



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. E26 OF 2021 (O.S)

GABRIEL MUHIA MBURU1ST APPLICANT
NGAI ANYIRI.....2ND APPLICANT
MERCY WAMBUI MAINA3RD APPLICANT
STEPHEN MAINA MURIMI..... 4TH APPLICANT
JOHN PETER KIGURU (Suing as the Administrator of the Estate
Of JANE NJAMBI NG'ANG'A).....5TH APPLICANT

VERSUS

JAMES MUREITHI MBOGO.....RESPONDENT
(Sued as the administrator of the Estate of JULIETA WANJIRA MBOGO (DECEASED))

RULING

1. The applicants filed a Notice of Motion dated 16th July, 2021 whereby they are seeking the following orders: -

a. SPENT

b. That a temporal injunction do issue restricting the Respondent by Himself, his agents, servants, heirs from entering, trespassing into, cultivating, using and/or in any way continuing to interfere with L.R NO. KIRINYAGA/GATHIGIRIRI/4629 pending hearing and final determination of this suit.

c. That this Honourable Court do issue an inhibition stopping further dealings, registration and transactions over land parcel L.R NO. KIRINYAGA/GATHIGIRIRI/4629.

d. That the costs of the application be borne by the Respondent.

2. The application is premised on both the supporting as well as the supplementary affidavits sworn by the 1st applicant on 16th July, 2021 and 27th September, 2021 respectively.

3. The application is opposed by the Respondent vide a Replying Affidavit sworn and filed on 21st September, 2021.

4. When the application came up for hearing on 21st October 2021, the parties through their advocates on record agreed to have the same canvassed by way of written submissions.

5. The applicants filed their submissions dated 1st September 2021 on 29th November 2021. The Respondent did not file their submissions within the timelines directed by the Court or at all.

APPLICANTS' CASE AND SUBMISSIONS

6. The applicants' case is that they are bonafide purchasers of their respective portions of land from Julieta Wanjira Mbogo (deceased) out of

L.R KIRINYAGA/GATHIGIRIRI/2043 formerly known as L.R KIRINYAGA/GATHIGIRIRI/550 as outlined below:

- GABRIEL MUHIA MBURU - 2 acres
- NGAJ ANYIRI - 2 acres
- MERCY WAMBUI MAINA - ½ acre
- STEPHEN MAINA MURIMI - ½ acre
- JOHN PETER KIGURU - 1¼ acre

7. They stated that they were put in possession thereon in the year 2002 where they have developed and cultivate for their livelihood.
8. They stated that when subdivision of L.R KIRINYAGA/GATHIGIRIRI/550 to L.R KIRINYAGA/GATHIGIRIRI/2043 was done, it was registered in the name of Martin Munene and the late Julieta Wanjira Mbogo had instituted a suit against him but she passed on before the matter was concluded.
9. They stated that the Respondent secretly took out a grant of letters of administration ad litem in Kerugoya Succession Cause E135 of 2020 for the purposes of prosecuting the suit and on 10th May, 2021 entered into a consent with the said Martin Munene Mwai transferring 5 acres out of the suit land.
10. The suit land was subdivided into Land Parcel KIRINYAGA/GATHIGIRIRI/4629 and 4630 and they reside on the latter which forms part of Julieta Wanjira Mbogo's Estate.
11. They stated that the said Munene Mwai sought an injunction against one Peter Kanyuiro Ngigi and confirmed that L.R KIRINYAGA/GATHIGIRIRI/4629 had been transferred to the Respondent for subsequent registration. They were thus apprehensive that the said land might be further subdivided and disposed of by the Respondent if the orders sought are not granted.
12. In their submissions, they contend that they had shown that they have an arguable and prima facie case to warrant orders sought and thus there was dire need of having the suit land preserved before the matter is concluded.
13. They also submitted that they had keenly detailed the dubious and questionable actions of the respondent pertaining to the suit property which show how fast he is moving in ensuring he is the absolute proprietor of the suit land.
14. They submitted that unless the orders sought are granted, the Respondent may dispose the substratum of the case rendering the applicants destitute.
15. They submitted that if the orders sought are not granted to preserve the suit property, the respondent may further subdivide and dispose it before the suit is heard to conclusion, thereby leaving the applicants with nothing to fight for as the suit land is the substratum of the case rendering it nugatory.
16. They relied in the case of *Peter Kariuki Njue Vs Severina Njira Kithumbu & Anor (2020) e KLR* and prayed that the application be allowed as prayed.

RESPONDENT'S CASE

17. The Respondent on their part stated that it was incorrect for the applicants to allege that land parcels registration number L.R KIRINYAGA/GATHIGIRIRI/550 or 2043 were registered in the names of Julieta Wanjira Mbogo as the same was jointly registered in the names of Julieta Wanjira Mbogo and Martin Mwai Munene and thus the sale agreement was entered into without the consent of one of the joint proprietors making it void ab initio.
18. He further stated that it is him and his siblings who lived on the said property whereby they have extensively developed and derive their livelihood.
19. He also stated that he had been wrongly sued in the matter since he was never a party to any of the sale agreements and that the suit land is neither registered in his name nor that of his deceased mother.
20. He stated that he had been advised by his advocates on record that if at all the said agreements were valid, the applicants were indolent during the lifetime of the deceased and are now time barred and invalid under the *Limitation of Actions Act* as well as the *Land Control Act*.
21. He prayed that the instant suit ought to be dismissed with costs as the same is time barred.
22. He stated that the application is brought in bad faith as in the agreement adduced by the 4th applicant, it was quite clear that he was not purchasing the suit land and the vendor therein is not the deceased.
23. He prayed that the application be dismissed with costs.

ANALYSIS

24. The applicant has brought this application under **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules** which provides as follows: -

1. 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 y g 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.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right. (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit”.

25. The prerequisites for a grant of the orders sought by the applicants have been set out in the celebrated case of **Giella Vs Cassman Brown (1973) E.A 358** wherethe court held as follows:-

“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience”.

26. Firstly, the applicants are mandated to demonstrate that they have a prima facie case with the probability of success.

27. A prima facie case was defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 K.L.R 125** where the Court held:-

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

28. In **Habib Bank AG Zurich Vs Eugene Marion Yakub (Nairobi Civil Application No. 43 of 1982) (UR)** the Court of Appeal defined probability of success as follows:

“Probability of success means the court is only to gauge the strength of the plaintiff’s case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”

29. From the above authorities, it is clear that at this stage, this Honourable Court is only required to the gauge the strength of the plaintiffs’ case and not to adjudge the main suit since proof is only required at the hearing stage

CONCLUSION

30. From the foregoing, I am satisfied that the Notice of Motion dated 16th July 2021 is merited and the temporary orders issued in the first instance on 21/07/2021 are confirmed pending the hearing and determination of this suit. The cost of the application shall be in the cause. It is so ordered.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 4TH DAY OF FEBRUARY, 2022.

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HON E.C. CHERONO

ELC JUDGE

IN THE PRESENCE OF:-

1. MS KIBATA HOLDING BRIEF FOR MR. OMBACHI FOR THE APPLICANT

2. MS WAMBUI HOLDING BRIEF FOR C.S. MACHARIA FOR RESPONDENT

3. KABUTA – COURT CLERK.