



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. E8 OF 2020

TABITHA WAMUTIRA KINYUA.....1ST PLAINTIFF

JANE WANJA KARATU.....2ND PLAINTIFF

VERSUS

FAITH NYAWIRA NG'ANGA (Sued as the Legal Representative of

Gakuya Marira (Deceased).....1ST DEFENDANT

PETERSON MUTHIKE KARATU.....2ND DEFENDANT

DAVID MWANGI KARATU.....3RD DEFENDANT

HENRY MAINA KARATU.....4TH DEFENDANT

RULING

1. By a Notice of Motion dated 11th November 2020 and supported by the 1st Plaintiff's affidavit of even date, the Plaintiffs herein approached the Court seeking the following orders:

(i) Spent;

(ii) That the Respondents be restrained by a temporary injunction from selling, alienating or disposing of Land Parcel Nos. Mutira/Kathare/1103, 1104, 1105, 1126 and 1127, being the resultant numbers from Land Parcel No. Mutira/Kathare/31 pending the hearing and determination of this application;

(iii) That a prohibitory/inhibition order be issued against Land Parcel Nos. Mutira/Kathare/1103,1104,1105,1126 and 1127 pending the hearing and determination of this application;

(iv) That a prohibitory/inhibition order be issued against Land Parcel Nos. Mutira/Kathare/1103,1104,1105,1126 and 1127 pending the hearing and determination of this suit;

(v) Costs of the application.

2. The Plaintiffs' prayers are premised on the following grounds:-

a) That the subject matter was subject to Kerugoya High Court Succession No. 51 of 2013 involving the parties herein and that judgement was delivered on 19th May 2020;

b) That during the course of the said Succession matter, the Defendants/Respondents, against the orders therein were in the process of illegally disposing off the said properties to third parties;

c) That, it would be best in the interest of justice that the orders prayed be granted to protect further dealings on the subject matter properties.

3. The Plaintiffs' application is opposed. Vide a replying affidavit filed on 9th December 2020 and a further replying affidavit filed on 05th

March, 2021, the 1st Defendant/Respondent averred that the Plaintiffs and the Defendants are siblings. That the suit land, originally No. Mutira/Kathare/31 belonged to their grandfather, one Gakuya Marira who passed away in 1959. That their father, one Stanley Karatu Gakuya instituted a Succession Cause No. 51 of 2013 in respect of his father's estate, but unfortunately also passed away before the grant could be confirmed. That the 1st Defendant/Respondent, with the consent of the family members substituted her father in the succession cause, which resulted in Parcel No. Mutira/Kathare/31 being transmitted to the 2nd, 3rd and 4th Defendants/Respondents. The Certificate of Confirmation of Grant in the Matter of the Estate of Gakuya Marira under Succession Cause 275 of 2007 issued by the Principal Magistrate at Kerugoya on 14th April 2009 has been filed in support. That after confirmation of grant, the Plaintiff/Applicants being dissatisfied with the mode of distribution filed for revocation of grant on 3rd June 2009. That in that case, the Plaintiffs challenged the manner in which distribution was done (since they were not included in the distribution), and faulted the 1st Defendant/Respondent for obtaining the confirmation fraudulently through the concealment of material facts. Judgement in the matter was delivered on 19th May 2020 and the Plaintiffs' application dismissed for want of merit. She further avers that subsequent to the confirmation of grant and after judgement was delivered on 19th May 2020, the 2nd, 3rd and 4th Defendant/Respondents have sold off portions of their land to third parties and that the portions claimed by the Plaintiffs are now in the hands of third parties. She prays for the application to be dismissed.

4. By consent, parties agreed to canvass the application by way of written submissions. The Plaintiff/Applicants filed their submissions on 28th April 2021. The submissions rehash the contents of the application and supporting affidavit. It is their submission that the averments in the Respondent's replying affidavits disclose matters that ought to be dealt with during the main hearing and that the court ought to grant the interlocutory orders sought. The Defendants/Respondents did not file any submissions.

5. The court has considered the notice of motion application and the parties rival affidavits and submissions. The legal standard governing the issuance of temporary injunctions was discussed in the seminal decision of *Giella Vs Cassman Brown [1973] EA 358*. The wording of *Spry VP* in that case is reproduced hereunder:

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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 Civil Procedure Rules 2010, legislate this position.

"[Order 40. Rule 1] Cases in which temporary injunction may be granted.

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 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 three-part test set out in the *Giella* case has been held to be all inclusive, meaning that where there is a positive finding for less than the three factors, the injunctive relief ought not to be given. See the Court of Appeal decision in *Hassan Huri & another Vs Japhet Mwakala [2015] e K.L.R* which cited with approval the case of *Kenya Commercial Finance Co. Ltd Vs Afraha Education Society [2001] 1 EA 86*, where the Court pronounced itself as follows:

"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 respondent 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 that stage. If prima facie case is 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."

The first limb of the test, that of whether or not the applicant has demonstrated a prima facie case with a probability of success, was further enunciated in the Court of Appeal case of *Mrao Ltd Vs First American Bank of Kenya and 2 Others {2003} e KLR* as follows:

"...a case in 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 to call for an explanation or rebuttal from the latter."

From the present set of facts, the Plaintiffs' case is that injunctive orders ought to be issued against the Defendants/Respondents in respect of Land Parcel Nos. Mutira/Kathare/1103, 1104, 1105, 1126 and 1127. They contend that they have an interest in the said land, by virtue of

being siblings with the Defendants/Respondents as well as grand-daughters of the deceased Gakuya Marira. It is their contention that the distribution of land to their exclusion was illegal and that their interest in the land was held in trust by the 1st Defendant/Respondent as the administratrix of their grandfather's estate.

The Court takes cognizance of the fact that the issue of the Plaintiffs' interest in the suit land was already determined in the judgement delivered on 19th May 2020, following their application for revocation of grant. In summary, the judgement appreciated the fact that the Plaintiffs and Defendants grandfather had passed away in the year 1959, prior to commencement of the **Law of Succession Act, Cap 160**. By dint of **Section 2(1) of the Law of Succession Act, Cap 160**, the provisions of the Act only apply to estates of deceased persons who died after 1st July 1981. **Section 2(2)** of the Act provides that estates of persons dying prior to the commencement of the Act are subject to the written laws and customs applicable as at the time of death. In following Kikuyu custom, the judgement noted that married women were not entitled to inherit land. Indeed, the 1st Respondent, who acted as the Administratrix of the estate did not herself get any share, with the shares going to the three brothers. In the judgement, it was also noted that the Plaintiffs were involved in the Succession process and were in agreement with their grandfather's wishes of excluding them from inheritance owing to the custom at the time. In any case, the court found that the Plaintiffs were time bound in bringing up the issue of dependency prior to the confirmation of grant and that the application made after confirmation of grant was time barred. Finally, the court appreciated the fact that portions of the properties inherited by the three brothers had been sold off to third parties and that the transactions were legal as they were only undertaken after the grant was confirmed. It was the court's conclusion therefore that the revocation of grant would be inconsequential and thus dismissed the application.

From the foregoing, and noting that the present application is not an appeal, the Court finds that a *prima facie* case has not been established. It must also be noted that court orders are not given in vain. The Parties agree that certain portions of the Suit Land have already been transferred to third parties who are now the new proprietors of those properties. In the absence of proof of fraud or corruption, the court cannot issue injunctions against them. See the decision in **Moses Warui Gatimu Vs Douglas Mwai Machuru & another [2014] e KLR**:

"Bearing the above in mind, the first issue that this Court notes is that the suit land is registered in the names of the two defendants/respondents and in the circumstances, they are entitled to enjoy the rights that go with such registration. It is a rare case indeed to injunct a registered owner of a property."

In any case, those parties have not even been enjoined in the case.

The Court finds succor in the Court of Appeal decision in **Eric V.J. Makokha & 4 Others Vs Lawrence Sagini & 2 Others Civil Application No. 20 of 1994 (12/94 UR)**:

"An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."

Having failed to satisfy the first limb of the conditions requisite for the grant of a temporary injunction, I find that the Plaintiffs/Applicants application ought to be dismissed with costs which I hereby do.

RULING READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 11TH DAY OF JUNE, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Wanyinge holding brief for Wangechi for the Respondent
2. Ms Ndorongo holding brief for Igati Mwai for Plaintiff
3. Kabuta – Court clerk.