



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(NAIROBI LAW COURTS)**

Civil Suit 1304 of 2006

MARY WANDIA MUNANU.....APPLICANT

VERSUS

JANE WANJIKU.....1ST DEFENDANT

PAULINE WANGECHI.....2ND DEFENDANT

MARY WANGUI.....3RD DEFENDANT

RULING

The plaintiff had moved to this court, by way of a plaint dated 7th December 2006, and filed on 8th December 2006. Simultaneously filed with the plaint is a chamber summons dated the same 7th December 2006, and filed the same 8th December 2006, brought under section 3A of the CPA, order XXXIX rules 1,2,3, and 9 of the CPR and all other enabling provisions of the laws by way of C/S. It initially sought 7 prayers. As at the time of argument, the court was informed that prayers 1 and 2 had been dispensed with, prayers 3 and 5 were withdrawn, leaving prayer 4 and 6 to be argued on merit. These read:

(4) That a temporary injunction do issue forthwith restraining the defendant/respondents herein by themselves, their servants and or agents or in any manner interfering with the plaintiffs quiet possession of the property referred to as L.R No 209/9/09 located along Jogoo Road, pending the hearing of this suit .

(6) That a mandatory injunction do issue forth with compelling and or directing the 3rd defendant/Respondent Mary Wangui to vacate the suit premises namely L.R No 209/9109 located along Jogoo Road and the 2nd defendant/Respondent Pauline Wangechi to vacate the suit premises namely Chinga/Gigigie/710 in Nyeri.

The grounds in support are set out in the body of the application, supporting affidavit, annexures. The application is anchored on the cause of action stated in the plaint, in paragraph, 3, 4, 5,6, 7, 8 of the plaint. The salient features of the same are that:-

- The plaintiff applicant is wife of the deceased one Munanu Kariuki, who died at Kenyatta National Hospital, on the 6th day of September 2006, where as the defendants are daughters of the same deceased

person presumably from another union.

- That prior to the death of the deceased, the plaintiff lived and cohabited with the deceased under Kikuyu customary law, and as a result of this cohabitation they had 3 issues between them namely Stellan Wanjiku, Denis Kariuki and Caroline Wangechi.

- That since the death of the deceased, the defendants have persistently been guilty of misconduct contrary to the wishes of the deceased, and are therefore a nuisance. They have started harassing and intimidating the plaintiff to sign documents to subdivide the properties equally which the plaintiff has refused as the deceased left a will dated 18th day of May 1996.

- The defendants have deliberately refused to stop intimidating and harassing the tenants and workers for the said suit premises being LR No 209/9109 located along Jogoo Road and Chinga/Gigigie/710 in Nyeri.

- That in spite of the will of the deceased, Munanu Kariuki, being read to the defendants, demand and notice of intention to sue given, the defendants deliberately refused, declined to and or neglected to make good the plaintiffs request.

- On the basis of the afore set out matters, the plaintiff applicant sought the following reliefs:

(a) *permanent injunction restraining the defendants from interfering with the plaintiffs quiet enjoyment of the suit property known as LR No 209/9109.*

(b) *That this Honourable court do order that the defendants be evicted from the suit property known as LR Chinga/Gikigie/710 in Nyeri.*

(c) *Cost of the suit.*

The grounds in support are set out in the body of the application, supporting affidavit, and annexures, as well as oral highlights in court and the major ones are:-

- The plaintiff inherited the suit property from the deceased as per the will.

- The applicant is the wife of the deceased and they have three issues between them.

- The defendants became a nuisance when the deceased died and they have persistently harassed her.

- That the defendants are daughters of the co-wife who have refused to accept the content of the will.

It is noted from the court, record that the matter came before Kariuki on 8/12/2006, and the learned Judge declined to grant interim orders because the applicant had not provided evidence to show that

- *the husband was deceased.*

- *She had taken steps to obtain a grant of probate to the deceased husband,s estate.*

-*She had not been named as the executor of the deceased's will'*

However on 20/12/2006 Osiemo J, gave interim orders to remain in force until the hearing interparties of the application in question.

In their oral highlights, counsel for the applicant simply reiterated the content of the plaint, grounds in the body of the application, and supporting affidavit and annexures namely:-

- That the applicant is the registered legal owner of the disputed properties.

- They have exhibited documents to show that the properties were transferred to the applicant by her deceased husband.
- The respondents have no right to the suit properties.
- They are within the ingredients for granting of an injunctive relief established by the decisions of GIELLA VERUS CASSMAN BROWN (1973) EA 358 and are therefore entitled to the orders sought.
- The court, is urged to ignore the further replying affidavit as the same has been deponed by a stranger to the proceedings whose interest in the proceedings is unknown.
- The other original replying affidavit to be ignored as the same had been drawn by an advocate who had not yet placed herself/himself on record.

In response, the first respondent filed a first replying affidavit sworn by one Jane Wanjiku on the 18th day of December 2006 and filed the same date. The salient features of the same are:-

- That the deponent has authority from the other respondents to swear the said affidavit, although the authority to so depone is not exhibited.
- They denied intimidating and or harassing the respondent. Instead it is the applicant who has been using the police to harass the 3rd respondent with a view to throwing her out of LR No 209/919 situated along Jogoo road.
- It is the applicant who has side lined the respondents and refused to discuss with them, the distribution of the deceased's estate.
- That their late mother who died in an accident in 1987 had acquired the subject property with their deceased father in the course of their marriage, long before the applicant purported to live with their late father namely
 - (a) LR. No 209/9109 situate in Nairobi combining a commercial building and a residential building.
 - (b) LR NO Chinga/Gikigie 710 with a tea plantation.
 - (c) LR NO. Chinga/Gatherat 6676 comprising a residential rental building.
 - (d) Motor Vehicle registration number KAL 356 W Toyota Corolla.
 - (e) Cash in Account No. 113179159 in KCB Othaya Branch.
 - (f) Cash in Account No. 4553057 Barclays Bank Nairobi.
- That the applicant who was a house help ensnared the deceased and purported to be his wife or concubine and purported to have children whom they have learned do not belong to their father.
- That as a result of the accident mentioned, their deceased father was afflicted by poor health for along time, and was diagnosed by the attending Doctors to be suffering from hypertension, dementia and brain atrophy and was also confused and suffered from loss of memory and concentration and at the time of his death he had developed malaria sepsis, renal failure, hyponatraema and bilateral contracted echogenic kidney. Also treated for high blood pressure, nutritional supplements and dementia. By reason of all these, he needed constant care taker and assistance. He later suffered a stroke and then went into a coma.
- By reason of matters stated above, they contend that, their late father had no capacity to enter into any transaction transferring property to the applicant or to any other person. More so when the purported authenticating signatures or thumbprints differ from what appears in their fathers National ID Card.

- The alleged will is invalid and fraudulent and only designed to benefit the applicant.
- That the applicant has been cohabiting with one Samuel Ndirangu even prior to the deceased's death to date.
- That the applicant and one Samuel Ndirangu have been collecting rent from land parcel number 209/9109 and Chinga/G/tchera/T 5696 in excess of Kshs 150,000.00 per month and tea proceeds from LR No Chenga/Gikigie/710 Nyeri to the exclusion of the other beneficiaries, and yet the said Samuel Ndirangu is not entitled to a share in the said estate.
- They contend the applicant has no Locus standi to file this suit as she has not taken out letters of administration. In addition the applicant is guilty of intermeddling in the deceased's estate by receiving rent and Tea proceeds as well as taking over the deceased's bank accounts without proper succession.
- That the respondent has already filed an application for an injunction seeking to restrain the applicant as well as the said Ndirangu from intermeddling in the deceased's estate.
- The court, is urged to hold that the transfers of the said titles to be void.

There is a second replying affidavit sworn by one Joseph Mwangi Kariuki sworn on 18th December 2006 and filed the same date. The salient features of the content are as follows:

- That he is brother to the deceased.
- There is no time the deceased informed him that he had made a will and appointed him an executor.
- He has looked at the alleged signature and thumbprint of the deceased and to him they are not authentic.
- To his knowledge, as at the time the alleged transaction took place, the deceased was aged, ailing, demented, infirm, confused and as such he was incapable of transacting in the manner alleged to have transacted.

There are (2) two further replying affidavits sworn by one Samuel Ndirangu. The first one is sworn on the 19th March 2007, and filed the same date. The salient features in the same are that:-

- He was involved in a romantic relationship with the applicant even before she started living with the deceased.
- The relationship lasted throughout the period the applicant was living with the deceased.
- He has knowledge that the applicant intends to dispose off the deceased's property and in the process disinherit the other beneficiaries.
- Concedes that he was manipulated to put a thumbprint on the transfer form of the land ref LR 209/9109 in favour of the plaintiff/applicant on the pretext that he was the son of the deceased, and applicant when infact he was an employee and a friend of the applicant.
- He was also present when the applicant took the deceased to KCB Bank in Othaya and Barclays Bank Nairobi and informed the said banks that the deponent was a son of the deceased to support the transfer of bank accounts into the applicants names.
- He confirms that as at the time of the said transfer, the said deceased was in a state of poor health, and could not understand his surroundings or what was happening
- He is privy to the applicants' ill intentions to eliminate the deceaseds' beneficiaries so that she is

unchallenged, so that she can benefit from the deceaseds property alone.

The second further affidavit is sworn on 9th May 2007 and filed on the same date. The central theme in the same is that him Samuel Ndirangu was told by the first respondent that he will be employed by her if he swore an affidavit against the applicant.

- That that is how he swore the affidavit sworn on 19th March 2007 and filed the same date.
- That all that he was told to do was simply to append his signature to the affidavit whose content he does not know.
- That he was shocked and dismayed when he learned of the content of the said affidavit.
- He prays to the court, to expunge the said affidavit from the record herein.

In their oral highlights the respondents stressed the following points.

- Properties were acquired by the parents of the respondent.
- Titles in the names of the applicants were obtained fraudulently.
- The plaintiff/applicant who was a house help took advantage of the deceased who was in poor health.
- The poor status of the deceased has been confirmed by the medical reports exhibited herein. As such there is no way the deceased could have entered into the transactions that he has allegedly entered into.
- Contend that the signature in the documents attributed to the deceased differ from each other.
- The alleged will was not signed
- One of the properties was given to a minor.
- They dispute marriage of the applicant to the deceased.
- The property in dispute is the subject of succession cause No 2375/06 and they contend that that is the correct forum in which the issues herein can be dealt with.
- It is the plaintiff who has been harassing the respondents with a view to disinheriting them.

In reply the applicant stated that prayer 3 and 5 relate to the succession cause and that is why they were withdrawn.

- They contend there is no proof that the titles were obtained fraudulently.
- There is no explanation as to why the succession proceedings have not been finalized.
- Transfers were effected 5 months before death of the deceased.
- Issues of cohabitation are irrelevant in these proceedings.
- Issues of forgery need to be proved.
- The court, is enjoined to protect the titles which are in the names of the applicant in the absence of cancellation.

- The court, is enjoined to ignore deponement of persons not party to the proceedings.

On the court's assessment of the facts herein, there is no dispute that the applicant here in has come to the seat of justice seeking an interim injunctive relief against the respondents. By reason of this, the applicant is required to bring herself within the ambit of the known principles of law governing the grant of such a relief. Which principles have now crystallized by case law, that this court has judicial notice of.

This is none other than the land mark case of GEILLA VERSUS CASSMAN BROWN (1973) EA 358. These are found in holding IV to VI of the said decision and these are:-

“(iv) an applicant must show a prima facie case with a probability of success.

(v) an injunction will not normally be granted, unless the applicant might otherwise suffer irreparable injury.

(vi) when the court is in doubt, it will decide the application on the balance of convenience”.

There is another additional principle to the famous three set out above, also developed by case law, that this court has judicial notice of, that even where damages will be an adequate remedy, the court, will none the less issue an injunctive order and or relief where the respondent has acted in a high handed, oppressive and punitive manner and with impunity towards the applicant or the respondent has deliberately and flagrantly flouted the law.

Having set out the applicable principles, it is the duty of this court, to set out observations derived from the rival arguments and then proceed to determine whether these answer the established ingredients or not, whether the injunctive relief sought is to issue or not and why.

This courts observation, on the facts of the case are as follows:-

- (1) According to the applicant, the properties subject of these proceedings belonged to her deceased husband. Where as according to the 1st Respondent, they belonged to their deceased mother who passed away in 1987. It is instructive to note that the applicant did not disclose that her deceased husband had another wife either before her marriage to him, after, or whether she came on board during the life time of the other deceased wife of the deceased
- (2) The first Respondent had deponed in her replying affidavit that the applicant came on to the scene after the death of their deceased mother. There is no controverting deponement from the applicant disputing that assertion.
- (3) The applicant has deponed in her supporting affidavit as well as averred in the plaint, that she had been living with the deceased as man and wife under customary law. But there is no mention as to whether customary rites were performed thus crystallizing what in law amounts to a customary law marriage. There is no revelation of dowry having been paid for the said marriage. The date when the cohabitation started has not been disclosed. The date when cohabitation was commenced is important as it will act as a fall back on in the event that the applicant will need to rely on presumption of marriage to prove customary marriage.
- (4) There are children mentioned as being children born to the applicant and the deceased, but the dates of birth of these children have not been given. Neither have the birth or Baptismal documents of these children been exhibited to reveal who the parents of these children are.
- (5) It is stated that one of the property owners of the suit property is a minor. The applicant has not sought leave of court, under the relevant provisions of law, to champion the rights of the minor. Further this court, has judicial notice of the fact that, in law, a minor is incapable of holding property in its own right. Such property can only be held on behalf of the minor through trusteeship. There appears to be an illegality in existence and if an injunctive order issues to protect minors' property in the manner sought if

indeed it is registered in the minors name the court will be protecting an illegality. The genuineness of the minors claim on to the said property not withstanding.

(6) The applicant asserts that the property was willed to her by the deceased but has not mentioned how she realized the proceeds of the will in her favour.

(7) It is not disputed that the properties formally belonged to the deceased. They are now registered in the name of other persons, the applicant inclusive. The documentation or paper work such as land control board, consents, and minutes vide which the transfers were effected have not been exhibited.

(8) Indeed it was correctly submitted that a title once issued has to be protected. That not withstanding where the process of acquisition is a subject of attack in a judicial proceeding, a court of law, cannot shut its eyes to acquisition and determine whether in protecting that method it will be protecting an illegality. In saying so or determining so, the court, will not be reversing the title un procedurally but will simply be directing the parties on the way forward on how to resolve that issue.

(9) It is surprising that the 1st Respondent made damaging deponement against the applicant supported by one Samuel Ndirangu and yet the applicant found it fit not to put in a further affidavit to controvert the respondents deponements. Indeed Samuel Ndirangu later disowned his, that only operates to oust those of Samuel Ndirangu but not those of the 1st Respondent.

(10) The issue of inheritance has featured centrally in deponements by both and as such the proper forum for determination of this should be succession proceedings. Indeed there is succession proceedings in place. Counsel for the applicant has submitted that no explanation has been given as to why it has not been prosecuted.

Although this did not come out from the submissions of the respondent, it is on record that Osiemo Js', gave interim injunctive relief herein. This must have contributed as any attempt by the respondent to proceed with the succession proceedings would have amounted to contempt of Oseimo J. interim injunctive relief.

For the reasons given in the observations above, this court, is of the opinion that the ingredients for granting of an interim relief have not been met by the applicant. For this reason prayer 2, and 6 of the applicants application dated 7/12/2006 and filed on 8/12/2006 be and are hereby refused.

(2) The parties are directed to forth with set down the succession proceedings for hearing and disposal.

(3) The parties are also at liberty to seek preservative orders in the said succession proceedings.

(4) The respondent will have costs of the application.

Dated, Read and delivered at Nairobi this 22nd day of May 2009.

R.N.NAMBUYE

JUDGE