



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. E015 OF 2021

ESTHER MUTHONI MWANGI.....PLAINTIFF/APPLICANT

VERSUS

SAMUEL MAINA NJARIA.....DEFENDANT/RESPONDENT

RULING

By a Notice of Motion Application dated **2nd of June 2021**, the Plaintiff/Applicant has sought for orders that;

1. Spent

2. Spent

3. That this Honourable Court be pleased to issue a temporary injunction restraining the Respondent herein Samuel Maina Njaria either by himself, agents, or servants and anybody howsoever claiming through him from entering, encroaching into, wasting, damaging, disposing, cutting down any trees and /or in any manner committing acts of waste and/or intermeddling with the land known as LR LOC NO. 19/GACHARAGEINI/2994 until this case is heard and determined or until further orders.

4. That the cost of this Application be provided for.

The Application is premised on the grounds stated on the face of the Application and on the Supporting Affidavit of **Esther Muthoni Mwangi**, who averred; that she is a **Co-administrator** of the estate of the late **Arthur Ikua Gioche**, having been issued with letters of administration jointly with **John Gathaiya Gichoe**, vide **Nairobi High Court Succession Cause No. 1713 of 2006**, which cause was transferred to **Murang'a High Court** being **Succession Cause No. 736 of 2013**. That the said **Succession Cause** is on ongoing at **Murang'a High Court** where the subject land parcel forms part of the deceased's estate and the grant is yet to be confirmed. That the Defendant/Respondent has encroached unto the suit land and has started felling trees and wasting the said parcel of land and unless he is stopped, the Plaintiff/Applicant stand to suffer irreparable damage. That the actions of the Defendant/Respondent amount to intermeddling, which is a criminal offence punishable by law. That only an order of this Court shall stop the Defendant/Respondent from encroaching onto, wasting, damaging or otherwise intermeddling with the subject property.

The Application is opposed through **Grounds of Opposition** dated the **14th June 2021**. The Defendant/Respondent avers that the application dated **2nd June 2021**, is frivolous, vexatious, scandalous and an abuse of the court process. That the said application is riddled with material non-disclosure and deliberate misrepresentation.

That **John R. Gathaiya Gioche Macharia**, owns **9.827 Ha** of all that land known as **L.R. No. Loc. 19/GACHARAGEINI/2994**. That the Estate of the late **Arthur Ikua Gioche** owns **2.423 Ha**, of the suit property, which is before **Murang'a High Court** in **Succession Cause No. 736 of 2013** and that the said estate does not own the entire suit property. That the Plaintiff/Applicant is merely a co administrator with **John R. Gathaiya Gioche**, with respect to the said estate of the late **Arthur Ikua Gioche**, and any purported right claimed by the Plaintiff/Applicant does not extend beyond the portion of the suit property measuring **2.423 Ha**. That **John R. Gathaiya Gioche**, sold his portion of the suit property measuring **15 acres** or there about to the Defendant/Respondent herein and the Defendant/Respondent is rightly in possession of the same. The Defendant/Respondent also filed a Replying Affidavit sworn by **Samuel Maina Njaria** on **2nd June 2021**.

The Application was canvassed by way of written submissions. The Plaintiff/Applicant filed her written submissions dated **12th November 2021**, through the **Law Firm of Mwaniki Warima & Co. Advocates**. She submitted that the principles for grant of a temporary injunction are set out in the case of **Giella vs. Casman Brown (1973) EA 358**.

That Application is grounded on the Grant issued jointly to one **John Gathaiya Gioche** and the Plaintiff/Applicant. That the

Defendant/Respondent encroached on the Applicant's portion of land and started felling trees and the injunction sought is to restrain the said Defendant/Respondent from further encroachment and wastage of the Applicant's property. That the Applicant has satisfied all the principles necessary for grant of a temporary injunction. In support of her case, she relied on the case of **Pius Kipchirchir Kogo vs. Frank Kemeli Tenai (2018) eKLR** and the case of **Nguruman Ltd vs. Jan Bonde Nielsen CA 77 of 2012**.

The Respondent filed his written submissions dated **13th November 2021**, through the **Law Firm of M.M. Gitonga Advocates LLP** on **26th November 2021**, and submitted that the Plaintiff/Applicant had failed to establish a **prima facie case** as she had not proved any right legal or equitable, which requires protection by injunction and has not made full disclosure of all the relevant facts for a just determination of the instant application. That the suit property is registered in the name of **John R. Gataiya Gioche** on one part and **John R. Gataiya Gioche** and **Esther Muthoni Mwangi** (the Applicant herein) in their capacity as

Co-administrators of the estate of the **Late Arthur Ikua Gioche** on the other hand, and an Order of injunction cannot issue to the suit property as the estate of the **Late Arthur Ikua Gioche** owns only a portion of it. That the trees the Plaintiff/Applicant alludes to, are on the Defendant's/Respondent's portion of the suit property and therefore the allegations of intermeddling cannot pass.

The Defendant/Respondent submitted further that the Plaintiff/Applicant had failed to establish irreparable loss that she will suffer if the Orders sought herein are not granted. That the Respondent had deliberately, refused, failed and or neglected to disclose that she is suing her Co-Administrator in the estate of the **Late Arthur Ikua Gioche**. That the Respondent has been duly authorized to cut trees by **John R. Gathaiya Gioche**, on his portion of the suit property. That the Applicant lacks the **locus standi** to institute the instant case with regards to the estate of the deceased person as **locus standi** is derived from the grant of letters of administration of the estate.

The Defendant/Respondent relied on a litany of cases in support of his case including: **Giella vs. Casman Brown (1973) EA 358**, **Mbuthia vs. Jimba Credit Corporation Ltd.**, **American Cynamid vs. Ethicom Limited**, **Moses C. Muhia Njoroge & 2 others vs. Jane W. Lesaloi and 5 others**, and **Republic vs. Nairobi City Council and 3 others Ex parte Christine Wangari Gachege suing on behalf of the Estate of Rahab Wanjiru Evans (2014)** among others.

The Court has considered the instant application, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issues for determination are; -

- a. **Whether the applicant has locus standi to institute this Application.**
- b. **Whether the Application meets the threshold for grant of an injunction.**
- c. **Who shall bear costs of this application?**

I. Whether the Plaintiff/Applicant has locus standi to institute this Application.

In the case of **Law Society of Kenya Vs. Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, the Court held that;-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.

Further in the case of **Alfred Njau and Others .Vs. City Council of Nairobi (1982) KAR 229**, the Court also held that;-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

It is evident that **locus standi** is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore, if a party is found to have **no locus standi**, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has **no locus standi**, then the Applicant cannot be heard and that point alone may dispose of the suit.

Upon perusal of the records, it is evident that this Court has already pronounced itself on the issue of the locus standi of the Plaintiff/Applicant in its ruling delivered on **29th July 2021**. The Court is therefore *functus officio* on that issue

II. Whether the Application meets the threshold for grant of an injunction.

The application herein is anchored under **Order 40 Rule 1(a)** of the **Civil Procedure Rules** which provides: -

“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) the Defendant threatens or intends to remove or dispose of his property in the 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.”

Further, the application is premised under **Sections 1A, 1B and 3A** of the **Civil Procedure Act** which Sections empower the court to facilitate the overriding objective of the Civil Procedure Act which is to ensure just, expeditious and proportionate determination of the matters before the court.

Further, the court is called upon under Section 3A to make or issue such orders that are necessary for end of justice to be done and also to prevent abuse of the court process

The law on granting of interlocutory injunction is set out under **Order 40(1) (a) and (b)** of the **Civil Procedure Rules 2010** as stated above.

Further, the conditions for consideration in granting an injunction are now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the Court expressed itself on the condition's that a party must satisfy it to grant an interlocutory injunction:

"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."

Further in the case **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR**, it captured the principles in **Giella vs Cassman Brown** as follows:

"i) Is there a serious issue to be tried?;

ii) Will the applicant suffer irreparable harm if the injunction is not granted?

iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")"

The test for granting of an interlocutory injunction was also considered in the **American Cyanamid Co. vs Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance namely:

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

Order 40 Rule 1 of the **Civil Procedure Rules** requires a proof that any property in dispute in a suit is in a danger of being **wasted, damaged** or **alienated** by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property. The Court in such situation is enjoined to grant a temporary injunction to restrain such acts.

In the instant Application, the Plaintiff/Applicant is seeking for an injunctive orders against the Defendant/Respondent in all that land parcel known as **L.R. No. Loc. 19/GACHARAGEINI/2994**. The applicant alleges that the said land belonged to the estate of the late **Arthur Ikua Gioche**, for which she was a duly appointed administrator, together with **John Gathaiya Gioche**. In granting the sought orders, the Court has to satisfy itself that the Applicant has a **prima facie case** with a **probability of success** and if the orders are not granted, as sought, the Applicant will suffer irreparable damage which cannot be compensated by way of damages.

A prima facie case was defined in **Mrao Ltd vs First American Bank of Kenya and 2 others, (2003) KLR 125** which was cited with approval in **Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR**, where the Court of Appeal defined a prima facie case as:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later"

The Court notes from the pleadings and the submissions of the parties that the suit land is owned by **John Gathaiya Gioche** on the one hand and the **Applicant** together with **John Gathaiya Gioche** on the other hand in their capacity as duly appointed administrators for the estate of the late **Arthur Ikua Gioche**.

The Respondent has alleged that the trees he was felling were on the piece of land owned independently by **John Gathaiya Gioche** and the said allegation has not been rebutted either verbally or with evidence by the Applicant. Further, the court notes that save for the photographs, the Plaintiff/Applicant has not placed before the Court any other evidence to show that indeed the Respondent herein was encroaching on the portion of the suit land owned by the estate of the Late **Arthur Ikua Gioche**.

The burden of proofing a prima facie case lies with the Applicant and it is only after that burden has been satisfied that the said burden shifts

to the Respondent. In the case of **Winfred Nyawira Maina vs. Peterson Onyiego Gichana, (2015) eKLR**, the Court held as follows:

"I am concerned mostly with the evidential burden which initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence... Therefore, the Applicant must first lay prima facie evidence against the Respondent if evidential burden is to be created on the soulders of the Respondent. "

The Court finds that the Plaintiff/Applicant bears the legal burden of proofing a prima facies case which she has not satisfactory established that there exist a prima facie case with a chance of success. The Respondent has rebutted the existence of a prima facie case by presenting before this Court material information which the Plaintiff/Applicant failed to present. In the case of **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another, (1990) eKLR** the court held as follows on what a party seeking an injunction must demonstrate:

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

It is clear from the above that full and frank disclosure is an important aspect for establishing a prima facie case and success in an application for injunction. The Applicant crippled her application with material **non-disclosure** and has therefore failed to establish a prima facie case to warrant grant of a temporary injunction.

Further, the **John Gathaiya Gioche** has a right to property guaranteed under **Article 40** of the Constitution of Kenya 2010. Article 40(3) further provides an exception to the right to own and acquire property outlined in Section 40 (1) of the Constitution. It states.

"State shall not deprive a person of property of any description or of any interest in or right over property of any description, unless the deprivation;

(a) Results from an acquisition of land or an interest on land or conversion of an interest in land or title to land in accordance with chapter five or;

(b) Is for a public purpose or in the public interest and is carried out in accordance with this constitution and any act of parliament that:-

(i) requires prompt payment in full, of just compensation to [he person, and

(ii) allow any person who has an interest over that property a right of access to a court of land."

The right of the above mentioned **John Gathaiya Gioche** includes, but is not limited to allowing the Respondent herein to use the same and this Court shall refrain from limiting that right unless it is proven that the Respondent or **John Gathaiya Gichoe** is encroaching on the portion of the suit property belonging to the Estate of **Arthur Ikuu Gioche**, which the Applicant has failed to do.

Having found that the Plaintiff/Applicant has not proven the existence of a prima facie case against the Defendant/Respondent, the other two requirements necessary for grant of a temporary injunction automatically fail.

The upshot of the foregoing is that the Plaintiff/Applicant has failed to satisfy the necessary ingredients for grant of a temporary injunction. The application dated **2nd June, 2021** is therefore found not merited.

III. Who shall bear costs of this application?

The Courts have discretion to grant costs, and it is trite that costs usually follow the events unless special circumstances present themselves. In the instant case, the Court finds no special circumstances and the Defendant/Respondent being the successful party is entitled to the costs of the application.

Having carefully read and considered the **Notice of Motion application** dated **2nd June 2021**, the Affidavits, the annexures, thereto, the written submissions and the relevant provisions of law, the Court finds and holds that the Plaintiff/Applicant has failed to establish the existence of all the ingredients necessary for grant of a temporary injunction.

Consequently, the said Application is found **not merited** and the same is dismissed entirely with costs to the Defendant/Respondent

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 16TH DAY OF DECEMBER, 2021.

L. GACHERU

JUDGE

In the presence of;

Kuiyaki & Alex Mugo - Court Assistant

M/s Waititu HB for Mwaniki for the Plaintiff/Applicant

N/A for the Defendant/Respondent

L. GACHERU

JUDGE