



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**NAKURU**

**LAND CASE NO. E 41 OF 2021**

**ROSE WANJIRU NDEGWA.....PLAINTIFF**

**VERSUS**

**RACHEL MUTHONI WAMUTTE.....1<sup>ST</sup> DEFENDANT**

**PATRICK WAMUTI WARUI.....2<sup>ND</sup> DEFENDANT**

**TERESIA WANGARI MUNDIA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling on an application for orders of interim injunction dated 21/5/2021. It has been brought by the plaintiff under the provisions of Sections 1A 1B 3A and 63 (e) of the Civil Procedure Rules order 40 rules 1,2,3 and 4 order 20 rules 2, 3 and 4 and order 51 rule 1 of the Civil Procedure Rules.

2. The application seeks an order that the defendants be restrained from howsoever entering trespassing occupying leasing collecting rent charging or carrying on any development or dealing in any with all or any portion of those parcels of land known as **Gaturi Gatimu 1915 Embu, LR No 1317/240 Gilgil Township** and **Gilgil Karunga Block 10 /270** or interfering with the suit land in any manner prejudicial to the interests of the plaintiff pending the hearing and determination of the application and the suit.

3. The application also seeks an order of inhibition inhibiting the registration of any dealing on the register of all the suit parcels pending the hearing and determination of the suit and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants be compelled to render an account for the rent collected from all that parcel of land known as **LR 1317/240 Gilgil Township** since the demise of **Oscar Warui Wamutte**. Costs are also sought.

4. The application is supported by the sworn affidavit of the plaintiff dated 21/5/2021. The grounds upon which the application is brought are that the plaintiff is the administrator of the estate of the deceased Oscar Warui Wamutte; that she is also the beneficial owner of the suit lands; that the deceased Oscar and the defendants and other persons named in the application were the beneficiaries of the estate of the late **Raphael Warui Wamutte** who also was known by several other names. However the defendants obtained and had confirmed a grant of letters of administration to the estate of Raphael and the confirmed grant reflects the deceased Oscar as a beneficiary of the estate of the suit lands; that in 2014 Oscar was issued with a title to **Gilgil Karunga Block 10 /270** and he leased it to two persons and used to receive rent therefrom; that after Oscar died in 2019 the 2<sup>nd</sup> defendant fraudulently had the plot registered in his name which he later transferred to the 3<sup>rd</sup> defendant; that the defendants have been obtaining rent from the premises without obtaining a grant of letters of administration and to the exclusion of the plaintiff and that the 3<sup>rd</sup> defendant now intends to develop **Gilgil Karunga Block 10 /270** and an order of this court is needed to restrain the defendants from their activities.

5. In their two separately sworn replying affidavits dated 22/6/2021 the 1<sup>st</sup> and 2<sup>nd</sup> defendants' response is that the 1<sup>st</sup> defendant is the administrator of the estate of Raphael who was her husband; that the 2<sup>nd</sup> defendant is her son; that the issue raised in the application is *res sub judice* since it has been raised in a similar application dated 9/9/2020 and an interim order of stay of sale of any of the deceased's assets granted in a succession cause, **Nakuru HC Succ Cause No 509 Of 2008**; that they believe the plaintiff is not a widow to the deceased; that there is in any event no proof of marriage between the plaintiff and the late Oscar; that the plaintiff employed fraud in the obtainance of the grant that she holds; that the 1<sup>st</sup> defendant and her late husband bought the suit land and put up a school and allowed a factory to operate therefrom; that all the children did not contribute to the acquisition of the suit properties as they were then minors and in school; that she was deriving income from and managing the school long before the demise of Oscar; that neither Oscar nor the plaintiff derived any income from the properties before his demise; that the lease in respect of one of the properties is only between the deponent and the owner of the school; that the Embu property had been sold by the 1<sup>st</sup> defendant's now deceased husband in his lifetime and had been erroneously included in the succession proceedings; that all her sons transferred their share to the 2<sup>nd</sup> defendant by consent and the 2<sup>nd</sup> defendant sold the same to obtain proceeds which were applied to the rehabilitation of the 1<sup>st</sup> defendant's house and the school which activities have already taken place.

6. The 3<sup>rd</sup> defendant's response is that she is an innocent purchaser for value and that she conducted due diligence and found that the 2<sup>nd</sup> defendant was the registered proprietor of the **Gilgil Karunga Block 10 /270** and she met him and purchased the land vide a sale agreement dated **8/2/2021** and she paid the entire consideration after which the land was transferred to her. She states that the account into which she paid the consideration for the land belongs to the 1<sup>st</sup> defendant.
7. On **27/9/2021** this court gave directions that the parties file submissions within the time frames provided. The plaintiff and the defendants filed submissions on **14/10/2021**.
8. In her submissions the plaintiff sets out the prayers that she seeks in the plaint and restates the facts in the same pleading. As to whether the suit is *sub judice* she states that it is not; she sets out the provisions of section 6 of the civil procedure act and cites the case of **ASL Credit Ltd Vs Abdi Basid Sheikh Ali & Another 2019 eKLR** and **Muhu Holdings Ltd Vs James Muhu Kangari 2017 eKLR** and avers that the rule relating to *sub judice* applies when the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or other court having jurisdiction. The plaintiff avers that that is not the case in the instant suit; she points out that the application dated **9/9/2020** has been brought under **Section 45 and 94 of the Law of Succession Act Section 1A and 1B of the Civil Procedure Act and Order 42 Rule 4 and 5 of the Civil Procedure Rules** and that the application deals with the issue of intermeddling with the estate of the deceased.
9. The plaintiff avers that the application dated **9th of September 2020** relates to all that parcel of land known as **LR 1317/240 Gilgil Township** while the suit herein concerns all those parcels of land known as **LR 330 /1915 and LR 1317/ 240 Gilgil and Gilgil / Karunga Block /10/227** which the plaintiff is claiming to be declared as the beneficial owner of; those orders, she states, cannot be granted in **Nakuru High Court Succession Case Number 549 Of 2008**.
10. She further blames the first and second defendants for not annexing the alleged order issued in the High Court at Nakuru in the succession case they allege stayed the sale of any assets of the deceased; she stated that the issues that the instant suit raises are distinct : the issue of purchase of land in a fraudulent transfer of **Gilgil/Karunga Block 10/270** which property was registered in the name of the late Oscar by the second defendant to the 3<sup>rd</sup> defendant; in contrast, she states, the succession case deals with the division of property of the estate of Raphael and as per the rectified certificate of confirmation of Grant the late Oscar is listed as a beneficiary of all those parcels of land known as **Gaturi/Gatimu/1915, LR 1317/240 and Gilgil /Karunga Block 10 270**.
11. As to whether an inhibition should be placed on the suit parcels of land pending the hearing and final determination of this suit she urges the court to consider **Section 68 of the Land Registration Act** which provides for registration or orders of inhibition which would restrict further dealings or registration of any instruments inconsistent with the inhibition.
12. She further mentions that **paragraph 32 of Gazette notice number 5178 titled Practice Directions On Proceedings In The Environment And Land Courts And On Proceedings Relating To The Environment And The Use And Occupation Of Entitled To Land And Procedures In A Court** encourages the preservation of the suit land; she cites the High Court case of **Japhet Kaimenyi M'Ndatho vs M'Ndatho M'Mbwiria 2012 eKLR** as follows:
- “In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions:-**
- a) **That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservatory orders of inhibition are issued.**
  - b) **That the refusal to grant orders of inhibition would render the applicant's suit nugatory.**
  - c) **That the applicant has arguable case.”**
13. She also cited **Billy Waweru Kamau Vs Joseph Kamau Munjuri 2019 eKLR** and she submits that her statements that her averments that the defendants are intermeddling with the estate of the late Oscar are uncontroverted yet the third defendant intends to develop personal **Gilgil /Karunga Block 10 270** which will occasion the plaintiff loss and damage; she states that this is a proper case in which to grant an order of inhibition.
14. As to whether the plaintiff has made out a case for the grant of a temporary injunction she quotes **Nyanza Fish Processors Ltd Vs Barclays Bank Of Kenya 2016 eKLR** and **Jemutai Tanui Vs Juliana Jeptepkeny and 5 Others 2013 eKLR** and states that she has established a *prima facie* case with high chances of success she has established that she got married to Oscar under kikuyu customary law with whom she had one issue of the marriage; that she has also obtained a grant of letters of administration *ad litem* in **Nakuru Succession Cause E26 Of 2021** in respect of the estate of Oscar the deceased.
15. The Plaintiff also urged that though the first and second defendants have alleged that the grant was unlawfully obtained they have not stated that they have taken any steps to have the sale Grant revoked or annulled; her further argument is that the late Oscar was a beneficiary of the late Raphael's Estate as per the rectified certificate of confirmation of Grant but the circumstances under which **Gilgil /Karunga Block 10 270** was transferred to the second defendant after the death of Oscar has not been explained.
16. She hit out at the 1<sup>st</sup> defendant's apparent belief that she has a life interest in all the properties of the Raphael despite the existence of a grant of letters of administration conferring title to some of the properties to other beneficiaries of the late Raphael's estate.
17. The plaintiff's further submission is that though the 1<sup>st</sup> and 2<sup>nd</sup> defendant's allegation is that the property known as **Gaturi/Gathimu/ 1915** was disposed of by the late Oscar in **2010** and that it was a mistake to include it in the succession case, the purported sale agreement

shows that Oscar was the beneficial owner of the property and she thus questions why the first and second defendant did not indicate in the certificate of confirmation of Grant issued in 2016 that one Bonaza Holdings Limited was the beneficiary of the said land. She terms the said agreement as suspect; she points out that the first defendant has admitted that she is collecting rent from some of the properties while she has failed to exhibit any lease she purportedly entered into with Tritops Investments Ltd and urges that the 1<sup>st</sup> defendant does not have any legal basis for collecting the rent.

18. As to whether the plaintiff would suffer irreparable loss which cannot be compensated for by way of damages in the orders of injunction were not granted she points out that the late Raphael had leased part of **LR Number 1317/240 Gilgil** to Tritops Investments Ltd and was collecting rent from the suit premises and that the defendants have been collecting rent from the same premises without accounting for it and to her exclusion and without prior obtainance of a grant of letters of administration.

19. She is apprehensive that the properties will be wasted leading to the need to restore them at a great cost. She also urged that the balance of convenience tilts in favour of the plaintiff and cited the case of **Jackton Nzioka Muyanga Vs Sitola Kinyili 2015 eKLR**. She also cited the case of **Nguruman Ltd Vs Jan Bonde Nielsen & 2 Others 2014 eKLR**. In her view the costs of the application should be borne by the defendants who in her view precipitated these proceedings by their conduct.

20. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' brief submissions cite **Giella vs Cassman Brown 1973 EA 358** and **Nguruman Ltd Vs Jan Bonde Nielsen & 2 Others 2014 eKLR** state that the applicant has failed to satisfy the three conditions for the grant of an interim injunction set down in the case of Giella. They state that the plaintiff's claim is predicated on the allegation that she is the administrator of the estate of the late Oscar Warui Wamutte and beneficial owner of all of the suit properties while the response is that she is not the widow of the late Oscar as she had allegedly never been married to him. It is alleged that the grant that she holds to the estate of the late Oscar was obtained through fraud and concealment of material facts. It is claimed that the affidavit of marriage that the plaintiff has exhibited is not evidence of a Kikuyu Customary marriage. It is urged that the applicant has not demonstrated that she stands to suffer any injury that cannot be compensated for by way of damages perchance the orders sought are not granted. Finally, it is stated that the applicant has not denied that she has filed a similar application for injunction in **Nakuru HC Succession Case No 509 of 2008** and that an interim order of stay of sale of any assets of the deceased herein was granted on 22/9/2020.

21. The issues for determination in the instant application are as follows:

- a. *Whether this suit and application are sub judice;*
- b. *Whether the interim injunction order sought is available to the plaintiff;*
- c. *Who should bear the costs of the application?*

The issues are dealt with as herein below.

22. I will start with and dispose of the allegation that the plaintiff applicant has filed a similar application for injunction in **Nakuru HC Succession Case No 509 Of 2008** and that an interim order of stay of sale of any assets of the deceased herein was granted on 22/9/2020 and whether if that order was issued as claimed by the defendant, this court is debarred from issuing any order of injunction in respect of the instant application.

23. In this regard I must concur with the principle in evidence that "*he who alleges proves.*" I have not seen any evidence of any order such as is mentioned by the defendants.

24. The second issue is whether the instant suit is *sub judice*. The plaintiff's response is that it is not *sub judice* since the issue in the succession cause is the distribution of the estate of the late Raphael Wamutte while the instant suit regards the title to the properties. I see a distinguishing feature here. I agree with the plaintiff that the deceased Oscar having been named as a beneficiary and one of the titles having been issued in his favour which was transferred to the 2<sup>nd</sup> plaintiff's name, the suit herein is not *sub judice*.

25. The defendants aver that an order of stay exists. They did not exhibit any evidence of such order. Perchance that alleged order exists, I will expressly state here that I think the fact that the suit relates to *title to land* and also that that title emanates from *already concluded succession proceedings* renders it possible for this court to deal with the instant application regardless of that order. However, the defendants having failed to present evidence to support their allegation with regard to the existence of another order allegedly issued in the succession court, I must disregard the allegation and proceed to consider the instant application on its merits.

26. As to the issue of whether the plaintiff has established that she has a *prima facie* case with probability of success the facts revealed by both parties must be considered. I must however consider them with caution as stated in the case of **Jan Bonde Nielsen (supra)** that "*in considering whether or not a prima facie case has been established, the court does not hold a mini-trial and must not examine the merits of the case closely.*"

27. I have considered the matters raised by the parties at length and I have taken time to put forth the parties' respective arguments in support of and in opposition to the motion before me and I have found that the plaintiff has established a *prima facie* case with a probability of success.

28. Having found that there is a *prima facie* case I must now consider the aspect of whether the plaintiff stands to suffer loss that cannot be compensated for by way of damages if the orders sought are not granted. In this court's view the salient features that would normally indicate impossibility of recompense by way of damages are absent in this matter. The plaintiff does not claim that she resides on the land or that there is any sentimental attachment thereto. I am not convinced that the plaintiff would suffer any loss that cannot be compensated for by

way of damages in the present matter, it being about the entitlement to certain lands and rental income. However even though the plaintiff has not established that she would suffer loss that cannot be compensated for in monetary terms if the orders sought are not granted, in my view the balance of convenience in the instant suit tilts in favour of taking the necessary measures to preserve the suit land.

29. The last issue to consider is whether this court should order the 1<sup>st</sup> and 2<sup>nd</sup> defendants to render an account for the rent collected from **LR No 1317 /240 Gilgil** since the demise of the late Oscar Warui. In this court's view that should be within the ability of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to do since they are in control of the suit land. It is of course the case that this prayer is premised on the fact that the plaintiff's statement in the plaint that the late Oscar was named as a beneficiary of **LR No 1317 /240 Gilgil** in the rectified certificate of confirmation of grant. However, I have observed that it is not safe to rely on the face value of the rectified grant at the moment and I do not need to go into the reasons so not to prejudice the hearing of the main suit herein. The conclusion I arrive at from a perusal of the record so far available before me is that it is not proper to grant that prayer for now.

30. Finally, I must consider the entire application in the light of several revelations from the defence. The 1<sup>st</sup> defendant states in her replying affidavit that she and her late husband developed the school and their son Oscar Warui never participated as he was a minor and in school. Secondly, she states that the succession proceedings were conducted with the understanding of all parties that she would have a life interest in all the properties acquired by her and her late husband, and that she used to derive income from the property before the demise of Oscar. I do not have any evidence so far from the plaintiff that the deceased Oscar used to receive rental income from the property and the order sought restraining the collection of rents is unmerited at the present stage of these proceedings.

31. Lastly the defence avers that the 2<sup>nd</sup> defendant has a dwelling house located on **LR No 1317/240 Gilgil** which house was built before the subdivision of the larger portion of land. In the light of the revelations as to a dwelling house and the need to collect rental income and related activities it is this court's opinion that the orders generally preventing ingress and egress into the suit land must be circumspectly considered. In this court's view, those orders should not issue in this case at this point.

32. Therefore, the only order that the court is likely to consider in pursuance of preserving the suit property is an order restraining the disposal thereof.

33. This is quite an early stage in this suit. The costs of the application should be in the cause.

34. Consequently, I hereby find in favour of the applicant in respect of the application dated 21/5/2021 and I order as follows:

**a. An order of temporary injunction is hereby issued restraining the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants from disposing of all those parcels of land known as LR No Gatari Gatimu /1915 and LR 1317/ 240 Gilgil Township and Gilgil/Karunga Block /10/270 pending the hearing and determination of this suit.**

**b. An order of inhibition is hereby issued inhibiting the registration of any dealings on the register of all those parcels of land known as LR No Gatari Gatimu /1915 and LR 1317/ 240 Gilgil Township and Gilgil/Karunga Block 10/270 pending the hearing and determination of this suit.**

**c. The costs of the instant application shall be in the cause.**

It is so ordered.

**Dated, Signed and Delivered at Nakuru via electronic mail on this 28<sup>th</sup> day of October, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU.**