



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 218 of 2012

JAMES WANYOIKE GATOTO.....PLAINTIFF

VERSUS

STEPHEN KARANJA GATOTO.....1ST DEFENDANT

GODFREY NJOROGE WANYOIKE.....2ND DEFENDANT

RULING

The plaintiff/ applicant has filed a notice of motion dated 27/4/12 brought under Order 40 rules 1 & 2 order 51 Rule 1 of the Civil procedure rules 2010, sections 1A, 1B, 3 & 3 A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Articles 31, 40 & 48 of the Constitution of the Republic of Kenya and all other enabling provisions of Law, seeking the following orders,

- i. Spent
- ii. The body of Everlyn Wangui Njoroge interred on the 19th day of April 2012 be exhumed.
- iii. A permanent injunction restraining the defendant from trespassing L.R. No. Githunguri/Nyaga/1426.
- iv. The OCS Githunguri police station to supervise the exhumation within 7 days of the order.
- v. Costs of this suit.
- vi. Any other relief that his Honorable Court may deem fit and just to grant.

The application is based on the following grounds:

- i. That the plaintiff is the registered owner of parcel number Githunguri/Nyaga/1426.
- ii. That on the 3rd day of April 2012 the defendant sought to bury the remains of one Everlyn Wangui Njoroge. Where upon he moved to Githunguri Law Courts seeking to stop the burial.
- iii. In a sharp twist of events his application together with the plaint were struck out for lack of jurisdiction.
- iv. The 1st and 2nd defendants' action to bury the remains of Evelyn Wangui Njoroge in the parcel of land belonging to the plaintiff is apparent infringement and flagrant violation of the plaintiff's constitutional rights to free ownership of private property.

The applicant filed a supporting affidavit dated 27th April 2012. The respondents filed 3 replying affidavits sworn by Benson Njoroge Gatoto dated 5th June 2012, Stephen Karanja Gatoto dated 5th June 2012 and Godfrey Njoroge Gatutu dated 5th June 2012. The respondents also filed a Notice of Preliminary Objection dated 8th May 2012 which raises the following points of law;

i. That the suit herein is vexatious, frivolous and an abuse of Court process, the plaintiff having filed or cause the filing of previous suits regarding the same core parties and subject matter, and even cause of action, if any, namely;

a) Githunguri Srmcc No. 69 of 2006 which is pending.

b) Githunguri Srmcc No. 23 of 2007, which was struck out with costs for want of jurisdiction and of which a notice to show cause against the plaintiff to pay costs is scheduled for the 17th May 2012.

c) NBI HC ELC No. 539 of 2009 which is pending hearing on 10th October 2012 and of which an order for status quo has been in force from 18th November 2009.

d) Githunguri Srmcc No. 19 of 2012 which was struck out with costs on 16th April 2012 which costs the plaintiff herein has failed to pay.

ii. That this suit has been filed in breach of the mandatory provisions of Order 4 Rules 1(1) (f) and (2) Civil procedure Rules 2010.

iii. That the suit herein is filed in violation of order 4 rule 5 Civil procedure rules 2010.

iv. That this suit is similarly filed in breach of section 6 Civil Procedure Act Cap 21.

I have read the affidavits filed and a summary of the facts in this matter is as follows; the plaintiff and the 1st and the 2nd defendants are brothers but from different households. Their father is the late Moses Karanja Gatoto. Their father owned Githunguri/Nyaga/8. According to the plaintiff before their father passed on in the year 2001 the two families sat down and a memorandum of understanding was drawn that the subdivision by their father was correct. That the said subdivision gave rise to Githunguri/Nyaga/1275, 1276 and 1277 in their father's name. This subdivision was challenged by the defendants in a tribunal matter and being aggrieved by the tribunal decision their father filed an application in Court Misc. Application No. 283 of 2003. Justice Emukule dismissed the tribunal's finding and his father consolidated the 3 parcels into 1418. After the ruling of Justice Emukule their father decided to subdivide the parcel into 9 portions starting from Githunguri/ Nyaga1424 to 1432. According to the plaintiff his portion was No. 1426 and he has a title annexure JWG6 and the 1st defendant's portion was No. 1430. That subsequently the defendants filed suit in HCC 1220 of 2006 against their late father challenging the subdivision of parcel No. 1418 and Justice Mugo dismissed their application for injunction on the 10th of January 2007. Thereafter the defendant filed a suit against one Peter Gatoto Karanja in HCC 539 of 2009. According to the plaintiff the 1st defendant avers that they buried his son in 1980 in parcel No. 1429. That on the 1st of April 2012 the defendants buried the daughter of the 2nd defendant in parcel No. 1426 which is his. This was done by the defendants on the 19th April 2012 after the plaintiff case which he had filed at Githunguri Court stopping the burial was dismissed for lack of jurisdiction. The plaintiff has filed this suit and seeks the orders in the application under consideration.

According to the defendants the plaintiff is not entitled to the orders sought. The 1st defendant has averred that he has lived together with his family in parcel No. Githunguri/Nyaga/8 for over 40 years now. He stays in the larger portion. That their late father subdivided the suit land into two for his two wives and their respective children. He never subdivided it into the respective portions for his sons as claimed by the plaintiff. That the plaintiff's alleged registered interest in parcel No. 1426 was founded on fraud and illegality as their late father never authorized the transfer and never attended any land control board. That the net effect of the registration of Githunguri/Nyaga/1426 is to dispossess their two mothers, Hannah

Wanjiku and Monica Wanjiru, together with them, the sons of the 1st household of Hannah Wanjiku of the land, in utter disregard of trust under Kikuyu customs, of which their father had held the head property and which have since crystallized into interests overriding any purported registered interest, the plaintiff's included. That the plaintiff and his brothers have always wanted to dispose of his and his family land which his father allotted to him before his demise. That there was no meeting held in 2001 as claimed by the plaintiff. That they have had disputes. That to achieve their purpose the plaintiff and their household caused parcel No.8 to be subdivided into parcels 1275 to 1277 and subsequently 1424 to 1432. That these subdivisions were fraudulent and irregular. That between the two households they have had cases of trespass in Githunguri Court. That in ELC 539 of 2009 which is pending the plaintiff's brother one Peter Gatoto Karanja has sued him for trespass over his property and specifically to parcel No. 1429. That the plaintiff and his brother cannot simultaneously maintain a claim against him for trespass over Githunguri/Nyaga 1426 and Githunguri/Nyaga/1429. The 2nd defendant deponed that they buried his daughter after the case the plaintiff filed in Githunguri Court was dismissed. That he could not have kept the body in the mortuary until the conclusion of the case as the plaintiff never appealed against the said ruling. He also claims that the plaintiff has never occupied the place where his daughter is buried.

Parties filed written submission which I have read and considered together with the affidavits. The defendant cited the case of **MBUI MUKANGI V. GERALD MUTWIRI MBUI, COURT OF APPEAL CIVIL APPEAL NO. 281 OF 2000 NYERI**. Counsel for the defendants argued that the said decision appreciates the right under customary law which are protected as overriding and interest. In the plaint filed dated 27th of April 2012 the plaintiff is praying for judgment against the defendant for, the defendants to exhume the body of Evelyn Wangui Njoroge buried on the 19th day of April 2012, a permanent injunction restraining the defendant from trespassing L.R. No. Githunguri/Nyaga/1425 and costs of this suit. The defendants in their notice of preliminary objection have raised the issue of being in breach of the mandatory provisions of Order 4 Rules 1 (1) (f) (2) and (5) Civil Procedure Rules 2010 and that the suit is filed in breach of Section 6 Civil Procedure Act Cap 21. I note that the plaintiff is in breach as stated however I will not penalize the plaintiff and strike out the suit bearing in mind the provisions of article 159 (2) (d) of the Constitution that states that in exercising the judicial authority the Court shall be guided by the following principles that justice shall be administered without undue regard to procedural technicalities. I also have in mind the provisions of section 1A (1) and 1B (1) (a) of the Civil Procedure Rule. The order sought by the applicant in the application dated 27th April 2012 for exhumation of the body of Evelyn Wangui Njoroge is a mandatory order. In the case of **KENYA BREWERIES LTD –VS- OKEYO (2002)1EALR 109**, the Court of Appeal held that;

“A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march from the plaintiff”

In this case there is a dispute as to whether there was a proper subdivision of parcel No. Githunguri/Nyaga/8. The plaintiff on one hand claims that the subdivision was proper and the defendants on the other hand claim that it was fraudulent, illegal and irregular. It is also evident that the parties who are family members but from different households have been filing suits against each other over the said parcel of land. In my view, this is not a clear case where this Court can grant an order of exhumation as sought, as the parties are each claiming rights over the parcels which they occupy. This is matter that should be fixed for hearing and further consolidated with the other suits that are pending before the Court bearing in mind the provisions of section 6 of the Civil Procedure Act so that the two households can be heard and a decision given as to whether there was subdivision of parcel No. Githunguri/Nyaga/8 and who is entitled to which parcel of land. It is only after this done that the Court can determine whether the late Evelyn Wangui was buried in the parcel the plaintiff claim to be his. I also note that the plaintiff's title is being challenged by the defendants from what is averred by the defendants this is another is for determination. I therefore order that the status quo shall remain as it is on the ground now. The body of Evelyn Wangui Njoroge shall not be exhumed. The plaintiff should comply with provision of Order 4 rule 5 of the Civil Procedure Rules. Each party should strive to keep peace until this suit is heard and determined. Parties shall comply with the provisions of Order 11 within 30 days from today and take a date for pre-trial conference as this matter needs to be determined expeditiously. Cost shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 3rd day of December, 2012

R. OUGO
JUDGE

In the Presence of:-

.....Plaintiff/applicant

.....1st Defendant/respondent

.....2nd Defendant/respondent

.....Court Clerk