



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.74 OF 2020

GEORGE IGOGO MUNYINYI.....PLAINTIFF/APPLICANT

VERSUS

PRISCILLA NJOKI IGOGO.....1ST DEFENDANT/ RESPONDENT

PETER MWAURA IGOGO.....2ND DEFENDANT/ RESPONDENT

MORRIS KUNGU IGOGO.....3RD DEFENDANT/ RESPONDENT

NELLIE WAITHERA IGOGO.....4TH DEFENDANT/ RESPONDENT

CATHERINE WAMUHU MWAURA.....5TH DEFENDANT/ RESPONDENT

RAHAB WANJIRU KIMANI.....6TH DEFENDANT/ RESPONDENT

CHRISTINE MARY NYAMBURA.....7TH DEFENDANT/ RESPONDENT

ALICE NJERI GAITI.....8TH DEFENDANT/RESPONDENT

LAND REGISTRAR, KIAMBU.....9TH DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....10TH DEFENDANT/RESPONDENT

RULING

Through a Notice of Motion Application dated **10th September 2020**, brought under **Order 40 Rule 1** of the **Civil Procedure Rules, Sections 1A, 1B, 3A and 4** of the **Civil Procedure Act** and **Sections 71** of the **Land Registration Act**, the Plaintiff/Applicant sought for the following Orders; -

- 1. That pending the full determination of this suit, this Honorable Court be pleased to issue a temporary injunction against the Respondents, their servants, agents, nominees, and or any person acting under their authority from entering, disposing, charging, encroaching, blocking access to, subdividing , registering any dispositions, trespassing on the suit parcel of land formally known as Land Parcel Reference No. Kiambaa/Ruaka/1324, which has been illegally subdivided into parcels Kiambaa/Ruaka /4932-4948.*
- 2. That this Honorable Court be pleased to grant an order of stay of the proceedings in Succession Cause No.186 of 2013, in the matter of the Estate of David Igogo Munyinyi (deceased) filed before the Chief Magistrate Court at Kiambu, pending the full determination of this suit.*
- 3. That pending the full determination of this suit, the Honorable Court be pleased to issue an order directing the 9th Respondent to register a Caution on the subject properties referenced Kiambaa/Ruaka/4932-4948.*
- 4. That this Honorable Court be pleased to issue an order directing the 9th Respondent to cancel and or revoke the titles issued by the 9th Respondent to the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents on 17th July 2020 arising out of the subdivision of the former land parcel known as Land Parcel Reference No. Kiambaa/Ruaka/ 1324.*

5. Costs be borne by the Respondents.

The Application was grounded on the Supporting Affidavit of **George Igogo Munyinyi**, who averred that he is one of the administrators and beneficiary of the **Estate of David Igogo Munyinyi (deceased)**, who was the registered sole proprietor of **Land Parcel Reference No. Kiambaa/ Ruaka/1324**.

That Succession Cause No.186 of 2013, was filed so as to distribute the assets to the beneficiaries and the 1st Respondent who is also an administrator of the estate had commenced subdivision of **Kiambaa/Ruaka/1324**, without his knowledge or authority of the Court transferring the resultant parcels of land to third parties.

He further averred that upon realization of the intended subdivision, he filed an affidavit of protest dated **17th June 2015**, where **Hon.Kituku(PM)** issued orders barring the 1st Defendant/Respondent from transferring the title of **Kiambaa/Ruaka/1324**, to other parties pending the determination of the protest proceedings.

He contended that he came to be informed that the suit property **Kiambaa/Ruaka/1324**, had already been fraudulently subdivided and titles issued to the 2nd - 8th Defendants/Respondents and the **Land Control Board** purportedly issued **consents** to transfer the subdivided plots. Further, that as a result of subdivision, he has been deprived of his rightful share of the estate.

The Application was opposed and the 1st -8th Defendants/Respondents filed their joint Replying Affidavit dated **15th October 2020**, by **Peter Mwaura Igogo**. He averred that he has authority to swear on behalf of the other Defendants/Respondents. That on or about **year 2011 and 2012**, the suit land was subdivided under the instructions of the deceased (**David Igogo Munyinyi**) during his lifetime in full knowledge of the Plaintiff/Applicant and they were all summoned by the **Land Control Board** to confirm the same. He further averred that after **consent** was granted, the Plaintiff/Applicant lodged a caution at the **Land Registry Kiambu**, which prompted the deceased to write to the **Land Registry Kiambu** to remove the caution and upon the hearing, the caution was lifted.

It was his contention that the Plaintiff/Applicant is a beneficiary of **Kiambaa/Ruaka/222**, and he has been bequeathed his share of **2 acres**. That the Application amounts to **res judicata**, as the Plaintiff/Applicant has made a similar Application seeking similar orders vide Application dated **15th November 2016**, which was heard and determined. Further, that the deceased had made his **Will** clear and the Plaintiff/Applicant has been misrepresenting facts in Court in a bid to disinherit his father's Will.

The court directed parties to canvass the instant Application by way of written submissions and the Plaintiff/ Applicant through the **Law Firm of Mwaniki Gachoka & Co. Advocates**, filed his written submissions dated **4th February 2021**, The 1st -8th Defendants/Respondents on the other hand through the **Law Firm of Beth G. Mwangi & Co. Advocates**, filed their submissions on **2nd February 2021**. The 9th and 10th Defendants/Respondents did not file any response or submissions with regards to the Plaintiff's/Applicant's Application.

The Court has keenly considered the Pleadings filed by the parties and finds the main issues for determination are;

- a) *Whether the Plaintiff/Applicant is deserving of the Orders sought*
- b) *Whether the instant suit is Res judicata*

Whether the Plaintiff/Applicant is deserving of the Orders sought

The Plaintiff/Applicant having sought for Injunctive Orders is only entitled to either grant or denial of the same at this stage. The Court is not supposed to deal with the merit of the case at this stage. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

In determining whether to grant or not to grant the Orders sought, the Court will be guided by the principles set out in the case of **Giella ... Vs... Cassman Brown Co Ltd (1973) EA 358**, and also in the case of **Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might 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. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”

Firstly, the Plaintiff/Applicant need to establish that he has a *prima-facie* case with probability of success. It is very clear that *prima-facie* case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

“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 as to call for an explanation or rebuttal from the latter”.

It is the duty of the Plaintiff/Applicant herein to establish that he has a *prima-facie* case. In the instant suit, the Court has established that the Plaintiff/Applicant is one of the Administrators of the **Estate of David Igogo Munyinyi, through Letters of Administration issued on 29th May 2017.**

The Plaintiff/Applicant's contention is that the 1st Defendant/ Respondent without any justification has subdivided **Land Parcel Reference No. Kiambaa/ Ruaka/1324**, to third parties. Further, the Court is also alive to the fact that **Hon.Kituku(PM)**, made a Ruling dated **1st March 2017**, to the effect that the Plaintiff/Applicant and the 1st Defendant Respondent are made joint administrators of the deceased's estate and status quo be maintained to await distribution of the estate and confirmation of the grant. Therefore, from the above documents produced, unless contrary evidence is adduced, which has not been adduced, the Court finds and holds that the Plaintiff/Applicant has beneficial interest over **Kiambaa/Ruaka/1324**, the suit property. Further, the said orders and ruling of the Subordinate Court have not been Appealed against and still remain valid.

Secondly, if the 1st and 8th Defendants/Respondents are allowed to proceed and interfere with **Land parcel Reference No. Kiambaa/Ruaka/1324, which has been subdivided into parcels Kiambaa/Ruaka/4932-4948**, the same would change the nature of the case and in the event the Plaintiff/Applicant is a successful litigant at the end of the main trial, then he would have suffered an irreparable loss or damages which might not sufficiently be compensated by an award of damages. See 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”.

Thirdly, On the balance of convenience, the Court finds that it tilts in favor of maintaining the **status quo** and the **status quo** herein is not to allow the Defendants/ Respondents, their servants, agents, nominees, and or any person acting under their authority from entering, disposing, charging, encroaching, blocking access to, subdividing , registering any dispositions, trespassing on the suit parcel of land formally known as **Land parcel Reference No. Kiambaa/Ruaka/1324**, which has been subdivided into parcels **Kiambaa/Ruaka/4932-4948**, until the suit is heard and determined.

See the case of *Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR*, where the Court of Appeal held that: -

“The general principle which has been applied by this court is where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”

On whether the court should grant an order of stay of the proceedings in **Succession Cause No.186 of 2013**, in the case of *Global Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* the Court held that;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.

In light of the above, it is this Court's holding that what it needs to establish is whether in exercising its discretion to order the Stay of proceedings, will be in the interest of justice to grant the same and whether there are exceptional circumstances which warrant the grant of the Stay of proceedings.

The court notes that **Succession Cause No. 186 of 2013**, has not been fully determined and the same touches on the subject property. Having found that the Plaintiff/Applicant has a prima facie case, then it will only be prudent to allow the stay of Succession Cause No. 186 of 2013, which essentially at the conclusion of the instant suit will enable the subordinate court decide on distribution of the deceased's estate.

Can the Court issue an order directing the **9th Defendant/ Respondent** to cancel and or revoke the titles issued by the 9th Defendant/Respondent to the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Defendants/Respondents on 17th July 2020, arising out of the subdivision of the former land parcel known as Land parcel Reference No. **Kiambaa/Ruaka/1324**?

It is evident that the said prayer is granted in very special and exceptional circumstances at the Interlocutory stage. These are orders that are sought in the Plaint and if granted at this stage, it would mean that some of the prayers in the Plaint will have been exhausted at the Interlocutory stage without the benefit of hearing evidence of all the parties involved in the suit.

Whether the instant suit is Res judicata

It was the Defendants/Respondents contention that the suit is **Res judicata**, as the Plaintiff/Applicant has made a similar application seeking similar orders vide an Application dated **15th November 2016**, which was heard and determined.

Though **Section 7** of the **Civil Procedure Act** deal with the issue of *Res judicata*, it is evident that the said issue of *Res judicata* cannot be raised in a Replying Affidavit as the same will require the ascertaining of facts. As was held in the case of *George Kama Kimani & 4 Others ...Vs...County Government of Trans-Nzoia (supra)*, the best way to raise the issue of *res judicata* is by way of **Notice of Motion**, wherein pleadings would be annexed to allow the Court consider whether the issues in the previous suit are similar to the issues in the suit being in issue.

For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this Court's considered

view that it will have to ascertain facts and probing of evidence.

The upshot of the foregoing is that the Plaintiff/Applicant's Notice of Motion Application dated **10th September 2020**, is found **merited** and the same is allowed in terms of prayers **No. 3 and 4 only, of the said Application. The other prayers to await the calling of evidence at the main trial. Costs shall be in the cause.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF JULY 2021.

L. GACHERU

JUDGE

29/7/2021

Court Assistant – Dominic

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 **15th 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. Muchiri holding brief for Mr. Gachoka for the Plaintiff/Applicant

Mrs Fundi for the 1st to 8th Defendants/Respondents

No appearance for the 9th Defendant/Respondent

No appearance for the 10th Defendant/Respondent

L. GACHERU

JUDGE

29/7/2021