



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**LAND AND ENVIRONMENTAL LAW DIVISION**  
  
**CIVIL SUIT (ELC) NO.235 OF 2010**

**MARY WAIRIMU KAMAU.....PLAINTIFF/APPLICANT**

**VERSUS**

**PETER KIMANI KAMUYU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RUSINGA SCHOool NAIROBI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**DAMAT INVESTMENT LTD.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**COMMISSIONER OF LANDS.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a chamber summons dated 3<sup>rd</sup> June, 2010, Mary Wambui Kamau, the applicant seeks inter alia orders that the honourable court be pleased to issue a an order of injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, their agents, servants or howsoever, from selling, transferring, disposing, building or otherwise alienating and/or interfering in any way whatsoever with Land Reference No.1222/Dagoretti/Riruta pending the hearing and determination of this suit.

2. The application is anchored on the grounds stated on the motion as follows: On 30<sup>th</sup> May, 2010 1<sup>st</sup> respondent demolished the applicant's rental houses and purported to erect a fence. The 1<sup>st</sup> respondent has fraudulently acquired a certificate of confirmation of grant which he is using to dispose off the suit property contrary to the Law of Succession Act Cap 160. The 2<sup>nd</sup> respondent has built permanent houses and dug trenches for purposes of fixing pipes on the suit property to connect water. The

grave of the applicant's mother-in-law has been turned into a play ground for Rusinga School Children. The 2<sup>nd</sup> respondent attempted to illegally subdivide the suit property without appreciating that the estate of Joseph Kamau Kamuyu is entitled to an equal share of the suit property. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have been using extra judicial methods to harass, intimidate and blackmail the applicant. The 3<sup>rd</sup> respondent wants to illegally sub-divide the suit property. The respondent has no power or authority to deal with the property of Joseph Kamau Kamuyu (deceased) in the manner he has done. Through the 1<sup>st</sup> respondent's fraudulent transaction, the dependants of Joseph Kamau Kamuyu have been disinherited.

3. The application is also supported by a lengthy affidavit sworn by the applicant on 3<sup>rd</sup> June, 2010. The applicant swears inter alia that pursuant to a confirmation of grant issued in respect of the deceased's estate, the suit property was to be inherited by the applicant's husband and the 1<sup>st</sup> respondent as tenants in common in equal shares. Upon the death of the applicant's husband, the 1<sup>st</sup> respondent through concealment of facts applied for a fresh certificate of grant excluding the applicant's husband and children as beneficiaries of the deceased's estate. The 1<sup>st</sup> respondent also fraudulently allocated part of the land to the 2<sup>nd</sup> respondent in total disregard of the beneficiaries of the estate of the deceased. The applicant maintains that through the actions of the 1<sup>st</sup> respondent, her children and herself, have been disinherited. She maintains that the 1<sup>st</sup> respondent has no authority to distribute the estate of the deceased. The applicant denies the allegation that she has encroached onto the 3<sup>rd</sup> respondent's land. She states that notwithstanding objections from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, her late husband was buried in the suit property.

4. The application is opposed by the respondents through an affidavit sworn by Alfred Irungu, the Finance and Administration Officer of the 2<sup>nd</sup> respondent on 15<sup>th</sup> June, 2010. Irungu depones that Josphat Kamuyu Gakumo (hereinafter referred to as the deceased), was the absolute proprietor of the suit property. The deceased entered into an agreement of sale of a portion of the suit property with the 2<sup>nd</sup> respondent before his death on 14<sup>th</sup> September, 1995. The 2<sup>nd</sup> respondent paid the full purchase price and was given possession of the agreed portion by the deceased. Subsequently, the deceased obtained consent to sub-divide the suit property into 5 portions, one of the portions being the one occupied by the 2<sup>nd</sup> respondent, which portion was to be transferred to the 2<sup>nd</sup> respondent. Unfortunately the deceased died before the subdivision and transfer was completed. Thereafter the 1<sup>st</sup> respondent obtained letters of administration jointly with his brother Joseph Kamau Kamuyu for the estate of the deceased. Unfortunately, the 1<sup>st</sup> respondent's brother Joseph Kamau Kamuyu also passed on before the estate was distributed.

5. The 1<sup>st</sup> respondent was confirmed as the sole administrator, upon which he proceeded to distribute the suit property into the 5 portions. Irungu swore that the 1<sup>st</sup> respondent was willing to effect the transfer of the said portion to the 2<sup>nd</sup> respondent, however the applicant has been uncooperative. Alfred Irungu further depones that at the time the applicant filed the present suit, there was Nairobi High Court Succession Cause No.2160 of 1997, in which the matters in issue are substantially the same as the matters in this suit.

6. Peter Kimani Kamuyu the 1<sup>st</sup> respondent has also sworn a replying affidavit reiterating the same facts sworn by Alfred Irungu. The 1<sup>st</sup> respondent swears that upon being appointed as the sole administrator of his father's estate, he proceeded to have the suit property subdivided into 5 portions and distributed to the beneficiaries as follows:

- Dagoretti/Riruta/5528 – Peter Kagera Ndumi;
- Dagoretti/Riruta/5529 – Peter Kimani Kamuyu;
- Dagoretti/Riruta/5530 – Peter Kimani Kamuyu and Mary Wambui Kamau;
- Dagoretti/Riruta/5531 – Peter Kimani Kamuyu and Mary Wambui Kamau;
- Dagoretti/Riruta/5532 – Rusinga School Nairobi.

The 1<sup>st</sup> respondent maintained that the distribution was done in accordance with the deceased's intention, which was well within the knowledge of the applicant.

7. The 3<sup>rd</sup> respondent has responded to the application through two replying affidavits. The 1<sup>st</sup> affidavit is sworn by Francis Kiarie Thiong'o, a shareholder and director of the 3<sup>rd</sup> respondent in which he depones that the 3<sup>rd</sup> respondent has no interest in the suit property and has not trespassed on the suit property as alleged. Thiong'o explains that following a boundary dispute between the applicant's

property, and the 3<sup>rd</sup> respondent's property, the Ministry of Lands requested the 3<sup>rd</sup> respondent to carry out a survey on where the boundary between Dagoretti/Riruta/1222 and Dagoretti/Riruta/2702 was. The survey revealed that Dagoretti/Riruta/1222 had been subdivided into several parcels and therefore Dagoretti/Riruta/1222, was no longer in existence.

8. Mr. Ondieki who appeared for the applicant submitted that the sale agreement dated 14<sup>th</sup> July, 1989, relied upon by the 2<sup>nd</sup> respondent was null and void as the application to the Land Control Board was made after 6 months in contravention of Section 8 of the Land Control Act. Relying on ***Simiyu vs Watambala [1985] KLR 852***, Mr. Ondieki submitted that the applicant's suit raised a serious legal issue. Mr. Ondieki submitted that the 1<sup>st</sup> respondent concealed material facts and made representations which amounted to fraud. He urged the court to grant the orders sought as the applicant stands to suffer irreparable loss if interim orders were not granted. Mr. Ondieki further relied on:

- ***Rift Valley Machinery Services Ltd vs Agro Complex Kenya Ltd and others HCCC (E&L) Case No.348 of 2008.***

- ***Charles Mwai Gatere vs Agnes Njeri Kago & 2 others HCCC (Nyeri) 89 of 1991.***

9. Mr. Chege who appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondent submitted that there was no concealment of any facts. He maintained that the applicant was given her share of inheritance in the distribution. Mr. Chege pointed out that Dagoretti/Riruta/1222 is no longer in existence as the title was closed, following the subdivision. Therefore the court should not issue orders in vain. The court was urged to find that no prima facie case was established. Mr. Chege argued that all the proceedings arose out of probate and Administration Cause No.2160 of 1997 and therefore any aggrieved party ought to seek redress in the same succession cause. He noted that the applicant had applied in the succession cause for annulment of the grant but has not pursued the matter. The court was urged to find the present suit a duplicity which could result in conflicting decisions. Mr. Chege also submitted that the applicant had not given any undertaking as to damages in respect to the interlocutory orders which he was seeking. It was submitted that the respondent were in occupation of their respective pieces of land, and the interlocutory injunction sought was not therefore necessary for preservation of the status quo. In support of his submissions Mr. Chege relied on the following cases:

- ***Edith Njeri Magua vs Johnson Mwarniki Magua HCCC No.1167 of 1996.***

- ***Mary Wambui Maningu vs Adamson Mukunga Mwaura & another [2006] eKLR***

- ***Bao Investments & Office Management Service Ltd vs Housing Finance of Kenya Ltd Kisumu HCCC No.75 of 2005 [2006] eKLR.***

10. Likewise, Mr. Kibanga who appeared for the 3<sup>rd</sup> respondent submitted that the facts disclosed by the applicant does not disclose any legal wrong, and therefore there is no cause of action disclosed. Mr. Kibanga reiterated that the complaint relating to the certificate of confirmation of grant cannot be addressed by this court. He urged the court to find that the conditions for granting an order of interlocutory injunction had not been met.

11. I have carefully considered the application, the affidavit in support and in reply and the annexures thereto. The application being one for interlocutory injunction, it is imperative that the applicant establishes that she has a prima facie case with a probability of success. In this case the applicant claims orders in regard to land parcel No. Dagoretti/Riruta/1222, in which she claims she has an interest as the widow of Joseph Kamau Kamuyu who was a tenant in common in equal shares with the 1<sup>st</sup> respondent by virtue of the two being beneficiaries of the estate of the late Josephat Kamuyu Gakumo alias Kamuyu Gakumo. It is common ground that the estate of the deceased was the subject of HCCC Succession Cause No.2160 of 1997. The applicant has exhibited a certificate of confirmation of grant issued in HCCC Succession Cause Non.2160 of 1997 in which the suit property is indicated as distributed to Joseph Kamau Kamuyu (i.e. the applicants late husband) and Peter Kimani Kamuyu (i.e. the 1<sup>st</sup> respondent) as tenants in common. This means that the applicant can only pursue recognition of her interest as a beneficiary of her husband either in HC Succession Cause No.2160 of 1997 or in the Succession Cause regarding the husband's estate in respect to which her husband's interest in the suit property would form part of the estate.

12. I find that the applicant's claim being one arising from the distribution of the deceased's estate, it should rightly be dealt with in the succession cause dealing with the administration of the deceased's estate. Indeed the applicant has challenged the validity of the agreement between the 2<sup>nd</sup> respondent and the deceased and these are issued which ought to have been dealt with in Succession Cause No.2160 of 1997 in her application for revocation of the grant issued to the 1<sup>st</sup> respondent.

13. Secondly, in her supporting affidavit the applicant has complained about an attempt to sub-divide Dagoretti/Riruta/1222. It is however evident from the annexures exhibited by the respondents that the sub-division has already taken place and the sub-divisions have been registered and transferred. Therefore there is an issue regarding the existence of the suit property. Should this court issue orders in respect to a title which is no longer in existence then the order may not be enforceable.

14. Thirdly, the 2<sup>nd</sup> respondent has maintained that they are in occupation of their portion of the suit property, having been given possession by the deceased. The applicant has not demonstrated anything to dislodge this contention save to allege that the 2<sup>nd</sup> respondent is a trespasser. In the circumstances it would not be fair nor just to interfere with the possession of the 2<sup>nd</sup> respondent before the applicant's suit is determined.

15. In the light of the above, I come to the conclusion that the applicant has failed to demonstrate that she has a prima facie case with a probability of success nor is the balance of convenience in favour of the granting of the order of interlocutory injunction. Accordingly, I find no merit in the chamber summons dated 3<sup>rd</sup> June, 2010 and the same is dismissed with costs.

**Dated and delivered this 24<sup>th</sup> day of November, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Advocate for the plaintiff/applicant absent

Alibhai H/B for Njiru for the defendants/respondents

B. Kosgei - Court clerk