



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E 148 OF 2021**

**MARGARET NYAMBARA WAITHAKA**

**(Suing as the Personal Representative of the Estate of**

**MARTIN FRANCIS THUKU WAITHAKA-Deceased).....PLAINTIFF**

**VERSUS**

**ROSELYN DOLA OUKO.....1ST DEFENDANT**

**AARON TAFARI OUKO.....2ND DEFENDANT**

**ANDREW ATINDA OUKO.....3RD DEFENDANT**

**NASHON KEBWARO OMWENGA.....4TH DEFENDANT**

**RULING**

1. The plaintiff, Margaret Nyambara Waithaka, contends that she is the administrator of the estate of the late Martin Francis Thuku Waithaka (**the late Waithaka**). She further contends that the 1st, 2nd and 3rd defendants are administrators of the estate of the late Jason Atinda Ouko (**the late Ouko**). Through a plaint dated 4/5/2020, the plaintiff, on behalf of the estate of the late Waithaka, brought this suit against the four defendants. Her case is that on 30/3/1983, the late Ouko sold to the late Waithaka two plots out of **Land Reference Number 3589/6**, each measuring 2.5 acres, and identified as Plot "A" and Plot "B" on the sketch of the sub-division plan of the said parcel. The agreed purchase price was Kshs 500,000. The late Waithaka paid the agreed deposit of Kshs 100,000. Balance of the purchase price was to be paid on the date of completion. The completion date was to be within sixty (60) days of issuance of the deed plans relating to the two plots by the Department of Surveys. Upon signing the agreement, the late Waithaka was given possession of the two plots.
2. The plaintiff contends that the sub-division scheme did not meet the planning conditions imposed by the City Council and as a result, the late Waithaka surrendered back to the late Ouko one plot measuring 2.5 acres and retained the other plot measuring 2.5 acres. The late Waithaka subsequently sold one acre out of the retained portion to a Mr Joseph Kamau Ngiria and remained with 1.5 acres which he developed and held until his demise. The estate of the late Waithaka has held the parcel measuring 1.5 acres since his demise.
3. The plaintiff further contends that Mr Joseph Kamau Ngiria sued the late Waithaka in **Nairobi HCCC No 673 of 1985**, claiming the 2.5 acres which the late Waithaka had purchased from the late Ouko. The late Ouko was joined in the said suit as a third party. The late Ouko swore an affidavit in the said suit and confirmed that he sold the 2.5 acres to the late Waithaka. Further, the late Ouko filed a third party defence dated 31/3/1989 in which he confirmed that he sold the 2.5 acres to the late Waithaka.
4. It is the case of the plaintiff that the late Ouko died before completing the survey exercise in terms of the agreement. She adds that the late Waithaka and his estate have always been ready and willing to complete the contract.
5. She further contends that, to protect his interest, the late Waithaka placed a caveat on the late Ouko's Title in 2008. On 18/11/2008, the Registrar of Titles wrote to the late Waithaka, notifying him that the caveat would be removed within 45 days unless extended by the court. The late Waithaka subsequently filed Nairobi **ELC Case No 616 of 2008 (OS)**. The 4th defendant applied to be joined as a party in the said suit on the ground that he had purchased the suit property. The said suit was eventually dismissed for want of prosecution, following the death of the late Waithaka.
6. The plaintiff adds that in September and October 2015, the estate of the late Ouko wrote to them threatening to evict them. In June 2019, the estate of the late Ouko reviewed the threat. In February 2021, she learnt that the 4th defendant had trespassed on the plot and had

commenced construction thereon.

7. Consequently, she brought this suit seeking the following reliefs against the defendant:

**a) An order of specific performance compelling the first, second, and third defendants to complete the sale agreement dated 30th March 1983.**

**b) A permanent injunction against the defendants, their servants and or their agents or anyone acting on their behalf from entering, using, occupying, constructing on, developing or in any other manner whatsoever interfering with the plaintiff's right of occupation and quiet possession of the portion marked "A" on Land Reference Number 3589/6.**

**c) A mandatory injunction to compel the defendants to remove any construction on the portion marked "A" on Land Reference Number 3589/6 and restore the property to its original state to the plaintiff's satisfaction**

**d) General damages for trespass**

**e) Costs of this suit**

8. Together with the plaint, the plaintiff brought a notice of motion dated 4/5/2021 seeking the following interlocutory injunctive reliefs:

**1) Spent**

**2) Spent**

**3) That pending the hearing and determination of this suit, an injunction do issue restraining the defendants whether by themselves, their servants, agents, contractors or assigns from entering, using, occupying, constructing on, developing or in any other manner whatsoever interfering with the plaintiffs right of occupation and quiet possession of the portion marked "A" on Land Reference Number 3589/6 ("the suit property").**

**4) That the costs of this application be awarded to the applicant.**

9. The said notice of motion is the subject of this ruling. It was supported by the plaintiff's affidavit in which she set out her case as summarized above. The application was canvassed orally in the virtual court on 14/7/2021.

10. In his oral submissions, Mr Kahura, counsel for the plaintiff, outlined the basis of the claim by the estate of the late Waithaka as summarized above. He added that the late Ouko having sold the suit property to the late Waithaka in 1983, he had no property to subsequently sell to the 4th defendant in 1983. He urged the court to place reliance on the affidavit and pleadings of the late Ouko in **Nairobi HCCC No 673 of 1985**. He added that the applicant had a home on a portion of the suit property and it was therefore necessary that the *status quo* be maintained.

11. The 1st, 2nd and 3rd defendants opposed the application through a replying affidavit sworn on 23/6/2021 by Aaron Tafari Ouko. He deposes that the suit property is the very plot that the late Waithaka returned to the late Ouko. He states that it was established in Nairobi HCCC No 673 of 1985 that the late Waithaka returned one plot measuring 2.5 acres to the late Ouko. He adds that the suit property was the subject of litigation in Nairobi ELC Case No 397 of 2011 in which the court determined that it belonged to the estate of the late Ouko. He urges the court to dismiss the application.

12. The 4th defendant opposed the application through a replying affidavit sworn on 24/6/2021. He deposes that he is the beneficial owner of Land Reference Number 3589/53 having purchased it from the late Ouko who executed a transfer in his favour on 26/6/1993. He further deposes that the late Ouko's lawyer who drew the transfer swore an affidavit to confirm that fact. He adds that he has enjoyed possession of the said piece of land for the last 30 years and he has built a matrimonial home on the said piece of land.

13. I have considered the application, the parties' affidavits and submissions, the relevant legal framework, and the applicable jurisprudence on the key question in this application. The single question falling for determination in this application is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant interlocutory injunctive relief. First the applicant is required to demonstrate that he has a *prima facie* case with a probability of success. Secondly, the applicant is required to demonstrate that unless an injunction is granted, he would stand to suffer damage for which he cannot be adequately indemnified through an award of damages. Lastly, if the court has doubts about either of the above two requirements, the application is to be decided on a balance of convenience [see **Giella v Cassman Brown EA 358 (1973)**]. At the interlocutory stage, the court does not make conclusive or definitive findings on the key issues in dispute.

14. Has the plaintiff established a *prima facie* case? At this point the answer to this question is in the negative. I say so because it does emerge from the plaint that the late Waithaka and the 1st, 2nd and 3rd defendants were involved in a litigation revolving around the question of ownership of the suit property, to wit, **Nairobi HC ELC Case No 616 of 2008 (OS)**. At that time, the late Waithaka claimed to own only one (1) acre, not 1.5 acres out of the late Ouko's land. In the plaintiff's own words, the 4th defendant applied to be joined as a party in the said suit on the ground that he had purchased the suit property. The plaintiff made the following averments in Paragraph 26 of the plaint in the present suit:

**"26 This case was eventually dismissed for want of prosecution following the death of the purchaser"**

15. A perusal of **Nairobi HC ELC Case No 616 of 2008 (OS)** reveals that the following issues/questions fell for determination in the said suit:

- a) *Whether the caveat registered by the Plaintiff L. R. No. 3589/6(I. R. NO. 23229/1) can be extended by this court and or remain in force until the Plaintiffs interests in the said land as ordered by the court in HCCC NO. 673 of 1985 are wholly registered and protected.*
- b) *Whether the Plaintiff lawfully owns one acre of land out of L.R. NO. 3589/6 (I. R. NO. 23229/1) and or whether the Plaintiff has interests over the said land which interests will be prejudiced by the removal of the said caveat.*
- c) *Whether the Defendant or their agents or servants have any right in law or otherwise over the said land to apply for the removal of the said caveat*
- d) *The costs of this originating summons be provided for in any event.*

16. At this point, it is not clear if, in light of the dismissal alluded to in paragraph 26 of the plaint in this suit, the plaintiff who has brought this suit on behalf of the estate of the late Waithaka, can properly maintain a fresh suit raising the same issue of ownership without rendering an explanation as to why the preceding suit was abandoned. Put differently, shouldn't the plaintiff, on behalf of the estate of the late Waithaka, have applied for revival of the preceding suit? Is there a legitimate reason why the plaintiff has opted to initiate fresh proceedings?

17. Secondly, the identity of the suit property is not clear at this point. It is contended that the plaintiff's plot has been the subject of litigation and determination in previous suits and that the plaintiff is deliberately misleading the court with a view to procuring an injunctive order relating to a different land that he does not own. It is noted from the record relating to **Nairobi HCCC No 616 of 2008 (OS)** that the late Waithaka laid claim to one (1) acre, not one and half (1.5) acres.

18. Unless and until the above matters are made clear, I do not think the plaintiff/applicant can be said to have established a prima facie case to warrant grant of injunctive orders against the defendants at this stage. I will in the circumstances not consider the other limbs of **Giella v Cassman Brown, EA 358 (1973)**.

19. The net result is that the plaintiff's application dated 4/5/2021 is declined on the above grounds. Costs shall be in the cause. Directions on fast-tracking the disposal of this suit will be given at the time of rendering this ruling.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JULY 2021**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr. Kahura for the Plaintiff.

Mr. Onyango for the 1st, 2nd & 3rd Defendants.

Mr. Kamiru for the 4th Defendants

Court Assistant: June Nafula