



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 64 OF 2019**

**MARY WANJIKU MANGARA**

**ESTHER WANJIKU MUHIU**

**WANJIKU KIMANI RUO (suing on their own behalf as well as trustees and officials of Nyakiambi Women Group) .....PLAINTIFFS**

**VERSUS**

**1. LONARD WAWERU GICHUHI**

**2. MARY WANJIKU GICHUHI**

**3. ESTHER WANGARI THUITA**

**4. JANE GITUKU**

**5. EDWARD RUIRU MAINA**

**6. MOSES MBUTHIA KARIUKI (Sued as the administrators of the estate of**

**John Gichuhi Mutego (Deceased)) .....DEFENDANTS**

**RULING**

1. By Notice of Motion dated 23<sup>rd</sup> July 2019, the plaintiffs seek the following orders:

1. ...

2. ...

3. *The defendants by themselves, servants and or agents be restrained from entering into, sub-dividing, constructing roads or any other development, offering for sale, charge or in any other manner interfering with the plaintiffs' possession, use and title of all that parcel of land known as L.R. NO. 1024 Mirera Suswa Southern Naivasha Municipality pending hearing and determination of this suit.*

4. *County Commissioner, Naivasha sub-county do ensure compliance with the orders herein to avoid possible violence and breach of peace.*

5. *Costs of this application be provided for.*

2. The application is supported by an affidavit sworn by James M. Njonge who stated that he is the chairman of Nyakiambi Women Self Help Group. He deposed that on 21<sup>st</sup> June 2019, the defendants took surveyors and workers in bulldozers and earth movers to the parcel of land known as L.R. NO. 1024 Mirera Suswa Southern Naivasha Municipality (the suit property) who started subdividing the land, erecting beacons and constructing roads on it. He added that the defendants' actions caused tension since members of the plaintiff had been shown their individual parcels of land carved out of the suit property which they had bought way back in the year 1986. He further stated that they have filed this suit following a ruling delivered on 12<sup>th</sup> June 2019 in **Nakuru HC Succession Cause No. 403 of 2009** pursuant to which the

High Court ordered them to pursue a remedy in respect of the suit property in this court. He added that the succession cause is still pending and that they had sued the original owner of the suit property in **Nakuru High Court Civil Case No. 113 of 1997 (O.S)** and that said owner admitted in a consent dated 12<sup>th</sup> October 1999 that he had received the full purchase price from the plaintiffs. He therefore urged the court to grant the orders sought so as to preserve the suit property.

3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants indicated through counsel on record for them that they do not oppose the application so long as no injunctive orders are issued against them. The applicants withdrew the application as against the 6<sup>th</sup> defendant.

4. The 4<sup>th</sup> and 5<sup>th</sup> defendants opposed the application through a replying affidavit sworn by the 5<sup>th</sup> defendant. He deposed that he does not know the applicants or the other respondents in this case and that he is not an administrator, a beneficiary or a dependant of the estate of John Gichuhi Mutego (deceased). He added that he is not a party to **Nakuru HC Succession Cause No. 403 of 2009** or **Nakuru High Court Civil Case No. 113 of 1997 (O.S)** and that he has never interfered with the suit property and does not know where it is located. He further stated that he does not have any claim over the suit property and that he did not construct any road on it or subdivide it or take any surveyors to it. He therefore urged the court to dismiss the application against him and the 4<sup>th</sup> defendant.

5. The application was canvassed through oral arguments. Counsel for the applicants argued that the applicants had raised specific complaints regarding interference with the suit property by the 4<sup>th</sup> and 5<sup>th</sup> defendants yet the said defendants did not offer any specific denial. He added that there is no reason why the applicants would just pick on the defendants and sue them. On his part, counsel for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants argued that the said defendants are in occupation of the suit property and that an injunction against them would amount to an eviction. In his submissions the 5<sup>th</sup> defendant argued that James N. Njonge the deponent of the supporting affidavit had not exhibited any authority to swear the affidavit on behalf of the applicants or any evidence of being a member of Nyakiambi Women Group which is a women's group. He added that the applicants had failed to establish any case against him and urged the court to dismiss the application. The 4<sup>th</sup> defendant adopted and relied on 5<sup>th</sup> defendant's submissions.

6. I have considered the application, the affidavits and the submissions. The principles applicable are that an applicant seeking an interlocutory injunction must satisfy the test in **Giella -vs- Cassman Brown & Co. Ltd [1973] E.A 358**. The applicants herein must thus establish a *prima facie* case with a probability of success. Even if they establish a *prima facie* case, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants must surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

7. Since the application was withdrawn as against the 6<sup>th</sup> defendant and further considering that the applicants' counsel only argued for issuance of the orders against the 4<sup>th</sup> and 5<sup>th</sup> defendants, I take it that the applicants equally no longer pursue any orders against the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants. In effect therefore, the application is only against the 4<sup>th</sup> and 5<sup>th</sup> defendants.

8. Have the applicants established a *prima facie* case? The Court of Appeal explained what is entailed in establishing a *prima facie* case in **Nguruman Limited v Jan Bonde Nielsen & 2 Others** (supra) as follows:

*The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate 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. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.*

9. The applicants have alleged that on 21<sup>st</sup> June 2019, the defendants took surveyors and workers in bulldozers and earth movers to the suit property who started subdividing the land, erecting beacons and constructing roads on it. To buttress their claims, they have annexed some photographs. A perusal of the plaint shows that the applicants also claim that they bought the suit property from John Gichuhi Mutego (deceased) in 1986 and that they therefore own it. The 4<sup>th</sup> and 5<sup>th</sup> defendants have strenuously denied the allegations. The photographs exhibited by the applicants only show a grader and land which appears to have been graded. There is nothing to show that the grading was done by the 4<sup>th</sup> and 5<sup>th</sup> defendants. Equally, there is nothing to show any subdivision or erection of beacons on the suit property. Even assuming that there was such evidence, the applicants would need to demonstrate that such actions were undertaken by the 4<sup>th</sup> and 5<sup>th</sup> defendants.

10. Since they bear the burden of proving a *prima facie* case, the applicants have a duty to show a clear and unmistakable right to be protected and evidence that the 4<sup>th</sup> and 5<sup>th</sup> defendants have directly, materially and substantially threatened that right. It is not enough for the applicants to make general allegations then expect the 4<sup>th</sup> and 5<sup>th</sup> defendants to answer with specific and detailed denials. The applicants have failed to discharge the burden of proof cast on them. They have not demonstrated a *prima facie* case. That being so, I need not enquire into the other limbs of the test in *Giella*. Notice of Motion dated 23<sup>rd</sup> July 2019 is dismissed with costs to the 4<sup>th</sup> and 5<sup>th</sup> defendants.

11. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 30<sup>th</sup> day of April 2020.**

**D. O. OHUNGO**

**JUDGE**