



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. E010 OF 2021

PRISCILLA MUTHONI NJAGI.....APPLICANT

VERSUS

IRENE KUTHII GATUA.....1ST RESPONDENT

PERIS WANJIRA MWANIKI.....2ND RESPONDENT

RULING

By a Notice of Motion dated 12th March 2021 brought under *Section 68 (1) of the Land Registration Act, 2012, Section 1A, 1B and 3A CPA and Order 40 and 51 CPR*, the Applicant sought the following orders:-

(1) Spent.

(2) That this Honourable Court be pleased to issue order of injunction restraining the 1st respondent either by himself, servants, employees and or agents from harvesting, accessing, interfering, picking and tilting, destroying and generally dealing with the 2 acres in the property being LAND PARCEL REFERENCE NO. NGARIAMA/RUNGETO/544 pending the inter-parties hearing and determination of this application.

(3) That this Honourable Court be pleased to issue order of injunction restraining the 1st respondent either by herself, servants, employees and or agents from harvesting, accessing, interfering, picking and tilting, destroying and generally dealing with the 2 acres in the property being LAND PARCEL REFERENCE NO. NGARIAMA/RUNGETO/544 pending the inter-parties hearing and determination of this summons.

(4) That the costs of this application be provided for.

The application is premised on the following grounds:-

(a) That the applicant pursuant to Sale Agreement dated the 16th June 1997 between applicant, PRISCILLA MUTHONI NJAGI herein and IRENE KUTHII GATUA paid the purchase price being Kenya Shillings one hundred thousand (Ksh. 100,000/=) for 1 acre of the suit property as the full consideration which was duly paid.

(b) That the applicant, PRISCILLA MUTHONI NJAGI further purchased a portion of ½ acre from the 1st respondent's son Albert Gatua out of the same parcel of land for a total cost of Kenya Shillings two hundred and sixty thousand (Ksh. 260,000) which was duly paid and was confirmed by the 1st respondent.

(c) That the applicant further vide Sale Agreement dated the 13th November 2014 between the applicant, PRISCILLA MUTHONI NJAGI herein and IRENE KUTHII GATUA paid the purchase price for another ½ acre bringing a total of 2 acres being Kenya Shillings four hundred and fifty thousand which the applicant paid Kenya Shillings two hundred and fifty three thousand one hundred and the remaining amount was to be paid upon transfer.

(d) That the applicant has so far purchased a total of two acres from the suit property being LAND REFERENCE NO. NGARIAMA/RUNGETO/544.

(e) That the applicant entered and took possession and commenced development in which she planted tea and coffee thereon in

1997.

(f) That sometime in February the year 2020, the respondent trespassed and illegally destroyed a fence, cut trees and crops. The 1st respondent son-in-law is currently facing a criminal case being Kianyaga Criminal Case No. 147 of 2020.

(g) That the respondents by themselves, agents and employees and servants have continued to harvest tea and coffee and received payments.

(h) The applicant has lost the incomes generated from the tea and coffee she planted therein Ksh. 80,000/= and Ksh. 150,000/= respectively.

(i) That suit property is a subject of distribution as it forms part of the deceased estate.

(j) That the applicant stands to suffer irreparable loss and damage and risks being rendered landless should the orders prayed be denied.

(k) That it is in the interest of justice that this summons be allowed.

Applicants summary of Facts

The applicant filed a supporting and a further affidavit in support of the application and deposed as follows:-

(1) That pursuant to Sale Agreement dated the 16th June 1997 between IRENE KUTHII GATUA and PRISCILLA MUTHONI NJAGI, the applicant herein paid the purchase price being Kenya Shillings one hundred thousand (Ksh. 100,000) for 1 (acre) of the suit property as the full consideration which I fully paid.

(2) That I, PRISCILLA MUTHONI NJAGI further purchased a portion of ½ acre from the 1st respondent's son Albert Muriithi Gatua out of the same parcel of land which was duly paid and was confirmed by the 1st respondent.

(3) That further vide Sale Agreement dated the 13th November 2014 between IRENE KUTHII GATUA and I, PRISCILLA MUTHONI NJAGI the applicant herein, I paid the purchase price for another ½ acre bringing a total of 2 acres being Kenya Shillings four hundred and fifty thousand which I paid Kenya Shillings two hundred and fifty-three thousand one hundred and the remaining amount was to be paid upon transfer.

(4) That I have so far purchased a total of two (2) acres from the suit property being LAND PARCEL REFERENCE NO. NGARIAMA/RUNGETO/544.

(5) That I have entered and taken possession and commenced development in which I planted tea and coffee thereon.

(6) That sometime in February the year 2020, the respondent trespassed and illegally destroyed a fence, cut trees and crops. The 1st respondent son-in-law is currently facing a criminal case being Kianyaga Criminal Case No. 147 of 2020.

(7) That the respondents by themselves, agents and employees and servants have continued to harvest tea and coffee and received payments.

(8) That the applicant has lost the incomes generated from the tea and coffee she planted therein Ksh. 80,000/= and Ksh. 150,000/= respectively.

(9) That the suit property is a subject of distribution as it forms part of the deceased estate.

(10) That I stand to suffer irreparable loss and damage and risk being rendered landless contrary to the Constitution and Statutory protection to my rights of property ownership.

(11) That I therefore pray for a DECLARATION that I am the legal purchaser and owner of 2 acres of land comprised in LAND REFERENCE NO. NGARIAMA/RUNGETO/544.

(12) That this Honourable Court be pleased to issue a DECLARATION directing the 1st and 2nd respondents to transfer a portion measuring 2 acres in the property being LAND PARCEL REFERENCE NO. NGARIAMA/RUNGETO/544 to me.

(13) That this Honourable Court be pleased to issue a DECLARATION that in the alternative, IRENE KUTHII GATUA, the 1st respondent herein be ordered to refund me the value of the 2 acres being Kenya Shillings four million (Ksh. 4,000,000/=).

(14) That this Honourable Court be pleased to issue a DECLARATION that IRENE KUTHII GATUA the 1st respondent herein be ordered to compensate me for the loss of income annually generated from tea and coffee being Ksh. 80,000/= and Ksh. 150,000/=.

(15) That in the interim, I am seeking for an order of injunction restraining the 1st respondent either by herself, servants, employees and or

agents from harvesting, accessing, interfering, picking and tilting, destroying and generally dealing with the 2 acres in the property being LAND PARCEL REFERENCE NO. NGARIAMA/RUNGETO/544 pending the interparties hearing and determination of this application.

(16) That I am further seeking for an order of injunction restraining the 1st respondent either by herself, servants, employees and/or agents from harvesting, accessing, interfering, picking and tilting, destroying and generally dealing with the 2 acres in the property being LAND PARCEL REFERENCE NO. NGARIAMA/RUNGETO/544 pending the inter-parties hearing and determination of this summons.

(17) That it is in the interest of justice that this summons be allowed.

(18) That the respondents are the Administrators of the Estate of GATUA KAMUNYI (deceased) who died on the 12th day of June 1994.

(19) That despite the filing of the application and summons, the respondent either by herself, servants, employees and or agents have continued harvesting, accessing, interfering, picking and tilting, destroying and generally dealing with the 2 acres in the property being LAND PARCEL REFERENCE NO. NGARIAMA/RUNGETO/544.

1st Respondent's summary of Facts

The 1st respondent, IRENE KUTHII GATUA filed a replying affidavit in opposition to the said application and deposed as follows:-

(1) That I have known the applicant for a long time, because during the life time of my deceased husband, he sold to the applicant 2 acres out of his original land parcel Number NGARIAMA/RUNGETO/434 measuring approximately 8 acres.

(2) That though my husband sub-divided the land, he did not effect transfer of the two acres to the applicant before his demise.

(3) That my husband who had two wives, had sub-divided his land into three portions; two measuring 6 acres each, and one measuring 2 acres.

(4) That he had intended that each of his two houses was to get 6 acres, while the applicant was to get 2 acres.

(5) That the resultant parcels were NGARIAMA/RUNGETO/544 (6 acres) – meant for me, NGARIAMA/RUNGETO/545 (2 acres) – meant for the applicant and NGARIAMA/RUNGETO/548 and 549 – all 6 totalling to 6 acres –meant for 1st wives children.

(6) That since the 1st wife was deceased, her house's share of 6 acres went already to her children as follows:-

(i) NGARIAMA/RUNGETO/547 – 1 acre to Peris Wanjira Mwaniki, the 2nd Respondent herein.

(ii) NGARIAMA/RUNGETO/548 – 2 acres to Njiru Kamunyi, he later sub-divided the same between his children and sold a portion to the church.

(iii) NGARIAMA/RUNGETO/549 – 1 acre. Title deed was issued to Njagi Ngari, who bought from the deceased son, Raphael Kamunyi.

(iv) NGARIAMA/RUNGETO/546 – 2 acres (meant for the Gachoki Kamunyi; a son who pre-deceased his father but left behind a widow; Anna Ruguru Gachoki; and her children.

7. That it was therefore a total shock to me when sometime in the year 1995; the applicant informed me that the 2nd respondent, who is my step daughter, had filed Embu Succession Cause No. 161/1994, seeking to distribute land parcel No. NGARIAMA/RUNGETO/544, which was meant for me and my children.

8. That the applicant, who also had interest in the deceased estate, took me to her advocate, who filed a protest in the succession matter.

9. That after the due hearing, the Court appointed me as a co-administrator; and further ruled that land parcel No. NGARIAMA/RUNGETO/544 belonged to me. She annexed a copy of the judgment in Succession Cause No. 161 of 1994 (Embu).

10. That it is the applicant who was paying the requisite legal fees, as I was financially incapacitated.

11. That being illiterate, and not knowing the legal process, the applicant and our advocate colluded and told me that I needed to file another succession case, where I would be the petitioner and we filed Embu High Court Succession Cause No. 62 of 2007, which was later transferred to the lower Court and became Principal Magistrate's Court Case No. 130 of 2019.

12. That I was granted letters of Administration and subsequently, we applied for confirmation of grant.

13. That it was only when the matter came up for confirmation when the proposed mode of distribution was read to me, and my children by the Court, when I heard for the very first time, that other than land parcel Number NGARIAMA/RUNGETO/545, which my husband was selling to her, I was also giving her 2 acres out of my land parcel No. NGARIAMA/RUNGETO/544.

14. That I and my children told the Court that this was foreign, and unacceptable to us, and the matter was adjourned, and we were advised to file our protests, upon which my children filed.

15. That we had a heavy fall out with the applicant, when I realised that all along, the applicant had craftily led to me to sign documents in our lawyer's office, which documents were calculated to a protracted legal battle in Embu Succession Case No. 161 of 1994.

16. That one of the fraudulent documents I discovered together with the application for confirmation of grant, citing a fraudulent distribution was an alleged agreement made on 13/11/2014; indicating that I was selling a further ½ acre out of land parcel No. NGARIAMA/RUNGETO/544, making a total of 2 acres.

17. That it is the only agreement the applicant has been relying on (and it is a fraud) in the Embu matter, but now, for the very first time, I have seen another agreement showing an agreement that has no year; and which is unsigned by myself, in respect of one acre out of the suit premises.

18. That needless to say, this is yet another fraud, emerging for the first time, in a further attempt to acquire land fraudulently.

19. That to help me finance the succession proceedings where the applicant was a beneficiary, having purchased two (2) acres, comprising of land parcel No. NGARIAMA/RUNGETO/545 from my husband during his life time, I allowed the applicant to utilise **one** (1) acre out of NGARIAMA/RUNGETO/544 so that the applicant could finance the succession proceedings.

20. That the said one (1) acre already had coffee trees, tea bushes and macadamia trees, all of which the applicant has been utilising since 1995; a period of 26 years; until February 2020, when I stopped her from using the land via a Court order.

21. That sometime in the year 1994, my daughter was charged in Court with the offence of arson, and since I had no money to get her legal representation, the applicant paid the legal fees, to our mutual advocate and other travelling expenses, which sum amount to Ksh, 253,100/= and which sum we agreed was a loan; and which I undertook to pay.

22. That this apparently; is the loan agreement which was twisted to read as a sale agreement.

23. That I have never disputed this loan and I have acknowledged the same in all my pleadings.

24. That I have even offered to offset the loan, but the applicant has been adamant in her desire to fraudulently acquire my land. (annexed as a letter dated 16/2/2020).

25. That in a bid to perpetrate her malicious and fraudulent bid, the applicant has been swearing false inconsistent and totally contradicting affidavits; which only go to show how false, baseless and fraudulent her claim is (Annexed is a bundle of such affidavits marked I.K.V).

26. That this suit is yet another attempt to get my land fraudulently; based on yet another inconsistent and contradictory affidavit.

27. That in any case, my advocates have advised me which advice I verily to be true that, that the suit is a non-starter, as the claim;

(a) Is not founded on any known law.

(b) Is time barred.

(c) Offends the express provisions of the Land Control Act.

(d) Offends the express provisions of Section 82 (b) of the Law of Succession Act.

28. That the applicant has been enjoying all the benefits of the one acre for a period of 27 years, and I now understand that even filing another succession case, while the matter was already finalised in Succession Case No. 161 of 2007, was only meant to delay; indefinitely if possible; her stay and enjoyment of my land.

29. That the applicant is very upset, that this status quo has been interrupted, hence this ill-conceived suit.

2nd Respondent's summary of Facts

The 2nd Respondent also filed a replying affidavit in opposition to the application and deponed as follows:-

(1) That I am one of the Administrators of the Estate of GATUA KAMUNYI (deceased) who died on the 12th day of June 1991 together with the 1st defendant.

(2) That I have read the applicant's Notice of Motion and the affidavit and further affidavit dated 11th April 2021 and wish to respond as hereunder:-

(3) That in response to paragraph 3 of the supporting affidavit, I wish to state that pursuant to sale agreement dated the 16th June

1997 between Irene Kuthii Gatua and Priscilla Muthoni Njagi, the applicant herein paid the purchase price being Kenya Shillings one hundred thousand (Ksh. 100,000/=) for 1 acre of the suit property as the full consideration which she duly paid to the 1st respondent.

(4) That in response to paragraph 4 of the supporting affidavit, I wish to state that Priscilla Muthoni Njagi further purchased a portion of ½ acre from the 1st respondent's son Albert Muriithi Gatua out of the same parcel of land for a total cost of Kenya Shillings two hundred and sixty thousand (Ksh. 260,000/=) which was duly paid and confirmed by the 1st respondent.

(5) That in response to paragraph 5 of the supporting affidavit, I wish to state that vide Sale Agreement dated 13th November 2014 between Irene Kuthii Gatua and Priscilla Muthoni Njagi, the applicant herein paid the purchase price for another ½ acre bringing a total of 2 acres being Kenya Shillings four hundred and fifty thousand which she paid Kenya Shillings two hundred and fifty three thousand one hundred and the remaining amount was to be paid upon transfer.

(6) That in response to paragraph 6 of the supporting affidavit, I wish to state that the applicant has so far purchased a total of two (2) acres from the suit property being land parcel Reference No. NGARIAMA/RUNGETO/544.

(7) That in response to paragraph 7 of the affidavit, I wish to state that the applicant entered and took possession and commenced development in which she planted tea and coffee thereon.

(8) That in response to paragraph 8 of the supporting affidavit, I wish to state that sometime in February 2020, the 1st respondent trespassed and illegally destroyed a fence, cut trees and crops. The 1st respondent's son-in-law is currently facing criminal case being Kianyaga Criminal Case No. 147 of 2020.

(9) That in response to paragraph 9 of the supporting affidavit, I wish to state that the 1st respondent through her agents, employees and servants have continued to harvest tea, coffee and even received payments for the same.

(10) That in response to paragraph 11 of the supporting affidavit, I wish to state and confirm that the suit property is a subject of distribution as it forms part of the deceased estate.

Legal Analysis and Decision

I have considered with anxious care the affidavit evidence, both in support and in opposition to the application. I have also considered the annexures to the affidavits, the submissions by counsels appearing for the parties and the applicable law.

The application dated 12th March 2021 is seeking interlocutory reliefs of an injunction pending the hearing of the main suit. The principles for the grant of injunction were settled in the locus classicus case of ***Giella Vs Cassman Brown and Company Limited (1973) E.A 358*** where the Court expressed itself as follows:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience”.

The three pillars set out in the celebrated case of ***Giella*** (supra) were re-examined and restated by the Court of Appeal in the case of ***Nguruman Limited Vs Jan Bonde Nielsen & 2 Others (2014) e K.L.R*** where it was observed:-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

- (a) Establish his case only at a prima facie level,*
- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and*
- (c) Allay any doubt as to (b) by showing that the balance of convenience is in his favour.*
- (d) Allay any doubt as to (b) by showing that the balance of convenience is in his favour.*

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd Vs Afraha Education Society (2001) Vol. 1 E.A 86. If the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at the stage. If prima facie case does not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between It is where there is doubt as to the adequacy of the respective damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted. On the second factor, that the applicant must establish that he “might otherwise suffer irreparable

injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury; speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is used solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy as the injury or harm is such a nature that monetary compensation, of whatever amount, will be the adequate remedy".

Now turning to the first pillar of prima facie in this case, the applicant in the supporting affidavit gave a narrative to the effect that she bought a portion of land comprised in the suit property land parcel No. NGARIAMA/RUNGETO/544 measuring in total approximately two (2) acres. She stated that the first agreement was entered into between herself and the respondents on 16th June 1997 for a portion of 1 acre. The second agreement was entered for a further portion of ½ (half acre) with the 1st respondent's son namely Albert Muriithi Gatua at a consideration of Ksh. 260,000/= and the third and last agreement was entered between her and the 1st respondent on 13th November 2014 for a portion of half (½) an acre. According to the applicant, she paid a deposit of Ksh. 253,100/= leaving a balance of Kenya Shillings one hundred and ninety six thousand nine hundred (Ksh. 196,900/=) to be paid upon transfer.

At paragraph 10 of the supporting affidavit, the applicant deposed that the suit property is a subject of distribution as it forms part of the deceased estate. If these depositions by the applicant are anything to go by, then the same raises serious questions as to whether the applicant has established a prima facie case. **Section 8 of the Land Control Board Act Cap. 302** provides as follows:-

"8 (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six (6) months of the making of the agreement for the controlled transaction by any party thereto:-

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reasons so to do, if any, as it may think fit.

Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by Section 6, any person:-

(a) Pays or receives any money; or

(b) Enters into or remains the possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment".

The import of the provisions of the law as shown in that section is that unless parties to the disposition of an interest in land seek and obtain consent in respect of a controlled transaction within six (6) months from the date of the agreement, the agreement becomes voidable and unless the extension to conclude the transaction is given by the High Court, any action done by any party in reliance of such a voidable agreement is liable to criminal offence. The applicant stated that the subject of the alleged sale transaction forms part of the estate of a deceased person. If that be the case, then there is doubt if the respondents were not intermeddling with the property of a deceased person and therefore lacked capacity to transact in the purported sale transaction.

The 1st respondent in her replying affidavit also in paragraph 12 thereof alluded to the fact that a Court of competent jurisdiction has rendered itself as to the ownership of the suit property and that the issue is now res-judicata. A copy of judgment in P.M – Succession Cause No. 161 of 1994 (Embu) was annexed. These are weighty issues which in my view points to the fact that the applicant has not established a prima facie case. Regarding the second principle, the applicant in paragraph 9 of her supporting affidavit stated as following:-

"(9) That the applicant has lost the incomes generated from the tea and coffee she planted therein Ksh. 80,000/= and Ksh. 150,000/= respectively".

Again in paragraph 14 thereof, the applicant deposed as follows:-

"14. That this Honourable Court be pleased to issue a DECLARATION that in the alternative, IRENE KUTHII GATUA the 1st respondent herein be ordered to refund me the value of the 2 acres being Kenya Shillings Four Million (Ksh. 400,000/=).

The second pillar for the grant of an equitable relief of injunction is that the applicant must demonstrate that he will suffer an irreparable injury which cannot be remedied by an award of damages. The applicant from the two paragraphs of her own affidavit in support of the application has quantified the damages which she suffered and even sought an order for compensation. In that case, the orders being sought cannot issue as the applicant can be compensated by an award of damages which she has even quantified herself.

Since the applicant has not demonstrated the first two principles in her favour, this is a suitable application for being disallowed. For the reasons I have given herein above, the Notice of Motion dated 12th March 2021 is hereby dismissed with costs to the 1st respondent. It is so ordered.

Ruling READ, DELIVERED physically in open Court and SIGNED at Kerugoya this 18th day of June, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Mr. Ojienda for the Applicant*
2. *Ms Rugaita for the 1st Respondent*
3. *Kabuta – Court clerk.*