



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. NO. 38 OF 2020

LUCY NYAWIRA GACHOKI.....1ST PLAINTIFF/APPLICANT

JANE NYAMBURA MUGERA.....2ND PLAINTIFF/APPLICANT

RICHARD FRANK NGUNGI.....3RD PLAINTIFF/APPLICANT

VERSUS

FAITH KARIOKO GACHOKI.....1ST DEFENDANT/RESPONDENT

MACHSON MUTHIKE MBOGO....2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. This ruling is on a notice of motion dated 17th September, 2020 filed by the Plaintiffs on 1st October, 2020. The Application is expressed to be brought under **Order 40 Rule 1 and 4, Order 51 (amendment) Rules 2020 and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the Law.**

The Applicants - **Lucy Nyawira Gachoki, Jane Nyambura Mugera** – and - **Richard Frank Ngungi** - are the plaintiffs in the suit while the Respondents - **Faith Karioko Gachoki** and **Machson Muthike Mbogo** - are the Defendants.

THE APPLICATION & RESPONSE

2. The motion came with three (3) prayers but prayer 1 is moot now. The prayers for consideration are therefore two (2) – prayers 2 and 3 – and they are as follows:

Prayer 2: Pending hearing and determination of the application a temporary order of injunction do issue restraining the 2nd Defendant/ Respondent by himself or his representatives, servants, agents and/or assigns from howsoever selling, alienating or in any manner or way howsoever interfering with or otherwise dealing with the property known as MBEERE/WACHORO/458.

Prayer 3: The costs of this application be awarded to the Plaintiffs/Applicants herein in any case.

3. The application is premised on grounds inter alia, that the subject parcel of land was owned by the late Francis Gachoki Mbogo and registered in the name of the 1st respondent for the beneficial interest of the 2nd and 3rd Applicants. The Applicants reiterate that after adjudication, the land was first registered in the name of the 1st respondent in trust for the 2nd and 3rd Applicants. However, without their knowledge the Defendants/Respondents colluded and transferred the parcel of land to the 2nd Defendant/Respondent name to the detriment of the 2nd and 3rd Applicants who are alleged to have been born and brought up on the land. The Applicant further alleges that the 2nd Defendant/Respondent is in the process of disposing of the parcel of land, which will result to irreparable loss.

4. In a supporting affidavit sworn by the 1st Applicant, the Applicant deposed, inter alia, that she is the Administratrix to the estate of the late Francis Gachoki Mbogo and has subsequently attached a grant of letters of administration. According to the Applicant, the late Francis Gachoki Mbogo acquired many parcels of land, among them P/N. 458 in Wachoro Adjudication Section, which parcel was recorded in the name of the 1st Defendant to hold in trust for the 2nd and 3rd Applicants. The land was then registered in the name of the 1st Defendant and

issued with title number MBEERE/WACHORO/458.

5. The Applicants depose that on unknown dates the Respondents colluded and transferred the land to the 2nd Respondent to the detriment of the 2nd and 3rd Applicants who upon such realization lodged a caution on the parcel of land. The Applicants reiterate in their affidavit that they have lived and continue staying on the land and have extensively developed it. It is their assertion that the transfer to the 2nd Respondent was irregular and unlawful and have prayed to the court to issue a temporary injunction restraining the 2nd Respondent from alienating/ disposing the land in any way to their detriment.

6. The Respondent filed a replying affidavit in response to the application. That was done on 29th October, 2020. He deposed, *inter alia*, that the 1st Respondent was the 2nd wife of the late Francis Gachoki Mbogo. He further stated that 1st Respondent applied and was allotted land P/NO 458 which was later registered to MBEERE/WACHORO/458. He denied that the 1st Respondent held the land in trust for the Applicants and deposed that the subject parcel never formed part of the estate of the late Francis Gachoki Mbogo. He further denied that the Applicants have settled on the land or even developed it and attached photos to prove his claim. It is his assertion that the 1st Respondent voluntarily transferred the land to him as she is one of sound mind and capable of making decisions on her own.

7. On 2nd December 2020, the 1st Applicant filed a further affidavit in which she reiterated most of the averments in her supporting affidavit but denied that the 1st Respondent was of sound mind. Instead she states that she is of old age and suffered from senility and the 2nd Respondent took advantage of her situation and confiscated her land documents and changed the subject parcel in his name.

SUBMISSIONS

8. The application was canvassed by way of written submissions. The Applicants submissions were filed on 13th January, 2021. They relied on the averments of the supporting affidavit and further affidavit and submitted that the court should issue a temporary injunctive order pending determination of the suit failure to which the suit would be rendered nugatory.

The Applicants cited **order XXXIX Rule 1 of the Civil Procedure Rules now Order 40 (1) of Civil Procedure Rules 2010** to support their case. They also relied on the case of **Giella Vs Cassman Brown [1973] EA 358** which sets out the threshold to be met for grant of an interlocutory injunction. With that they submitted, that the court grants their application as they have met the requirements of **Order 40 of the Civil Procedure Rules** and the elements set out in the case of **Giella Vs Cassman Brown**.

9. The Respondent's submissions were filed on 28th January 2021. The Respondents have extensively relied on the principles set out in **Giella Vs Cassman Brown** to which they have submitted that the Applicants have not met the threshold set out in the case. It is their assertion that the Applicants have failed to prove that the land was held in trust for them. Further the Respondents aver that the Applicants have failed to substantiate claims that the 2nd Respondent took advantage of the 1st Respondent senility.

ANALYSIS

10. I have had a look at the entire court record generally. I have also considered the application, the response made, and the rival submissions. However, a close scrutiny of the prayers sought in the application make it hard for the court to determine anything further in this application apart from the issue of costs. The application itself is spent. The submissions by both sides reveal great learnedness but in the circumstances of this application, they amount to much ado about nothing. They address a non-existent prayer.

Prayer 2 of the application seeks for a temporary injunction pending hearing and determination of the Application. It is trite law that parties are bound by their pleadings and the Applicants are clear on what they seek from the court and this in itself has already been granted during the pendency of this application. The meaning, purport and scope of this prayer is that it can't apply beyond the determination of the application. There should have been another prayer for a restraining order pending hearing and determination of the suit. That is the prayer we should be considering now.

11. The court sympathizes with both parties as they have extensively submitted on the issue of grant/denial of a temporary injunction pending determination of the suit. Yet, as stated above the court notes that this prayer is not one that has been sought by the Applicants in their pleadings. As such the court in determination of the application is guided by the prayer sought in the application. This court notes that it's hands are tied as prayer 2 in the Application as sought is spent. The upshot of the foregoing is that the Application is spent and is therefore for dismissal. It is hereby dismissed with no order as to cost.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 11TH DAY OF MARCH, 2021.

In the presence of M/s Njoroge for Mbiyu Kamau for defendant and in the absence of Gori, Ombogi & Company advocates for the Plaintiffs.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

11.3.2021