



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 41 OF 2020**

**MARGARET NGOIRI NGOTHO.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**JOYCE NJERI NJAU.....DEFENDANT/RESPONDENT**

**RULING**

By an Originating Summons dated **29<sup>th</sup> June 2020** the Plaintiff/ Applicant herein **Margaret Ngoiri Ngotho** sought for the following orders against the Defendant/ Respondent ;

- a) A Temporary Injunction be issued restraining the Defendant/Respondent her employees, servants, agents or any other person claiming through her from interfering with the quiet and peaceful possession of the Plaintiff/Applicant usual home a portion of land title No. KABETE/NYATHUNA/313, suit property pending the hearing and determination of this suit.*
- b) A Temporary Injunction be issued restraining the Defendant/Respondent her employees, servants, agents or any other person claiming through them from alienating, transferring, disposing and/or dealing with the property land title No. KABETE/NYATHUNA/313, suit property in any manner adverse to the proprietary interests of the plaintiff/applicant pending the hearing and determination of this suit.*
- c) A Temporary Injunction be issued directing the Registrar, Kiambu District Land Registry not to allow the registration of dealings and making of any entries in the register relating to land title No. KABETE/NYATHUNA/313, pending the hearing and determination of this suit.*
- d) Costs be provided for*

The Application is premised on the grounds that **the Defendant/Respondent** applied for a grant of Letters of Administration and the same was confirmed in the High Court at Milimani Family Division in Succession Cause No. 2096 of 1999, as consolidated with Succession Cause No. 1140 of 2002, and she was granted the suit property absolutely and has transferred the same to her name.

That the Plaintiff/ Applicant moved to the Family Division Court seeking to revoke the grant to ascertain her interest in the suit property on the ground that **Henry Njau Ngotho (Deceased)**, who was the original registered owner of the suit property did not hold the title absolutely, but held as a fiduciary for the Plaintiff/ Applicant and her siblings under the Agikuyu Customary Law. That the Family Division Court in its Ruling delivered on **28<sup>th</sup> January 2020**, agreed with the substance of the Application, but found that it did not have jurisdiction to determine issue of customary trust . That the Plaintiff/ Applicant lives on the suit property with her children and grandchild and there is a real and present danger, that the Defendant/ Respondent may alienate the suit property unless restrained. That no prejudice shall be caused to the Defendant/ Respondent.

In her supporting Affidavit, **Margaret Ngoiri Ngotho**, averred that **L.R Kabete/Nyathuna/313**, was registered in the name of **Henry Njau Ngotho**, (deceased) who died intestate on **7<sup>th</sup> May 1997**, and that the said **Henry Njau Ngotho** (deceased) was her younger brother together with **Racheal Kabura Mukuria**. That the three of them were raised in the suit property belonging to their father **Gerald Ngotho Njau** and in **1958** after the death of their father, the process of land consolidation, adjudication and registration was commenced by the colonial government. That **Henry Njau Ngotho** was the only son to **Gerald Ngotho Njau**, and was registered as the proprietor of the property on **20<sup>th</sup> October 1958**. That she had been informed by her Advocates that the said registration having been done under Kikuyu Customary Law, created an inherent notion of customary trust on behalf of **Racheal Kabura Mukuria** and herself.

That the Defendant/Respondent is the wife to **Henry Njau Ngotho** (deceased) and unknown to her the grant was confirmed on **26<sup>th</sup> July**

2016, wherein the Defendant/Respondent was granted the suit property as the sole beneficiary. That the **grant issued on 29<sup>th</sup> July 1997 and confirmed on 26<sup>th</sup> July 2016, was procured with non-disclosure of material facts. Further that she got married in 1965 and her marriage broke down and he came back to the suit property and that during her stay in the suit property since 1965 until 1997, she lived peacefully and amicably with the family of Henry Njau Ngotho in the suit property. That upon the death of her brother in 1997, the Defendant/ Respondent has made all effort to throw her out of the suit property.**

**That she is informed by the Advocates which information she believes to be true that only a portion of the suit property falls as part of the Estate of Henry Njau Ngotho. That the Defendant/ Applicant has made several attempts to evict her and sell her portion where she lives and there is a real and present danger that the Defendant/ Respondent may dispose her of her share.**

The Application is opposed and **Joyce Njeri Njau**, filed a Replying Affidavit dated **21<sup>st</sup> July 2020**, and filed on **31<sup>st</sup> August 2020**, and averred that she is the registered proprietor of the suit property. That the same was registered in the name of her husband **Henry Njau** and it had never been registered in the name of **Gerald Ngotho Njau** as alleged by the Plaintiff/Applicant. That the Plaintiff/ Applicant does not reside on the suit property as she has her own parcels of lands namely **Maela/Ndabibi/Blk 3/241** and **Kabete Nyathuna/T.340**. That she was married in **1952** long before the process of consolidation and her husband died in 1997. That the Plaintiff/Applicant lives at **Kabete/ Nyathuna/T.340**, and has rental properties in the said plot. She denied the existence of a trust on the suit property. Further that the suit is Res Judicata as it pertains to **KABETE/NYATHUNA/313**, which has been heard and decided in other Courts. She urged the Court to dismiss the Application as it is a waste of time.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. It is the Court's considered view that the issues for determination are;

**1. Whether the matter is Res Judicata**

**2. Whether the Plaintiff/ Applicant is entitled to the injunctive orders sought.**

**1. Whether the matter is Res Judicata**

In her Replying Affidavit, the Defendant/Respondent averred that the suit is Res Judicata as it pertains to **Kabete/Nyathuna/313**, which has been heard and determined in other cases.

Section 7 of the Civil Procedure Act stipulates as follows:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

Though the Defendant/ Respondent had averred that there is a Ruling that had decided issues over the said property and further marked the same as JNN4, the said annexure was not attached to the Replying Affidavit filed in Court and its absence has also been submitted on by the Plaintiff/ Applicant. For a Court to hold that a matter is Res Judicata, it must look at the other proceedings to determine the same, In the absence of any proceedings and or Ruling to aid the Court in making a determination, the Court finds and holds that the said allegation is baseless. The Court therefore finds and holds that the suit herein is not Res Judicata.

**2. Whether the Plaintiff/ Applicant is entitled to the injunctive orders sought**

The Plaintiff/Applicant has sought for injunctive orders and she is either entitled to grant or denial of the same. The Applicant has to satisfy the Court that she has met the threshold for grant of the injunctive orders as set out in the case of **Giella...Vs...Cassman Brown Co. Ltd 1973 EA 358**. which are;

**a) The Applicant must establish that he has a prima facie case with probability of success.**

**b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**

**c) When the Court is in doubt, to decide the case on a balance of convenience.**

A **prima-facie** case was described in the case of **Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, to mean;-

***“In civil cases, it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

Has the Applicant then established a prima facie case? the Plaintiff/ Applicant is claiming **Customary Trust** rights over the suit property. It is her contention that her late brother **Henry Njau Ngotho(Deceased)** was registered as the owner of the suit property to hold it in trust on her behalf and that of her sister. Though the Defendant/ Respondent has averred that her late husband was registered absolutely as the

owner of the suit property and further averred that the Plaintiff/ Applicant's father was never registered as the owner, she has not denied the Plaintiff's/ Applicant's allegations that the suit property belonged to her late father. There is no doubt that if the Court was to find that the suit property was ancestral land, that it belonged to the Plaintiff's/Applicants' father then she absolutely has rights over it and the Defendant/ Respondent would be holding the same in trust for her.

For a prima facie case to be established, the Court is required to find that there exists a right that has been allegedly breached. The suit property being potentially an ancestral land, would then follow that the Plaintiff/ Applicant has a right over the same. The Plaintiff's/ Applicant's contention that the Defendant/Respondent is seeking to evict her from the suit property and further dispose off the suit property have not been rebutted. The threat of disposing off the suit property while the Plaintiff/ Applicant has an interest over the same, would no doubt lead to the infringement of the Plaintiffs/ Applicant's rights. The Court therefore finds and holds that the Plaintiff/ Applicant has established a prima facie case with probability of success.

The 2<sup>nd</sup> limb that the Plaintiff/Applicant has to meet is that she **will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.** In the case of Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR, where the Court held that:-

***“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction.”***

Further in the case of Pius Kipchirchir Kogo ...Vs... Frank Kimeli Tenai (2018) Eklr the Court held that;

***“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”***

The Court has found and held that there is a threat of the Plaintiff/ Applicant being evicted from the suit property. Further the Court having held that the Plaintiff's/ Applicant's allegations that the Defendant/ Respondent intends to dispose off her part of the suit property has not been rebutted, finds and holds that if the same was to be disposed off, and the Plaintiff/ Applicant becomes the successful party, then the Plaintiff/Applicant would have suffered damages that cannot be compensated by award of damages. Therefore, the Court finds and holds that the Plaintiff/ Applicant has established that she will suffer irreparable injury if the injunction is not granted.

On where the balance of convenience lies, the balance of convenience always tilts in favour of maintaining the status quo which is that which is existed before the alleged wrongful act. In the case of Pius Kipchirchir Kogo ...Vs... Frank Kimeli Tenai (2018) EKLR the Court defined the concept of balance of convenience as :

***“The meaning of balance of convenience will favor of the plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's' to show that the inconvenience caused to them be greater than that which ma)' be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.***

***In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting.”***

It is thus not in doubt that the balance of convenience tilts in favour of granting the injunction. Consequently, the Court finds and holds that the Plaintiff/ Applicant has met the threshold for grant of the injunctive orders sought.

As the Application is anchored under Order 40 Rule 1 which provides that:-

**Where in any suit it is proved by affidavit or otherwise—**

***(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or***

***(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”***

The Court having held that the Defendant/ Respondent has threatened to dispose off the suit property which may hinder the Plaintiff/ Applicant in execution of the Decree if she is the successful party, the Court finds and holds that the Applicant is deserving of the injunctive orders sought. See the case of Noormohammed Jan Mohammed ...Vs... Kassam Ali Virji (1953) 20 LRK 8, where the Court held that:-

***“To justify temporary injunction there must be evidence of immediate danger to property or sale or other disposition.”***

Having now carefully considered the available evidence, the court finds that the Plaintiff/Applicant has established the laid down principles

for grant of injunctive orders.

For the above reasons, the court finds the Applicant's **Notice of Motion** Application dated **29<sup>th</sup> June 2020** is **merited** and the same is allowed entirely in terms of **prayers no. 5, 6 and 7** with costs to the Applicant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 15TH DAY OF APRIL 2021.**

**L. GACHERU**

**JUDGE**

**15/4/2021**

**Court Assistant - Phyllis**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Githinji for the Plaintiff/Applicant**

**No appearance for the Respondent**

**L. GACHERU**

**JUDGE**

**15/4/2021**