



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E180 OF 2020**

**MOSES KARIUKI KIBATHI & JAMES MUCHUGIA KIBATHI (*Suing as Administrators of the Estate of the Late Milkha Wangui Wambura*.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**DANIEL KIBATHI KIARIE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DENNIS KARIUKI WAWERU.....2<sup>ND</sup> DEFENANT/RESPONDENT**

**JAMES KAHUGU MWANGI.....3<sup>RD</sup> DEFENANT/RESPONDENT**

**CHIEF LAND REGISTRAR – NAIROBI.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 12<sup>th</sup> October 2020 brought under provisions of Section 73(1) of the Land Registration Act, order 40 rule 1, order 51 rule 1 of the Civil Procedure Rules, and section 1A and 3A of the Civil Procedure Act and any other enabling provisions of the law.

2. It seeks orders:-

**1. Spent.**

**2. Spent.**

**3. That pending the herein and determination of this application, this honourable court do orders compelling the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to remove the caution registered against Title No Dagoretti/Mutuini/309 and to pave way for registration of new titles and subsequent issuance of the Title to the plaintiffs/beneficial owners.**

**4. That this honourable court do issue an order directing that Title Deed emanating from Plot No 1597 excised from Title No Dagoretti/309 belonging to the 1<sup>st</sup> defendant to be deposited in court upon subdivision and processing of Title Deeds pending determination of his dispute with the 2<sup>nd</sup> and 3<sup>rd</sup> defendant and determination of this suit.**

**5. That pending the hearing and determination of this application, this honourable do issue an order allowing Mr. Reuben Ng'ang'a Wambura and Mr. Beshon Muchugia Wambura beneficiaries of the Estate of the Late Milkha Wangui Wambura to sell their Land parcels No 1598 and 1595 both excised from Dagoretti/Mutuini/309 as per annexed mutation map dated 7<sup>th</sup> January 2019 so as to seek urgent medical attention.**

**6. That pending hearing and determination of this suit, a temporary injunction to issue restraining the defendants by themselves, agents, servants and/or any other persons claiming through them from interfering with the plaintiff's ownership and or usage of Land Title Number Plot Nos 1595, 1596, 1598, 1599 and 1600 excised from Dagoretti/Mutuini/309.**

**7. That the cost of this application be provided for.**

3. The grounds are in the face of the application and are set out in paragraphs (1) to (14).

4. The application is supported by the affidavit of Moses Kariuki Kibathi one of the plaintiffs/applications sworn on the 12<sup>th</sup> October 2020.
5. The application is opposed. There is a replying affidavit sworn by Daniel Kiarie Kibathi, the 1<sup>st</sup> defendant/respondent herein on the 18<sup>th</sup> December 2020.
6. There is also a replying affidavit sworn by Dennis Kariuki Waweru, the 2<sup>nd</sup> defendant/respondent sworn on the 25<sup>th</sup> November 2020.
7. There is also a replying affidavit sworn by James Kahugi Mwangi the 3<sup>rd</sup> defendant/respondent herein sworn on the 25<sup>th</sup> November 2020. It appears the 4<sup>th</sup> defendant/respondent did not file any response.
8. On the 15<sup>th</sup> April 2021 the court with the consent of the parties directed that the application be canvassed by way of written submissions.

#### **The Plaintiffs/Applicants submissions**

9. They are dated 27<sup>th</sup> May 2021. The plaintiffs/applicants herein are the legal administrators of the Estate of the late Milkah Wangui Wambura, the proprietor of Land Parcel Number Dagoretti/Mutuini/309. They raise three issues for determination:-

*(a) Whether an injunction should issue against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants/agents restraining them from interfering with the plaintiffs/beneficial owners occupation of plot Nos 1595, 1596, 1598, 1599 and 1600 excised from Dagoretti/Mutuini/309 as per mutation plan registered on 7<sup>th</sup> January 2019.*

*(b) Whether the caution registered against Title No Dagoretti/Mutuini/309 by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant should be removed to enable conclusion of subdivision and the resulting Title deed for Plot No. 1597 belonging to the 1<sup>st</sup> defendant be deposited in court pending determination of his dispute with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and determination of the suit.*

*(c) Whether Mr. Reuben Ng'ang'a and Mr. Benson Muchugia Wambura beneficiaries of the Estate of the late Milkah Wangui Wambura should be allowed to sell their parcels No 1595 both excised from Dagoretti/Mutuini/309 as per annexed mutation map dated 7<sup>th</sup> January 2019 so as to seek medical attention.*

10. The plaintiffs have met the threshold for issuance of interlocutory injunction as per the celebrated case of **Giella vs Cassman Brown [1973] EA 358**. They have also put forward the cases of **Mrao Ltd vs First American Bank of Kenya Ltd [2003] KLR 125**; **Nguruman Ltd vs Jan Bonde Nielsen & 20 Others**.

11. The plaintiffs have established a prima facie case with a probability of success as it is evident that they own plot Nos 1595, 1598, 1599 and 1600 excised from Dagoretti/Mutuini/309 as beneficial owners and they were never privy to the sale of Plot No 1597 belonging to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants caused the caution to be registered therefore making it impossible for the plaintiffs and co-beneficiaries to acquire title deeds, develop or sell their respective parcels. They have put forward the cases of **Paul Gitonga Wanjau vs Gatuthia Tea Factory Co. Ltd & 2 Others [2016] eKLR**; **Alice Awino Okello vs Trust Bank Ltd & Another LLR No.625 (CCK)** quoted in the case of **Kisimani Holdings Ltd & Another vs Fidelity Bank [2013] eKLR**.

12. The distribution of the Estate of the Deceased has stalled due to the impasse created by the cautions registered against the property by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on account of an alleged sale of the 1<sup>st</sup> defendant. The continued existence of the cautions illegally placed on the suit property by strangers who had no known legal right or interest on the property continues to cause harm and loss to the plaintiffs and the beneficiaries of the Estate.

13. That cautions placed against Title No Dagoretti/Mutuini/309 by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are illegal as they have no legal right as purchasers to warrant them to register cautions against the mother title to the detriment of the plaintiffs and co-beneficiaries. The plaintiffs as administrators of the said Estate were not aware of the alleged sale by the 1<sup>st</sup> defendant as the alleged sale happened before the issuance of letters of administration and confirmation of grant.

14. They have relied on sections 73 and 78 of the Land Registration Act, and the cases of **Mamut Hardware Stores Ltd vs Chief Land Registrar & Another [2017] eKLR**; **Maria Ngangi Gwako vs Charles Mwenzi Ngangi Gwako [2014] eKLR**; **Alice Kariuki vs Telkom Kenya Ltd; Land Registrar Nakuru (intended defendant/respondent) [2020] eKLR**. They have also relied on **Sections 45 and 79 of the Law of Succession Act and Succession Cause 1397 of 2012 in the Estate of Francis Kimani Muchiri (Deceased)**.

15. The plaintiffs are the sole administrators of the Estate of the Deceased's properties hence the only persons entitled in law to deal with the property of the deceased under the Law of Succession Act. The 1<sup>st</sup> defendant has never been appointed an administrator of the said Estate hence only intermeddled and could not exercise proprietary right over the suit property and his alleged sale was illegal.

16. Mr. Reuben Ng'ang'a Wambura and Mr. Benson Muchugia Wambura and beneficiaries of the Estate of the late Milkah Wangui Wambura and beneficial owners of Plot No 1598 and 1595 both excised from Dagoretti/Mutuini/309 are elderly and they wish to sell their properties so as to seek medical attention to avoid being driven to their death bed by their 1<sup>st</sup> defendant. They have relied as section 24 of the Land Registration Act and the case of **Jemutai Tanui vs Juliana Jeptepkeny & 5 Others [2013] eKLR**. They pray that the application be allowed as prayed.

17. On the 7<sup>th</sup> June 2021 Mr. Ndurumo for the 1<sup>st</sup> defendant sought and was granted fourteen (14) days to file the submissions. By the time

of writing this ruling, no submissions on behalf of the 1<sup>st</sup> defendant have been filed.

### **The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Submissions**

18. They are dated 4<sup>th</sup> June 2021. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants have legal rights to property. The plaintiffs were privy to the sale. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants do have purchasers' interest on Dagoretti/Mutuini/309. They have put forward the case of **Kenya Electricity Company Ltd vs Kiboto Ltd [2019] eKLR**. They had an option of registering their purchase interest on the portion of land and rightfully so. It is this right that informed the Land Registrar to register caution on Dagoretti/Mutuini/309 as per the Land Registration Act.

19. A purchaser's interest is not the same as a beneficial interest. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are claiming purchasers interest and not beneficial interest. They are creditors of the Estate by virtue of the sale. They have put forward the case of **In RE Estate of Joseph Mutua Munguti (Deceased) [2016] eKLR**. The 1<sup>st</sup> defendant has beneficial rights as per Section 93(1) of the Laws of Succession Act.

20. There exist legal contracts that have been breached by the 1<sup>st</sup> defendant and since the land on sale is still not officially registered, it is prudent that the rights of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to ownership of the portion of the property be considered. They have put forward the case of **Kiptuya Ngerech Too vs Peris Wangui Macharia & Another [2013] eKLR**.

21. The essence of a caution of is to forbid the registration of disposition in the subject land because the cautioner is apprehensive that such registration may obliterate the interest in the land. Removal of the caution from Dagoretti/Mutuini/309 will automatically give way to dealing on the portion of land including and not limited to Plot No 1597 to third parties which the 2<sup>nd</sup> and 3<sup>rd</sup> defendant are laying claim to.

22. The plaintiffs request for removal of the caution from the mother title may only be granted with a condition that Plot No 1597 as shown on the mutation form shall be deposited in court pending determination of this suit, Civil Appeal No 183 of 2020 and 490 of 2020.

23. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are claiming purchaser's interest and rightfully so vide the legally executed sale agreement by the 1<sup>st</sup> defendant who sold them the portions of land with a condition that once subdivision of the land was complete, he would transfer the portions to them but he later changed his mind. They have put forward the case of **Anne Mwambi vs John Munyao & Another [2018] eKLR**. They pray that the application be dismissed with costs.

24. I have considered the pleadings, the notice of motion and the affidavit of support. I have also considered the affidavits in response, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination are:-

*(i) Whether the plaintiffs'/applicants' application meets the threshold for grant of temporary injunction.*

*(ii) Whether the caution registered against LR NO. Dagoretti/Mutuini/309 ought to be removed.*

*(iii) Who should bear costs of this application?*

25. At this juncture, it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

26. It is not in dispute that Land Parcel Number Dagoretti/Mutuini/309 is registered on the name of Milkah Wangui Wambura (Deceased). The plaintiffs/applicants herein are the legal administrators of the Estate of the late Milkah Wangui Wamburu (Deceased). They were issued with letters of administration on 21<sup>st</sup> September 2012 and confirmed on 26<sup>th</sup> November 2018.

27. It is the plaintiffs'/applicants' case that they are unable to complete subdivision of the suit property, processing of titles and final distribution of the Estate to the beneficiaries in line with the confirmed grant as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have placed cautions on the suit property. They are claiming purchaser's interest.

28. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was)** held that:-

*“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”*

The plaintiffs'/applicants have satisfied the court they are the administrators of the Estate of Milkah Wangui Wambura. That they together with Co beneficiaries are entitled to the said estate. I find that they are entitled to this court's protection.

29. I also find that they (Plaintiffs/applicants) have established a prima facie case with a probability of a success the trial. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the other hand are not beneficiaries of the said Estate. They claim to have purchased a portion of the land belonging to the 1<sup>st</sup> defendant. From the confirmed grant the 1<sup>st</sup> defendant is entitled to Plot No 1597 measuring 0.305 hectares. In my view they ought to wait for the 1<sup>st</sup> defendant to be issued with a title before they pursue their claim against him.

30. I also find that the balance of convenience tilts in favour of the plaintiffs/applicants who are the administrators of the Estate of Milkah Wangui Wambura. I rely on the case of **Paul Gatonga Wanjau vs Gathuthi Tea Factory Co. Ltd & 2 Others [2016] eKLR**.

31. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents caused a caution to be placed against the suit property Dagoretti/Mutuini/309. The same was done illegally as they did not purchase the whole portion of land. **Section 73(1)** of the Land Registration Act provides that:

***“A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar”.***

In the case of **Alice Kariuki vs Telkom Kenya Limited; Land Registrar Nakuru (Intended Defendant/Respondent) [2020] eKLR**, the court stated thus:-

***“The effect of the Court’s ruling was that the court found no basis to encumber the defendant’s title. The plaintiff had sought to have the defendant restrained from alienating, disposing, selling, and/or dealing with the properties in any manner prejudicial to the plaintiff’s interest as purchaser. This plea was refused by the court meaning the court allowed the defendant to deal with its property howsoever it desired.***

***I am persuaded that the plaintiff having failed to obtain an order of injunction from the court and the caution having been registered by the Land Registrar on the strength of the agreement of sale between the plaintiff and the defendant which essentially the court found to have been breached by both parties there can be no basis to sustain the same. The order of the court dismissing the plaintiff’s application for injunction superseded the act of the Land Registrar of registering the caution. In lodging the caution the plaintiff was claiming a purchaser’s interest as he was when he presented the application for injunction before the court. The court made its decision which as per the record was not appealed from and therefore stands. Accordingly, I find this a proper and fitting case for the court to order the withdrawal of the caution registered against the Number Nakuru Municipality Block 6/29.”***

32. I am satisfied that the plaintiffs/applicants herein have made out a good case for the removal of the said caution.

33. In conclusion, I find merit in this application and I grant the orders sought namely:-

***(a) That an order is hereby issued compelling the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to remove the caution registered against Title No Dagoretti/Mutuini/309 and to pave way for registration of new titles and subsequent issuance of the Title to the plaintiffs/beneficial owners.***

***(b) That an order is hereby issued directing that Title Deed emanating from Plot No 1597 excised from Title No Dagoretti/309 belonging to the 1<sup>st</sup> defendant to be deposited in court upon subdivision and processing of Title Deeds pending determination of his dispute with the 2<sup>nd</sup> and 3<sup>rd</sup> defendant and determination of this suit.***

***(c) That Mr. Reuben Ng’ang’a Wambura and Mr. Beshon Muchugia Wambura beneficiaries of the Estate of the Late Milkha Wangui Wambura are allowed to sell their Land parcels No 1598 and 1595 both excised from Dagoretti/Mutuini/309 as per annexed mutation map dated 7<sup>th</sup> January 2019 so as to seek urgent medical attention.***

***(d) That an order is hereby issued restraining the defendants by themselves, agents, servants and/or any other persons claiming through them from interfering with the plaintiff’s ownership and/or usage of Land Title Number Plot Nos 1595, 1596, 1598, 1599 and 1600 excised from Dagoretti/Mutuini/309 pending the hearing and determination of this suit.***

***(e) That the cost of this application be provided for.***

It is so ordered.

Dated, signed and delivered in Nairobi on this 22<sup>nd</sup> day of July 2021.

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Munyasya for the Plaintiff

No appearance for 1<sup>st</sup> – 3<sup>rd</sup> Defendants

Mr. Menge for the 4<sup>th</sup> Defendant

