

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 44 of 2010

JOHN JESSEL (Suing as the legal representative of the estate of Gachambi John (deceased)).....
.....PLAINTIFF

VERSUS

BRENDA WANJIRU KABUE.....DEFENDANT

RULING

Pursuant to the provisions of *Sections 3A and 63(e)* of the Civil Procedure Act and *Order XXXIX rules 1 and 2* of the Civil Procedure Rules, John Jessel, in his capacity as the legal representative of the Estate of Gachambi John, deceased, took out the Summons dated 9th April 2010 in which he applied for the following orders against Brenda Wanjiru Kabue, the Defendant herein:

- (i) ***THAT the honorable court do issue a temporary injunction restraining the defendant, her servants, agents and/or assignees from alienating by way of sale or otherwise and/or taking possession, working or in any way dealing in the land known as Loc 11/Maragi/1003 until the hearing and determination of this suit.***
- (ii) ***THAT a mandatory injunction do issue directing the cancellation and nullification of the title deed issued to Brenda Wanjiru Kabue on 17th February 2010 with respect to title no. Loc. 11/Maragi/103.***

The Summons is supported by the affidavit of John Jessel sworn on 9th April 2010. When the application came up for interpartes hearing, the Applicant was granted leave to proceed exparte under *Order L rule 16 (3)* of the Civil Procedure Rules when it became evident that the Defendant was served but she failed to file any response nor attend court.

The Applicant is seeking for both prohibitory and mandatory orders of injunction. Before granting the orders for prohibitory injunction, an applicant must show a *prima facie* case with a probability of success. Secondly one must show that unless the orders are given, he would suffer irreparable loss. Thirdly, that if the court is in doubt it would decide the case on a balance of convenience. The matter before me relates to a dispute over title which was alleged to have been fraudulently obtained. It is the submission of the Applicant that the Defendant used forged Grant of Letters of Administration to transmit **L. R. NO. LOCATION 11/MARAGI/1003** from the late Gachambi John, deceased, to herself. The Applicant averred that he is the only son of the late Gachambi John. It is also averred that the deceased passed on in 1966 leaving behind an Estate comprising of the aforesaid parcel of land. The Applicant attached to his affidavit a copy of the Grant of Letters of Administration in respect of his mother's Estate. He claimed that he learnt from one Njengo Gatara that the Defendant had visited the farm in dispute claiming ownership. The Applicant conducted a search and discovered that on 17th February 2010 the Defendant got herself registered as the proprietor of **L. R. NO. LOC. 11/MARAGI/1003** in place of Gachambi John, deceased, upon the presentation of a confirmed Grant of Letters of Administration issued through Thika Chief Magistrate's Court, vide Thika Chief Magistrate's Court Succession Cause No. 347 of 2008. A search at the Thika Chief Magistrate's Court revealed that the Thika C.M.C.SUCC. Cause No. 347 of 2008 is in respect of different parties. The area assistant chief is said to have denied having written a letter to the Land Registrar to introduce Brenda Wanjiru Kabue as the heir of the late Gachambi John. The Applicant was also able to show that the Defendant has now advertised for sale the land in question through the Daily Nation Newspaper for 12th March 2010. The aforesaid facts have convinced me

that the Applicant has a *prima facie* case with high chances of success. There is evidence that the real identity of the Defendant may not be known easily. If the order is not granted therefore, I am afraid the Applicant will suffer irreparable loss. Since I am not in doubt, I do not need to consider the principle of convenience. The prayer for mandatory order of injunction can only be granted in very clear cases where the court feels assured that it is to grant. The facts stated appear to indicate that the Defendant is hell bent to surreptitiously sell the deceased's land. The copy of the register indicates that the Defendant obtained title on 17th February 2010. She advertised the same for sale on 12th March 2010. This is a person who is ready to dispose of the deceased's only asset and most probably disappear from the area. There is cogent affidavit evidence that the Defendant used false court documents to acquire the property. She even forged a letter from the area chief. I am convinced the order for mandatory order of injunction should be given. In the end I allow the Summons dated 9th April 2010 as prayed with costs. For the avoidance of doubt, the consequence of the order is that the Land Registrar, Murang'a District, is directed to cancel the title issued to Brenda Wanjiru Kabue notwithstanding that the original title deed has not been surrendered as required under *Section 33* of the Registered Land Act. In essence, the name of Brenda Wanjiru Kabue should be cancelled from the register and in its place the name of Gachambi John, deceased, be restored.

Dated and delivered at Nyeri this 21st day of May 2010.

J. K. SERGON
JUDGE