter referred to as the suit property), and the developments thereon, pending the hearing and determination of the suit filed herein.

The grounds for the application are that the 2nd Defendant was granted judgment in her favour on 12th June 1981 in High Court Civil Suit No. 1995 of 1980 (**Jane Njoki Gituanja vs Kimani Gituanja**)

wherein she had sued the 1st Defendant herein. The 1st Defendant is the father to the Plaintiffs/Respondents herein and the son of Elizabeth Njeri Gituanja (Deceased) who was the 2nd Defendant's co-wife. The said judgment held that the parcel of land known as Kabete/Nyathuna/53 and registered in the 1st Defendant's name be subdivided into two portions, and one portion thereof be transferred to the 2nd Defendant/Applicant. The property was accordingly subdivided into Kabete/Nyathuna/1115 and Kabete/Nyathuna/1116 and Kabete/Nyathuna/1115 was supposed to have been transferred to and registered in the 2nd Defendant's/Applicant's name. However the said transfer could not take place because at the time the land parcel Kabete/Nyathuna/53 was charged to secure a loan facility, and the 1st Defendant thereafter went missing, whereupon the 1st Plaintiff placed a caution on the said property. The 2nd Defendant/Applicant further states that her efforts to have the caution removed has been met with resistance from the Plaintiffs/Respondents.

These grounds are also reiterated in the 2nd Defendant/Applicant's supporting affidavit sworn on 22nd August 2011 wherein she also states that Elizabeth Njeri Gituanja did not participate in H.C.C.C. No. 1995 of 1980, and that the issue of her participation and interest on the subject property was fully addressed by the Court in the judgment given in the said case. The 2nd Defendant/Applicant further states that notwithstanding the foregoing facts, the Plaintiffs/Respondents have commenced construction of permanent structures on her portion of land, and her rights will be grossly prejudiced unless there is an intervention by this Court. The 2nd Defendant/Applicant has annexed copies of the said judgment delivered by Gachuhi J. in H.C.C.C. No. 1995 of 1980 on 12th June 1981 and of the Decree issued on 2nd September 1982. Also annexed are copies of a Court Order issued in the said case on 1st November 1984, a letter of consent from the Land Control Board to the subdivision of Kabete/Nyathuna/53, a Certificate of Official Search with respect to Kabete/Nyathuna/53 dated 28.6.04 and of photographs of structures put up on the suit property.

The Plaintiffs/Respondents response is contained in Grounds of Opposition dated 7th September 2011, and in a Replying Affidavit sworn by the 1st Plaintiff/Respondent on 7th September 2011. The Plaintiffs/Respondents oppose the application on the grounds that it is incompetent by reasons of the fact that the suit herein is based on adverse possession, which the application purports to take away before the suit is determined. The 1st Plaintiff/Respondent states that the judgment/decreed referred to in the 2nd Defendant's/Applicant's affidavit is not a new matter in these proceedings and was delivered more than 30 years ago. The 1st Plaintiff/Respondent also states that he was born on Kabete/Nyathuna/53 and has continuously lived thereon ever since, and that the other Plaintiffs/Respondents herein have equally lived on the said piece of land.

The 1st Plaintiff/Respondent claims that the registered owner of the suit land namely Kabete/Nyathuna/53 is the 1st Defendant/Respondent in these proceedings who has not been served with this application. He also states the structures exhibited by the 2nd Defendant/Applicant is an old house which was left behind by his late grandmother Elizabeth Njeri Gituanja, whose rights to the piece of land remain unaltered and valid, and whose said house was inherited by one of the Plaintiffs/Respondents herein. The 1st Plaintiff/Respondent alleges that it is the 2nd Defendant's/Applicant's who has recently engaged in demolition of the said structure with a view to destroy or distort evidence against her.

Parties were given directions by this Court to file and exchange written submission on 30th November 2011. The 2nd Defendant's/Applicant's Advocate requested for a ruling on the basis of the pleadings and submissions filed at the hearing of the application on 23rd January 2012, whose notice was served on the Plaintiffs. The 2nd Defendant/Applicant's Advocate had earlier filed written submissions dated 20th January 2012 in which he reiterated the facts of his application, and contended that he had thereby demonstrated all the three ingredients for the grant of an injunction stated in the case of **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**. The Plaintiffs/Respondents did not file any written submissions.

The issue I need to consider is whether there is a *prima facie* case established by the 2nd Defendant/Applicant on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**. It is not disputed that there was judgment entered in favour of the 2nd Defendant/Applicant in High Court Civil Suit No. 1995 of 1980 (**Jane Njoki Gituanja vs Kimani Gituanja**) and that the land parcel known as Kabete/Nyathuna/53 was to be subdivided. It is also not disputed that the suit property was as a result of the said sub-division to be registered in the 2nd Defendant's/Applicant's favour. The 2nd Defendant/Applicant has provided evidence of the said judgment and the relevant decree and order of this court. I find that the 2nd Defendant/Applicant has thereby demonstrated a *prima facie* case. The rights if any of the Plaintiffs/Respondents over the suit property cannot be decided at this stage, but at the trial of the Originating Summons they have filed herein. The Plaintiffs/Respondents have not pleaded or shown their willingness and ability to compensate the 2nd Defendant/Applicant in damages, and I find that in the event she succeeds in her claim she will thereby suffer irreparable damage if the suit property is not conserved.

For these reasons the application dated 26th August 2011 is allowed and I hereby order that the Plaintiffs/Respondents by themselves, their servants, agents, employees, or any other person acting for or on their behalf be restrained from ingressing, trespassing, carrying on any construction, or erecting structures (permanent or otherwise), cultivating, utilizing, selling, transferring, disposing, wasting or in any other way dealing with that portion of the parcel of land registered as Kabete/Nyathuna/53 that is now known as or referred to as Kabete/Nyathuna/1115 resulting from a sub-division thereof, pending the hearing and determination of the suit filed herein.

Costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____14th____ day of ____March____, 2012.

P. NYAMWEYA
JUDGE