



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 602 of 2006

JAMES N. SOLOMONPLAINTIFF

VERSUS

KIHARA GICHUHI.....DEFENDANT

R U L I N G

1. By his application dated June 9, 2006 brought by way of Notice of Motion, the plaintiff seeks the following orders from this court:-

1. *Already spent.*

2. *That there be a stay of proceedings in Thika PM CSC No.289 of 2001, In the Matter of the Estate of Kimani Gichui (deceased) and Thika PM CSC No. 290 of 2001, In the Matter of the Estate of Kaniaru Gichui (Deceased) until this application is heard and determined;*

3. *That there be an order of injunction restraining the defendants by themselves, their servants or agents from alienating, sub-dividing, wasting, damaging or dealing with Land Titles No. Ng'enda/Wamwangi/25, Ng'enda/Wamwangi/28 and Ng'enda/Githunguchi/T.250 until this application is heard and determined.*

4. *That there be a stay of proceedings in Thika PM CSC No. 289 of 2001, In The Matter of the Estate of Kimani Gichui (deceased) and Thika PM CSC No. 290 of 2001, In the Matter of The Estate of Kaniaru Gichui (deceased) until this suit is heard and determined.*

5. *That there be an order of injunction restraining the Defendants by themselves, their servants or agents from alienating, sub-dividing, wasting, damaging or dealing with Land Titles No. Ng'enda/Wamwangi/25, Ng'enda/Wamwangi/28 and Ng'enda/Githunguchi/T.250 until this suit is heard and determined.*

6. *Costs be provided for.*

2. The application is premised on three grounds which are on the face thereof:-

(i) *The plaintiff has brought a suit claiming for the estate of his deceased father shares of the suit premises (sic).*

(ii) *That the Defendnats and others through Succession Causes in Thika Principal Magistrate's Courts are seeking to alienate the suit property.*

(iii) *That it is only fair and just to stay the said Succession Causes and restrain the defendants until this suit is heard and determined to preserve the subject matter of this suit.*

3. The affidavit in support was sworn by James Njoroge Solomon (Solomon) who said that he had brought this suit on behalf of his father Gichui Kimani (the deceased). On May 29, 2006, Mr. Solomon obtained a Limited Grant of Letters of Administration *Ad Litem* Limited the purpose only of filing suit. Mr. Solomon also said that the deceased was a nephew to one Kimani Gichui (also deceased) who were brothers and the sons of one Gichui Kimani (long deceased) who was a grandfather to Solomon. That during land demarcation, Solomon's father was in detention and because of the death of Gichui Kimani (Solomon's great grandfather) the land was registered in the joint names of Kimani Gichui and Kaniaru Gichui and claims that the two registered proprietors held what he called the family land in trust for Solomon's father under the Kikuyu customs. The parcels of land in dispute are **Title No. Ng'enda/Wamwangi/25** (in the name of Kimani Gichui) and **Title No. Ng'enda/Githunguchi/T.250** both of which titles Soomon claims were held in trust for the whole Gichui family under Kikuyu customary trust; while **Title No. Ng'enda/Wamwangi/28** was registered in the name of Kaniaru Gichui to hold in trust for himself and Solomon's father under Kikuyu customary trust. Solomon also said that father's uncles Kimani Gichui and Kaniaru Gichui did not transfer the shares in the suit lands belonging to Solomon's father who claims a third of each of the three parcels of land.

4. Solomon also said that the defendants herein have filed the following Succession Causes at the PM's Court Thika:- (i) Thika PMCSC No.289 of 2001 – In the matter of the Estate of Kimani Gichui (Deceased), (ii) Thika PMCSC No. 290 of 2001 – In the matter of the Estate of Kaniaru Gichui by which the defendants seek to distribute the suit lands to the deceased's heirs. From the affidavit, the grant in Thika Principal Magistrate's Court Succession Cause No. 290 of 2001 was set to be confirmed as per the application to that effect dated August 9, 2001 while application for confirmation in PMCSC No. 289 of 2001 was set for hearing on June 14, 2006. Solomon said he was apprehensive that unless the two causes filed at the Principal Magistrate's Court Thika are stayed the suit properties are likely to be distributed without his father's share being hived off and transferred to the estate of his deceased father.

5. During the arguments on behalf of the applicants, Mr. Mari submitted that the plaintiff is the duly appointed administrator of the deceased's estate, and that the plaintiff/applicant's mother, filed objection in Thika Principal Magistrate's Court Succession Cause No. 289/2001, which objection was overruled. Mr. Mari urged the court to grant the orders sought under the provisions of Order 39 Rules 1(a) of the Civil Procedure Rules so as to preserve the suit property before the same changes hands. He argued that damages would not be an adequate remedy in this case since the subject matter is family land. He also said that the balance of convenience tilts in favour of the applicant.

6. The application was opposed. The respondents on the Replying Affidavit sworn by Jeremiah Njoroge Gichui sworn on September 21, 2006. He urged on behalf of the respondent that the applicant's claim to the suit land was too remote to be viable. Further, the deponent said that the applicant should have filed objection proceedings in the Thika causes as required by law. In support of this claim, the deponent annexed to his affidavit a copy of the objection proceedings in Thika Principal Magistrate's Court Succession Cause No. 290 of 2001, but these proceedings were dismissed and that is how the limited grant was issued to Solomon on May 26, 2006.

7. At the hearing of the application, Mr. Ngugi contended that the instant application ought to have been brought by way of chamber summons and not by way of Notice of Motion. Mr. Ngugi also contended that the applicant cannot purport to seek orders under the umbrella of this one application when there are two different suits in dispute. Further, Mr. Ngugi argued that the applicant is a vexatious litigant for the reason that as per the annexure marked "JK3" to John Karuga's affidavit the applicant's mother protested in Thika Principal Magistrate's Court Succession Cause No. 289 of 2001.

8. It was also contended on behalf of the respondents that by the time Solomon's father died on 2/11/2001, the two disputed succession causes in Thika had already been filed, so that if there were any issues similar to the ones the applicant has brought before this court, then the same could have been raised by the applicant's father when the latter was alive.

9. In reply, Mr. Mari submitted that since the instant application is premised both on Order 39 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, it does not matter that the same has been brought by way of Notice of Motion instead of being brought by way of Chamber Summons. On whether or not the application should have been filed before the Civil or Family Division, Mr. Mari said that the Civil Division is the proper forum for the application which is seeking declaratory orders over land.

10. It is necessary at this stage to look at the plaintiff. The suit is against two sets of defendants, all of whom are sued in their capacities as the administrators of the estates of Kimani Gichui and Kaniaru Gichui respectively. According to paragraphs 4 and 5 of the plaintiff, Kimani Gichui and Kaniaru Gichui were both paternal uncles to the plaintiff's father and the registered proprietor's of Land Title Nos Ng'enda/ Wamwangi/25; Ngenda/Githunguchi/T.250 and Ngenda/Kamwangi/28 respectively which parcels of land the plaintiff says were previously family lands, a third portion of which the plaintiff said was the rightful share of his father. Accordingly, the plaintiff prayed for judgment against the Defendant for:-

- a. *A declaration that the estates of Kimani Gichui (deceased) and Kaniaru Gichui (deceased) holds 3.47 acres of the Land Title No. Ng'enda/Wamwangi/25, a third share of Land Title No. Ng'enda/Githunguchi/T.250 and 4.37 acres of Land Title No. Ng'enda/Wamwangi/28 in trust for the estate of Gichui Kimani (deceased).*
- b. *An order for transfer of 3.47 acres of the Land Titles No. Ng'enda/Wamwangi/25, a third share of Land Title No. Ng'enda/Githunguchi/T.250 and 4.37 acres of Land Title No. Ng'enda/Wamwangi/28 to the estate of Gichui Kimani (deceased).*
- c. *A permanent injunction against the administrators of the estates of Kimani Gichui (deceased) and Kaniaru Gichui (deceased), either by themselves, their agents or assigns from wasting, damaging or alienating Land Titles No. Ng'enda/Wamwangi/25, Ng'enda/Githunguchi/T.250 and Ng'enda/Wamwangi/28 until they transfer the rightful share of the Estate of Gichui Kimani (deceased) to the said Estate or its heirs.*
- d. *Costs of the suit.*

11. It is this suit that counsel for the four Defendants says is an abuse of the court process and further that the plaintiff has no locus standi to institute the same. It is not disputed that the two Succession Causes in Thika were filed before the plaintiff/applicant's father died. It is also not disputed that the plaintiff's/applicant's father raised no objection to the two causes during his lifetime. It is also not disputed that one **Martha Muthoni Gichui** objected to the making of a grant in Thika Principal Magistrate's Court Succession Cause No. 289 of 2001 and also filed Petition by way of Cross-Application for a Grant. At the same time, the plaintiff/applicant James Njoroge Solomon filed an Affidavit of Protest dated June 13, 2006 against confirmation of Grant in Principal Magistrate's Court Succession Cause No. 289 of 2001.

12. From the above it does appear to me that the plaintiff/applicant is already a party in the Succession Causes at Thika, so that by bringing this suit and this applications, he is abusing the process of the court. During the hearing the plaintiff/applicant did not inform the court that he had filed a protest and that his mother had also objected. The said non-disclosure is fatal to the plaintiff/applicant's case and the same must be held against him.

13. Secondly, I do not think that the plaintiff/applicant has met the conditions set out in the case of **GIELLA –VS- CASSMAN BROWN LTD**, for the granting of injunctions: namely that there must be a prima facie case with a probability of success; that unless the orders sought are granted the plaintiff/applicant will suffer irreparable loss and finally that if this court is in doubt, it should determine the case on a balance of convenience. There is evidence here that the plaintiff's own father never pursued the rights in the suit land that the plaintiff now purports to pursue, so that the plaintiff cannot be said to have greater and more delicate rights than those that his father had and which he (plaintiff's father) could pass on to the plaintiff. Even considering the balance of convenience, I think that the scales tilt in favour of the defendant's who are the first registered proprietors of their respective suit lands.

14. For the reasons above given, I find and hold that the plaintiff's application lacks merit. The same is accordingly dismissed with costs to the defendants.

15. It is so ordered.

Dated and delivered at Nairobi this 18th day of July 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-