



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 21 OF 2018

TABITHA NJERI CHERERE (Suing as the Administrator of the Estate of

JOHN CHERERE MWANGI (Deceased).....APPLICANT

VERSUS

GICHUHI GITHUMBI (Sued as the Legal Representative

of the Estate of KITHUMBI GICHUHI (Deceased).....1ST RESPONDENT

PATRICK CHARAI GICHUHI.....2ND RESPONDENT

JOSEPH GITARI EZEKIEL.....3RD RESPONDENT

RULING

The Applicant, TABITHA NJERI CHERERE filed a Notice of Motion dated 28th August 2018 under Section **1A & 1B CPA and Order 40 Rule 1 & 2 CPR**. The applicant is seeking an equitable remedy of injunction restraining the defendants/respondents from erecting illegal structures, committing acts of waste, alienating, selling and/or transferring land parcel No. MWERUA/KAGIO/2732 pending the hearing of this suit. The first prayer was declined when the application was placed before the duty Judge under certificate of urgency. The application is supported by an affidavit sworn by the applicant in which she stated that her claim is based on grounds that the 3rd defendant's title to the suit land is not clean or proper. She narrated how the original title to the suit land being MWERUA/KAGIO/646 had been acquired by the defunct Kirinyaga County Council whereby the initial owner of the said land was compensated with another land being KIRINYAGA/MARURUMO/234. The applicant further deponed that after acquiring the said land, the County Council of Kirinyaga partitioned the same into plots which was allocated to developers including her late husband who was allocated Plot No. MWERUA/KAGIO/630/179. Upon allocation, they were issued with allotment letters, rates clearance certificate and lease approval. The applicant further stated that despite following these requirements, the defunct County Council failed to register the leasehold on the register of land parcel Number MWERUA/KAGIO/646 the result of which the said land was partitioned giving rise to parcel numbers 2636, 2637 and 2638. Thereafter, parcel No. 2637 was sub-divided and one of the resultant numbers is parcel No. 2732 which is the subject of this application. The applicant contends that the portion on which Plot No. MWERUA/KAGIO/630 /179 is situate is the current parcel No. MWERUA/KAGIO/2732. She deponed that the respondents have now began putting up illegal structures on the disputed parcel of land during the pendency of this case. She also deponed that she has reliably learnt that the respondents especially the 3rd defendant is in the process of selling and/or transferring the suit property to third parties in order to defeat justice.

In response, the 3rd respondent filed a replying affidavit opposing the said application sworn on 29th January 2019. According to him, he was sold the suit land No. MWERUA/KAGIO/2732 way back in 2013 by one PATRICK CHARAI GICHUHI being his share of inheritance from his father Kithumbi Gichuhi who was the first registered proprietor of land parcel No. MWERUA/KAGIO/646 from which the suit land was excised. The 3rd respondent deponed that the applicant has not demonstrated a prima facie case with a high probability of success or shown that she will suffer irreparable loss unless the same are granted.

I have considered the affidavit evidence in support and in opposition to the application. I have also considered the submissions by the applicant and the rival submissions by the respondents. The main issue which presents itself in this application for determination is whether the applicant deserves the injunctive orders sought against the respondents. The principles for the grant of injunctive orders was aptly dealt with at length in the celebrated case of **Giella Vs Cassman Brown Co. Ltd (1973) E.A 358**. In that case, the Court set out the three conditions to be met as follows:

(1) The applicant must establish a prima facie case with probability of success.

(2)The applicant must show that he will suffer irreparable loss which cannot be compensated by an award of damages; and

(3) Where the Court is in doubt, the case to be determined on a balance of convenience.

From my view point, both the applicant and the respondent have presented strong arguments in support of their respective positions. The 3rd respondent has a title to the suit property in his possession which the applicant is challenging on grounds of fraud. It is clear from the affidavit evidence and the annexures that the defendant is the proprietor of the suit property which the applicant is also laying claim and is challenging the acquisition of the title on grounds of fraud. On the basis of those two competing interests, it would be in the interest of justice that the subject of the suit is not defeated pending the hearing and determination of the main suit. The nature of the issues in this application goes beyond the *Giella* case (supra) and calls upon this Court to go beyond the principles in *Giella* case and ensure the subject of this suit is preserved.

I therefore apply the *doctrine of Lis Pendens* so as to restrict the respondents from disposing or otherwise dealing in the suit property until the suit is heard and determined. In the case of *Bellamy Vs Sabine (1857) 1 De 566 Turner L. J.* while addressing the purpose of the principle of *Lis Pendens* held as follows:

“It is a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings denovo, subject again to defeat by the same course of proceedings”.

Again in *Mahoji Vs International University & another (1976) K.L.R 185 Madan J.A* (as he then was) stated:

“The doctrine of lis pendens under Section 52 of CPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the Court. The doctrine of lis pendens is necessary for final adjudication of the matter before the Court and in the general interests of public policy and good effective administration of justice. It therefore overrides Section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other”.

I agree with the decision of the learned Judge. In the upshot, I find the application merited and the same is allowed in terms of prayer 3 thereof. The costs of this application shall be costs in the cause.

READ and DELIVERED in open Court at Keruogya this 5th day of July, 2019.

E.C. CHERONO

ELC JUDGE

5TH JULY, 2019

In the presence of:

1. M/S Mohindi holding brief for I.W. Muchiri for the 3rd Defendant
2. Plaintiff/Advocate – absent
3. Mbogo – Court clerk – present