



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Civil Case 365 of 2011**

**WARIARA MBUGUA.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENNETH PARIT LIKIMANI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**EVA RATIA LIKIMANI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**LIVINGSTONE GITAU NJOGU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**LAND REGISTRAR, KAJIADO DESITRIC.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is a ruling in respect of the Notice of Motion dated 29<sup>th</sup> November 2011 which is expressed to be brought under Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil procedure Act.
2. In her application, the Plaintiff seeks orders barring the Defendants from dealing in any way with L.R. No. Ngong/Ngong/19764, 19765, 19766, 19767 and 19768 (each, individually, “Suit Property” and collectively, “Suit Properties”), all of which are situated in Ngong in Kajiado District, until this case is heard and determined.
3. By consent of the parties, there are already in place interim orders barring any dealings in the Suit Properties until this present application is determined.
4. This being an application for an interlocutory injunction, the application is required to demonstrate the three main factors to be considered in determining whether to grant a preliminary injunction. (See *Giella v. Cassman Brown*). The trial court must evaluate whether:
  - a. The Applicant has showed that it is likely to prevail on the merits;
  - b. The Applicant has demonstrated that it will suffer imminent irreparable harm if the injunction is not granted; and
  - c. The harm the Applicant is likely to suffer absent the injunction outweighs the harm it would cause to the adverse party.
5. Retired Justice Kuloba clarified these factors in his celebrated book on injunctions thus:

[T]he right formulation of [the principles] would be this, *that among other considerations a court takes into account* in determining whether a temporary injunction should be issued, first, whether there is a significant likelihood that the applicant will prevail on the merits of the case at a full trial. Second, the court will ordinarily consider whether there is a threat of irreparable harm. Finally, there is the traditional consideration of whether harm to the respondent would outweigh the need for temporary relief. But there may be other matters, for example public interest, involved. [Emphasis his]

6. In applying the *Giella Principles* to the application at hand, the court is at this stage in the proceedings not required to make any conclusive findings of fact (or even law) for that will have to await the complete compilation of the case record and full ventilation of the facts at trial which must include the cross examination of the witnesses. At this point, however, I must come to provisional conclusions which will allow me to determine if the injunctive relief sought is appropriate.

7. The Applicant's case, briefly stated, is that she signed an agreement for the purchase of the Suit Properties on 20<sup>th</sup> January, 2005 ("Sale Agreement") with one Rhoda Naipanoi Likimani ("Deceased") who was the mother of the 1<sup>st</sup> Defendant and a sister to the 2<sup>nd</sup> Defendant. The Applicant says she deposited part of the purchase price (Kshs. 300,000 being 10 percent of the Purchase Price) and was granted possession of the land, whereupon she embarked on developments like fencing and tree-planting. Unfortunately the seller died some two months after the Sale Agreement was signed, but before the sale was completed.

8. The Applicant says that she later discovered that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had applied to the Kajiado Law Courts for letters of administrations of the estate of the seller. She states that the Letters of Administration were issued on 23<sup>rd</sup> June 2011. However, before the grant was confirmed, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered an agreement purporting to sell part of the Suit Properties to the 3<sup>rd</sup> Defendant at Kshs. 3 million. It appears this sale was completed because an official search she did revealed that some of the Suit Properties were transferred to the 3<sup>rd</sup> Defendant on 12<sup>th</sup> August 2011.

9. It is the Applicant's case that the sale of the Suit Properties to the 3<sup>rd</sup> Defendant was fraudulent because the 1<sup>st</sup> and 2<sup>nd</sup> Defendants colluded with the 4<sup>th</sup> Defendant to dispose the land to the 3<sup>rd</sup> Defendant without valid title, and before waiting for confirmation of grant of probate. She fears that the 3<sup>rd</sup> Defendant is in the process of transferring some of the Suit Properties to other people, even though cautions have been placed on the title.

10. The 3<sup>rd</sup> Defendant, on his part, contends that he purchased some of the Suit Properties from the 1<sup>st</sup> Defendant who had authority to sell it, emanating from a Power of Attorney dated 14<sup>th</sup> February 2012 and which was registered on 20<sup>th</sup> July 2011. He therefore says that he is entitled to the Suit Properties as a bona fide buyer for value without notice.

11. The 1<sup>st</sup> Defendant denies knowledge of any Sale Agreement between the Applicant and her mother over the suit properties, and doubts the authenticity of the Sale Agreement produced by the Applicant because as far as he is concerned, his mother used to sign her documents rather than thumb-print them as she apparently did in this Sale Agreement.

12. The 2<sup>nd</sup> Defendant states that she has a Power of Attorney to act on behalf of Ann Talasha Likimani who is a daughter of Rhoda Naipanoi Likimani and the sister of the 1<sup>st</sup> Defendant. She got the Power of Attorney to enable her take care of Talasha's interests in her mother's property since the latter is resident in the United States. In her submissions, she joins the Applicant in arguing that the Applicant has established a *prima facie* case with a probability of success because, she says, there is no way someone can purport to sell the property of a deceased person on the strength only of a Power of Attorney. In fact she urges this court to save judicial time by dismissing the entire suit rather than going into the merits.

13. As I had stated earlier, this is an Application for an interlocutory injunction for this the Applicant needs establish a *prima facie* case with a probability of success, and to stand the risk of irreparable

damage if the injunction is denied. If the court is still in doubt then it should settle the matter on a balance of convenience.

14. The gist of the Applicant's case is that she entered a valid Sale Agreement with the Deceased who died before the sale was completed. The Deceased's son then purported to sell the same land to another person using a Power of Attorney which was purportedly granted while his mother was alive but registered more than six years after her death. Rather than wait to get confirmation of grant of Letters of Administration, the 1<sup>st</sup> Defendant opted to use the Power of Attorney to dispose of the property. In the process, it seems, he also disposed his sister whose interests in the estate were held by the 2<sup>nd</sup> Defendant.

15. At the time the 1<sup>st</sup> Respondent signed the Sale Agreement with the 3<sup>rd</sup> Respondent the owner of the property had died. It is trite law in Kenya that estates of deceased persons can only be dealt with in accordance with the Law of Succession Act. The Act provides at Section 45(1) that:-

***Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.***

16. The Act goes on to state that the property of a deceased person may only be disposed by a person who has confirmed letters of administration over the estate. Indeed it is because of this reason that a Power of Attorney lapses automatically upon the death of the donor so that the Law of Succession can take over.

17. In the present case, the 1<sup>st</sup> Defendant, by his own admission, purported to sell the suit property on the strength only of a Power of Attorney which had expired: a Power of Attorney, even if durable, ceases to be effective upon the demise of the donor. In this case, the donor passed away on 7<sup>th</sup> March, 2005. That is when the Power of Attorney lapsed. Yet, the 1<sup>st</sup> Defendant purported to register it on 20<sup>th</sup> July, 2011. If it is in doubt I should restate: the Power of Attorney was completely ineffective by that time having expired upon the demise of the Deceased. On this point alone, it is evident that the Applicant's case against the Defendants has a high likelihood that it will succeed.

18. The 1<sup>st</sup> Defendant seems to suggest that the Sale Agreement allegedly signed by his Deceased is forged because it is thumb-printed rather than signed yet the Deceased used to sign her documents. For my part, I take this piece of self-serving theory in the context of a son who tried to sell his late mother's estate on the strength of a Power of Attorney more than six years after her death; and without taking into account the beneficial interests of his other surviving sibling. In addition, there is the hand-written letter produced by the 3<sup>rd</sup> Defendant who authenticity is not denied by the 1<sup>st</sup> Defendant which provides latent evidence that the 1<sup>st</sup> Defendant believes in the authenticity of the Sale Agreement. Finally, there is the uninterested evidence by the 2<sup>nd</sup> Defendant who plainly concedes that she knew about the Sale Agreement. To my mind, there is simply no question about the likelihood of success of the Plaintiff's case.

19. On the second limb of the *Giella Principle*, I find that the Applicant will definitely suffer irreparable harm if the injunction is denied. If she is to succeed after full trial, she may not have any property to go back to since the 3<sup>rd</sup> Respondent will be at liberty to deal with the property as he deems fit unless he is restrained by this court. Were I to reach the third *Giella* factor, I would still hold it against the Defendants: it is not contested that the Plaintiff has been in possession of the Suit Properties. The balance of equities would require that we maintain that possession.

20. To sum it up, it is my finding that the Applicant has established a *prima facie* case with a probability of success and that she will suffer irreparable harm if this court does not grant the injunction she seeks. For the above reasons, I hereby allow the Application in terms of prayer 2. The Defendants are hereby restrained from dealing in any way with the suit property until this case is heard and decided.

**DATED, SIGNED and DELIVERED at MACHAKOS this 17TH day of OCTOBER, 2012.**

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**J.M. NGUGI**

**JUDGE**