



1. REPUBLIC OF KENYA

HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS

ENVIRONMENTAL & LAND CASE 378 OF 2008

**ESTHER MURUGI MUHOI  
PETER CURURU KAMAU  
JANE WANGUI MBIRU  
JOSEPHINE WANJIKU KURIA  
SOPHIA NJERI BOLO  
JOSEPHINE WANGUI KIMANI  
BENSON NGARUIYA KIHU  
VERONICA WANJIRU NDIINGURI  
PAULINE ORESI ASIGE  
JANE WACHEKE MUTUURA.....PLAINTIFFS**

**VERSUS**

**JANE WANJIRU KAMAU  
TERESIAH MUMBI KIARE  
AGNES WANJIKU MWARIRI .....DEFENDANTS**

**RULING**

The plaintiff has moved to this court, by way of originating summons dated 7<sup>th</sup> day of August 2008. It is brought under order XXXVI rule 1(a) of the CPR, sections 3A and 63 of the CPA and all other enabling provisions of the law. The OS is brought by one Esther Mungi Muhoi and 9 others against Jane Wanjiru Kamau and 2 others. It seeks

- (1) *A declaration and determination whether the defendants hold the properties known as LR.NO Githunguri/Gathanga RI/T.180 MEASURING 0.096 Ha, Building at Ikinu Trading Centre, Githunguri Ikinu women group 4953/1229 in Thika Municipality, Kiambu/Municipality Block 11/89 and a plot in Limuru upon first two plaintiffs and other members of Githunguri Ikinu women's group.*
- (2) *A declaration and determination that members of Githunguri Ikinu women self-help group both jointly and severally are the beneficial owners of the property known as L.R No Githunguri/Gathanga RI/T 180 measuring 0.096 Ha, Building at Ikinu Trading centre, Githunguri Ikinu women group 4953/1229 in Thika Municipality, Kiambu/Municipality Block 11/89 and a plot in Limuru.*
- (3) *A declaration and a determination for the dissolution of Githunguri Ikinu women's self-help group and appointment of the 1<sup>st</sup> – 4<sup>th</sup> plaintiffs as trustees of the property known as Ikinu womens group building at Ikinu trading centre pending establishment and or registration of either a co-operative society*

*or limited company by the group members to take-over the ownership and management of Ikinu women group Building at Ikinu trading centre.*

Vide prayers 4,5,6,7,8,9,10 and 11, after determining the issues in numbers 1, 2 and 3 the court is to proceed on and:-

- *Vide 4 declare that the above mentioned properties respectfully belong jointly and severally to Ikinu 42 women self-help group members.*
- *Vide 5 order accounts to be taken in respect of the sale by the defendants of the suit properties and income from Ikinu women group Building at Limuru Trading centre.*
- *Vide 6 Ms Lioyd Masika Ltd or any other estate agents to be appointed receivers of Ikinu 42 women maendeleo group to take charge and management of the assets, liabilities and operations of Ikinu 42 women maendeleo group and to pay debts of the said group and the surplus of the income to the members of the group in ratio of their contribution to the capital of the group.*
- *Vide 7 A permanent injunction to issue restraining the defendants whether by themselves, their agents and or servants from interfering, selling, charging, pledging as security and or dealing with the property specified above namely L.R. NO Githunguri/Gathangari/T.180 measuring 0.096 Ha. Building at Ikinu Trading center Githunguri Ikinu women Group 4953/1229 in Thika Municipality Kiambu/Municipality Block 11/89 and a plot in Limuru.*
- *Vide 8, a mandatory injunction to issue compelling the defendants whether by themselves, their agents and or servants to return to the plaintiffs or to deposit in court the titles to the suit properties, pending the establishment of a society or company to take over the same upon dissolution of Ikinu 42 Maendeleo women group.*
- *Vide 9 a mandatory injunction be issued to compel the defendants to carry out an inquiry under a supervision of a court, appointed Auditor to determine the members of Ikinu 42 maendeleo women group.*
- *Vide 10, that the defendants be restrained permanently by themselves, their servants and agents from selling or otherwise disposing of the said suit properties.*
- *Vide 11 that costs be borne by the defendants.*

On the basis of the above prayers, the plaintiff/applicant anchored an interim application dated 31<sup>st</sup> day of October 2008, and filed the same date. It is brought under section 3A of the CPA and order 39 rules 1 and 2 of the CPR. Six (6) Relief's are sought namely:-

- (1) *Spent.*
- (2) *Spent*
- (3) *That a temporary injunction do issue restraining the Respondents whether by themselves, their agents and/or servants from interfering, selling, charging, pledging as security and/or dealing with the properties specified here under pending the hearing and determination of this suit.*
  - (a) *L.R. No. Githunguri/Gathangari/T.180*
  - (b) *building at Ikinu Trading Centre.*
  - (c) *Githunguri Ikinu women group 4953/1229 in Thika Municipality*
  - (d) *Kiambu/Municipality Block 1/89.*

(e) *A plot in Limuru.*

(4) *That a mandatory injunction be issued compelling the respondents whether by themselves, their agents and/or servants to return to the plaintiffs applicants or to deposit in court, the titles to properties specified above pending the hearing and determination of this suit.*

(5) *That messers Lloyd Masika Ltd or any other estate agents be appointed receivers of the properties, assets, liabilities and the operations of Ikinu women Manendeleo group to debts of the said group and he surplus to the defendants in the ratio of the contribution to the capital of the group.*

(6) *That the costs of this Application be in the cause.*

The grounds in support are set out in the body of the application, supporting affidavits, annexures and oral submission in court. The sum total of the same are as follows:-

- The applicants are Ikinu women's group.
- They are the owners and registered proprietors of the mentioned properties.
- The respondents are officials and trustees of the applicant group.
- The source of complaint arises because the defendants/respondents have dealt with the property in a manner inconsistent to their position by selling, disposing and/or transferring to themselves some of the suit properties and the applicants have reasonable cause to fear that the respondents will tamper with, damage or waste the said properties and or documents especially upon commencement of the suit.
- By reason of what has been stated aforesaid it is proper that receivers be appointed to manager the said properties, otherwise the applicants will suffer irreparable loss.
- That the deponent of the supporting affidavit has authority to depone the affidavit on behalf of the others.
- On divers days between 1982 to 2006, the defendants jointly and severally appropriated to themselves the proceeds from the groups building situated at Ikinu Trading Centre, and fraudulently sold property listed in paragraph 4 namely Limuru plot sold for approximately Kshs 500,000/=, Githunguri plot Kshs 300,000.00. Two storeyed building sold for approximately Kshs 3,000,000.00.
- Vide paragraph 5 that the 1<sup>st</sup> defendant has fraudulently transferred to herself LR No Githunguri/Githangari/T.180, dispute the fact that the property was purchased by the group.
- Vide paragraph 6 that the 1<sup>st</sup> defendant in conjunction with one Ruth Nyambura Njau fraudulently sold and transferred the groups plot of land in Kiambu Town known as LR No Kiambu/Block 11/89
- Vide paragraph 7 that the defendants have turned themselves into a permanent leadership of the Ikinu 42 – women maendeleo group in the course of which they have appropriated to themselves the ownership of and the income from the groups property.
- In 1994 the group fraudulently sold the group plot at Githunguri namely LR Githunguri/Githangari/1262 for Kshs 75,000 and mis approximated the money.
- The deponent and the other co plaintiffs learned recently that they are trustees.
- The defendants have sold some properties contrary to the wishes of the applicants.

- The default in the supporting affidavit has been cured by the supplementary affidavit.
- They have dropped prayer 5 and wish to proceed with prayers 3, 5 and 6.

The respondents opposed the application on the basis of an affidavit sworn by one Jane Wanjiru Kamau on the 1<sup>st</sup> day of December 2008. The salient features of the same are as follows:-

- the deponent has authority from the co respondents to depone on their behalf.
- She is the chair lady of Ikinu location Maendeleo women group and is not aware of any entity known as Ikinu 42 women Maendeleo group.
- A part from the building at Ikinu, the defendants are not in possession of the properties listed by the applicants.
- Vide paragraph 5, that plot no Githunguri/Gathangari/T.180 formerly owned by Merina Mururi self help group and through a resolution passed by members of Kanyore, Merina Mururi the property was sold to Wanjiru Kamau, concede LR 4953/1229 Thika Municipality was formally owned by Githunguri Ikinu women group but the same was disposed off through a resolution of the members.

- (i) Kiambu municipality Block11/99 was formerly owned by Githunguri women investment limited.
- (ii) Denied fraudulently selling the properties afore mentioned.

Asserts that the 1<sup>st</sup> defendant is a purchaser for value of Githunguri/Gathangari/T.180 having purchased the same from one Merina Mururi self help group alias Kanyore Meri na Mururi/B Women group.

- (iii) That LR No Kiambu/Block 11/89 was an exclusive property of Githunguri women investment company and the applicants were neither shareholders nor Directors.
- (iv) Deny to have fraudulently and secretly transferred LR Githunguri/Githunguri/ 1262.
- Deny any move on their part to obtain a loan from Equity Bank, using a building at Ikinu trading centre as security.

- It has not been demonstrated how the defendants can waste property not in their control.
- The challenge to the authority of the defendants has not been made by bonafide members.
- There is no need for the appointment of a Receiver manager.

In their oral highlights, they stressed the following points:-

- Some of the properties sought to be preserved have not been properly described.
- The supporting affidavit is defective as the names of deponents at the beginning of the affidavit and those at the Jurat are different.
- There is nothing to show that the properties are owned by the applicants.
- No registration certificate has been

In response, the applicant stated that any defect in the replying affidavit has been cured by the supplementary affidavit.

- The defect if any is curable under order 18 rule 7 CPR.
- Striking out of the affidavit will be draconic and the court, is urged not to employ the same.
- Applicants seek the order sought as beneficiaries because the defendants are in the leadership as trustees.
- As beneficiaries they are entitled to know how their properties are managed.

On the courts assessment of the Rival arguments herein, it is clear that the argument raises both technical issues as well as merit issues. The technical issues arise because of an alleged defect in the supporting affidavit, which the defendant respondent allege that the same is fatal where as, the applicants say that it is curable under the provisions of order 18 rule 7 CPR. A perusal of the said supporting affidavit reveals that from its heading, the first plaintiff applicant is named as one Esther Murugi Muhoi. The person deponing is described as Esther Muthoni Muhoi. The cure for this anomaly is supposed to come from the further affidavit. This court, has perused the same, and finds that, the default in the supporting affidavit did not arise from the content but the discrepancy of the names of the deponent. The further supplementary affidavit is supposed to have shed light on who Esther Murungi Muhoi and Esther Muthoni Muhoi is. Whether it is one and the same person.

Further no ID Card was exhibited to show that it is one and the same person. In the absence of such a certification, the supporting affidavit is defective for it having been deponed by one person and signed by another. It therefore offends the provisions of order 18 CPR and the same is not curable under rule 7 of the said order as the defect is not one of want of form but one of lack of substance. More so when no explanation has been given as to why a copy of the identity card of the deponent not was exhibited to the supplementary affidavit. This being the case, there is no alternative but to strike out the supporting affidavit to the interim application. Once struck out, the application becomes incompetent by reason of the requirements in order 50 rule 7 CPR, that a chamber summon be accompanied by an affidavit if the same is based on evidence. Herein, the application was based on evidence and as such a supporting affidavit was necessary. Once faulted, the application cannot stand and the same is a proper candidate for striking out.

The striking out disposes off the entire interim application on a point of technicality. But for purposes of the record only, and for the purpose of providing, the way forward in order to quicken the speedy disposal of the matter, and for the reason that the applicant might find the need to represent the application in its current form, the court, is of the opinion that in the interests of justice to both parties, a pronouncement on the merits of the application should be made.

From the submissions set out herein, all that the applicant seeks from this court, is an injunctive relief. This being the case, all that is required of him is to satisfy the ingredients established by the decision in the case of GIELLA VERSUS CASSMAN BROWN (1973) EA 358. These are:

- (1) *A demonstration of the existence of a prima facie case with a probability of success.*
- (2) *A demonstration that damages will not be an adequate compensation.*
- (3) *Where number 1 and 2 do not apply the court, will decide the matter on a balance of convenience.*

These ingredients have been applied to the Rival arguments herein and the court makes a finding that these have not been satisfied because:-

- (1) The Registration certificate of the applicant has not been exhibited.
- (2) Some of the properties sought to be protected have not been properly described.

(3) The central theme in the grounds in the body as well as the supporting affidavit is that the properties had already been sold. Once sold, they are not in the control of the defendants. In such a situation a temporary injunction will not serve any purpose as the defendants cannot preserve that which is not in their custody. A better way of going round this should have been for the applicant to join the beneficiaries of the sales and transfers complained of.

(4) The balance of convenience is not also in their favour as the properties are said to have left the custody of the persons sought to be enjoined. The property alleged to be still in the custody of those sought to be enjoined is not properly described.

For the reasons given in the assessments, the court makes the following findings:-

(1) The supporting affidavit to the interim application has been faulted, as it appears to have been sworn by two different persons namely Esther Murugi Muhoi and Esther Muthoni Muhoi.

(2) This defect has not been cured by the supplementary affidavit confirming that one Esther Murugi Muhoi and one Esther Muthoni Muhoi are one and the same persons.

(3) No Identity card was exhibited to the supplementary affidavit to show that the names are for one and the same person.

(4) By reason of what has been stated above in No 2 and 3 above, the supporting affidavit is struck out.

(5) Once the supporting affidavit is struck out, the application becomes incompetent for non-compliance with the provisions of order 50 rule 7 CPR since it was based on evidence.

(6) The striking out of the application and supporting affidavit and application notwithstanding the interests of justice herein demand that pronouncement be made on the merits of the application for purposes of paving the way forward in the speedy disposal of the matter. On the merits, the court, finds that the ingredients for the granting of an injunctive relief herein have not been satisfied because of the following:-

(i) The registration certificate for the applicant has not been exhibited.

(ii) Authority of the applicants deponent to depone on behalf of the other applicants was not exhibited.

(iii) Some of the properties were not properly described.

(iv) The central theme in the grounds as well as the grounds in the supporting affidavit is that the properties had been sold. Once sold they would no longer be in the possession of the defendants, and once not in possession of the defendants, no injunctive relief could issue against the defendants to protect that which is not in their possession.

(v) In order for the injunctive order to be effective, had it been granted, it was necessary to join the beneficiaries of the sales and transfers to these proceedings so that in the event that an injunctive order is issued, it would also bind these 3<sup>rd</sup> parties.

(vi) The defendant Respondent, will have costs of the application.

**Dated, Read and delivered at Nairobi this 18<sup>th</sup> day of September 2009**

**R.N.NAMBUYE**

**JUDGE**