



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CIVIL SUIT NO. 1186 OF 2013

JANE WANJIKU NYOIKE.....PLAINTIFF/APPLICANT

VERSUS

JOTHAM KIRINGA GICHERU

EDWARD MUONI GICHARU (being the legal representatives of the
estate of GICHARU WAINAINA).....DEFENDANTS

RULING

The Notice of Motion before the court for determination is dated 2nd October 2013 and is brought by the Plaintiff under sections 1A, 13, 3A and 63(e) of the Civil Procedure Act, Order 40 Rules 1, 4 and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff is seeking a temporary injunction to restrain the Defendants either by themselves, their agents, servants, employees or persons acting under their instructions from encroaching, constructing, developing, interfering, alienating and/or tampering with or in any way dealing with the suit land known as **LOC 5/Gitura/1155** severed from **LOC 5/Gitura/293** (herein after referred to as the suit property) pending the hearing and determination of this suit.

The application is supported by the Plaintiff's affidavit sworn on 2nd October 2013. The Plaintiff contends that the Defendants were the legal representatives of the estate of **Gicharu Wainaina** who was a step brother to her late husband, **Nyoike Wainaina**. The Plaintiff avers that her father in law **Wainaina Kamau** (deceased) owned land parcels number **LOC/Gitura/293** and **LOC/Gitura/438** and had two wives, with her husband being from the 2nd house and the Defendants being from the 1st house.

The Plaintiff avers that upon the death of Wainaina Kamau, the late Gicharu Wainaina filed Murang'a Senior Principal Magistrate **Succession Cause no. 106 of 1995** and she exhibited a certificate of confirmation of grant dated 13th November 2000. The Plaintiff states that 3.1 acres of **LOC/Gitura/293** were jointly allocated to her, her step-brother and sister in law and that subsequently, the said parcel was subdivided into the suit property and **LOC 5/Gitura/1156**. The Plaintiff's case is that Gicharu Wainaina allocated himself the entire parcels suit property measuring 3.1 acres which he later disposed off to an unknown purchaser besides having also taken up **LOC 5/Gitura/438** which belonged to her father in law.

While stating that that parcels no. **LOC 5/Gitura/438** belonged to her father in law who had in his lifetime expressed that it belonged to her late husband and his brother **Mburu Wainaina**, the Plaintiff avers that **Gicharu Wainaina** caused the registration of the land in his name without her father in law's

knowledge. According to the Plaintiff, the sons of **Gicharu Wainaina** have been disposing off the suit property despite her lodging several cautions and that in **Nairobi JR case 24 of 2010**, the court found that there was need to investigate how title to the suit property was issued. The Plaintiff contends that to avoid any further alienation of the suit property and parcel no. **Loc 5/ Gitura/438**, there is need to issue a preservative order to restrain any dealings pending the hearing of this suit.

Through a supplementary affidavit sworn on 16th February 2014, the Plaintiff avers that the issue in dispute is on the allocation of the deceased's land as during **Succession Cause no. 106 of 1995**, the Respondents' father stated that he had been allocated 3 acres and that he had also bought 0.9 acres from **Nganga Chihhi**. The Plaintiff contends that **LOC 5/Gitura/438** solely belonged to her deceased father in law and further, that the Respondents father lacked claim to land parcel no. **LOC 5/Gitura/293**.

It is the Plaintiff's averment that the Court ought to be called upon to interrogate how title to the said parcels were passed since all dispositions ought to be compliant with the law, principles of equity and due regard paid to other beneficiaries and existing customary trust. The Plaintiff contends that interrogation of the title is within the purview of the Court which has wide and unfettered jurisdiction under section 12 of the Environment and Land Court Act.

The Plaintiff avers that she buried her 2 children and husband on land parcel **LOC 5/Gitura/293** before the subdivision, and further contends that after subdivision, she buried more kin on burial sites which were informed by the Respondents' father who did not raise any claim to the said land. The Plaintiff further contends that misjoinder or non joinder of a party is not fatal to a case as the court can direct the joinder of a party if it finds just and would assist in its decision making.

The Defendants opposed the application through a replying affidavit sworn by the 2nd Defendant on 16th January 2014. The Defendants state that land parcel **LOC 5/Gitura/293** was initially registered in the name of **Wainaina Kamau**, their grandfather, who died in 1968. They state that his estate was the subject matter in Murang'a Senior Principal Magistrate **Succession Cause no. 106 of 1995** where the court ordered that **LOC 5/Gitura/293** be sub-divided into two equal parts among the deceased's two houses. The Defendants contend that the 1st house of the deceased comprised their father alone while the 2nd house comprised of **Jane Muthoni Njoroge, Emanuel Mburu Ngugi** and the Plaintiff herein.

While stating that land parcel number **LOC 5/Gitura/293** was subsequently divided into 2 portions of 3.1 acres each, the Defendants aver that land parcel **LOC 5/Gitura/1155** (the suit property herein) was registered in the name of their late father, Gicharu Wainaina, while parcel number **LOC 5/Gitura/1156** was jointly registered in the names of Jane Muthoni Njoroge, Emmanuel Mburu Ngugi and the Plaintiff herein. The Defendants have annexed as evidence abstracts of titles **for LOC 5/Gitura/1155** and 1156 as "**EMG 6**" and "**EMG 5**" respectively.

According to the Defendants, the suit property herein which was registered in the name of their late father was vide Thika Principal Magistrate **Cause No. 281 of 2009** transmitted to them and **Beatrice Wangari Nyaguti** and title deeds subsequently issued as evidenced by the abstract of title produced as "**EMG 6**"

It is the Defendants' contention that the Plaintiff and her co-beneficiaries caused subdivision of **LOC 5/Gitura/1156** into **LOC 5/Gitura 1393** and 1394 which were later closed and combined to create parcel No. **LOC 5/Gitura/1783** which is still jointly registered in the names of the 3 beneficiaries and measures 3.1 acres. The Defendants further aver that on 19th October 2010, the suit property was transferred to **Beatrice Wangari Nyaguti** who was the 3rd beneficiary in Thika Chief Magistrate **Succession Cause no. 281 of 2009** and that as the absolute proprietor, she was issued with a title deed as evidenced by a copy of a certificate of official search dated 11th December 2013.

The Defendants contend that the creation of the suit property was through a succession cause and that since the judgement was delivered by a competent court, the open recourse for an aggrieved party was to lodge an appeal to the High Court. It is also the Defendants' contention that this Court has no powers to

revoke the title deeds and all subsequent entries made in respect to LOC 5/Gitura/293 which was the subject of Murang'a Senior Principal Magistrate Succession Cause no. 106 of 1995 whose judgement and certificate of confirmation was issued by a competent court. The Defendants aver that the only cause of action available to the Plaintiff is to appeal against the judgement delivered on 12th September 1996 or to apply for revocation of the grant in the High Court.

The Defendants stated that land parcel no. LOC 5/Gitura/293 was cancelled upon creation of the suit property and LOC 5/Gitura/ 1156 and was therefore nonexistent, and thus contend that the prayers sought in the Plaint are not available to the Plaintiff. The Defendants contend that they have nothing to do with the suit property which is registered in the name of Beatrice Wangari Nyaguti, a third party who is not party to these proceedings.

Submissions

The application was canvassed by way of written submissions. The Plaintiff in submissions dated 28th January 2015 stated that there existed a customary trust where the Defendants' deceased father who was of age was registered as the owner of suit property known as LOC 5/Gitura/293 as a trustee on behalf of the siblings. Counsel argued that by virtue of being a trustee, the Defendants' father had no absolute interest.

While submitting that the Defendants did not deny that parcel number LOC 5/Gitura/293 existed, the Plaintiff stated that the partitioning of the property gave rise to the suit property. It is the Plaintiff's submission that Order 40 Rule 1 of the Civil Procedure Rules empowers the court to issue injunctive orders if the property in issue is likely to be damaged, alienated and wasted and that since her claim was based on customary trust, the Court was being called upon to investigate the propriety of such a claim.

Counsel submitted that the Defendants' father indefeasible title was subject to any unregistered rights and further, that a claim on customary trust is an overriding interest. Reference was made to section 28 and 30 of the repealed Registration of Land Act and section 28 of the Land Registration Act 2012 and it was submitted that the Plaintiff cannot be shut out from being heard over such a legitimate and substantial issue which has never been litigated in any forum.

The Plaintiff argued that since customary trusts are overriding interests that do not require registration on the register, the issuance of a title does not waive or defeat the interests in land nor fetter the Court's jurisdiction to investigate and interrogate the issues before it. Counsel submitted that pursuant to section 13 of the Environment and Land Court Act, matters relating to title to either public or private land are to be heard by this Court.

It was submitted that whereas the jurisdiction of a probate court is limited by the Law of Succession Act to issuance of grants, rectification, revocation and overseeing administration of estates, the said court does not deal with whether the deceased's property was lawfully owned. Counsel contended that a probate court could therefore not revoke title on the basis of fraud as its revocation power of a grant was under section 76 of the Act and therefore, that that the proceedings before this Court were therefore competent.

In respect to persons who may be affected by the sought orders, it was submitted that the Defendants who sold the suit property were under an obligation to make full disclosure of facts within their knowledge. Reference was made to section 3 of the Environment and Land Court Act and Order 1 Rule 9 and 10 of the Civil Procedure Rules and it was submitted that a suit cannot be defeated by misjoinder or non joinder of parties. The Plaintiff submitted that a prima facie case as enunciated in the case of **Giella vs. Cassman Brown (1973) EA 358** had been established. Counsel stated that considering the longevity of time the dispute had been in court and the relations between the parties, damages cannot at all times suffice and rather, that the interests of justice ought to prevail.

The Defendants in submissions dated 16th June 2014 argued that the Court has no jurisdiction to hear this suit and as such, has no powers to grant the conservatory prayers for injunction. Counsel submitted that the cause of action squarely lies with the probate division as the Plaintiff seeks reliefs for revocation of

title number **LOC 5/Gitura/293** and a declaration that the said parcel was solely owned by Wainaina Kamau Gatika.

It is the Defendants submission that parcel number **LOC 5/Gitura/293** registered in the name of Wainaina Kamau Gatika who died in 1968 was the subject of Murang'a Senior Principal Magistrate **Succession Cause no. 106 of 1995** where in a judgement delivered on 12th September 1998, the court ordered that the said parcel be subdivided into equal portions among the deceased's two houses. Counsel submitted that each house was allocated 3.1 acres out of the deceased's estate and that the Plaintiff and her co-beneficiaries who were from the 2nd house were not satisfied with the judgement and refused to co-operate during registration of the certificate of grant necessitating the execution of the documents by the court.

The Defendants submitted that Parcels number **LOC 5/Gitura/293** whose subdivision gave rise to parcel number **LOC 5/Gitura/1155** which was the subject of Thika Chief Magistrate Court Succession Cause No. 281 of 2009 belonged to deceased persons whose estates are governed by the Law of Succession Act. It is the Defendants' submission that if the Plaintiff was dissatisfied with the judgement delivered in Murang'a Senior Principal Magistrate Succession Cause no. 106 of 1995, the only avenue available to her was to lodge an appeal in the High Court pursuant to section 50 of the Law of Succession Act.

Counsel argued that by seeking revocation of title number **LOC 5/Gitura/293** and a declaration that the parcel belonged to Wainaina Kamau Gatika, the Plaintiff was asking the Court to revoke the grant and certificate issued in Murang'a Senior Principal Magistrate Succession Cause no. 106 of 1995 which powers this Court lacks. The Defendant submitted that pursuant to section 76(a) of the Law of Succession Act and Rule 44 of the Probate and Administration Rules, revocation and/or annulment of grant must be filed in the High Court, Probate Division. Counsel urged that the Environment and Land Court Act has no powers to deal with succession matters and as such, this court lacks jurisdiction to hear this suit which is liable for striking out for want of jurisdiction.

In further submissions, the Defendants argued that they lacked locus standi to be sued in this suit as they were not the registered owners of parcel no. **LOC 5/Gitura/293** which belonged to their grandfather and was subject to Murang'a Senior Principal Magistrate **Succession Cause no. 106 of 1995**. Counsel argued that the Defendants were not answerable for the said estate which they were not even beneficiaries. It is the Defendants submission that they have never been owners of **LOC 5/Gitura/293** either as registered owners or equitable owners and that the Plaintiff can therefore not sue them over the land.

The Defendants further argued that whereas they had been sued as legal representatives of the estate of Gicharu Wainaina, the Plaintiff did not exhibit a grant to show that they were the legal representatives to the deceased's estate and therefore, that they cannot be sued to represent the deceased's estate. It was submitted in the alternative that even if the Defendants were such representatives, the deceased's estate ceased to exist upon transfer by transmission and the legal representatives were therefore discharged from their duties as such.

It was submitted that the suit property was no longer registered in the name of the Defendants since according to the official search exhibited, the parcel was registered in the name of **Beatrice Wangari Nyaguti** on 19th October 2010 as the absolute proprietor. Counsel argued that the Plaintiff had not sued the said **Beatrice Wangari Nyaguti** and that the Defendants were not answerable for a parcel of land which had been transferred to a third party who is not party to the suit.

The Defendants submitted that the Plaintiff had not satisfied the principles set out in the case of **Giella vs. Cassman Brown (1973) EA 358** and did not therefore deserve the orders sought. Lastly, the Court was referred to the case of **Suleiman vs. Amboseli Resort Ltd (2004)2KLR 589**, **Mary Watiri Kirumba vs. Rose Nyokabi Ndungu ELC No. 31 of 2013**, **East African Development Bank vs. Hyundai Motors(K) Ltd (2006)eKLR** and **Peterson Marui Githinji vs. James Muriuki Gutu (2006)eKLR**.

Determination

The issue for determination is whether a temporary injunction should issue as prayed by the Plaintiff. The facts that are not in dispute are that the suit property is a subdivision of **LOC 5/Gitura/293** which was owned by Wainaina Kamau Gatika (deceased). **LOC 5/Gitura/293** was the subject matter of Murang'a Senior Principal Magistrate Succession Cause no. 106 of 1995 where in a judgement delivered on 12th September 1996, the court directed that the said property be divided equally among the deceased's two houses. A certificate of confirmation of grant was subsequently issued on 13th November 2000 where Joel Gicharu Wainaina acquired 3.1 acres while **Jane Muthoni Njoroge, Emmanuel Mburu** and the Plaintiff acquired 3.1 acres jointly. No appeal was preferred against the judgement and the aforesaid grant has never been revoked.

The subdivision of **LOC 5/Gitura/293** into two parcels gave rise to the suit property and **LOC 5/Gitura/1156**. The suit property was registered in the name of Joel Gicharu Wainaina on 23rd November 2005. The Defendants who are sons to Joel Gicharu Wainaina contend that following his death, the suit property was transmitted to Beatrice Wangari Nyaguti who was the 3rd beneficiary in Thika Chief Magistrate **Court Succession Cause no. 281 of 2009**. There is no evidence that the said succession proceedings have been appealed against and/or set aside.

The crux of the Plaintiff's claim revolves around the mode of distribution of **LOC 5/Gitura/293** owned by Wainaina Kamau Gatika (deceased) in Murang'a Senior Principal Magistrate **Succession Cause no. 106 of 1995**. The Plaintiff contends that there existed a customary trust where Joel Gicharu Wainaina (deceased), who was of age, was registered as the owner of **LOC 5/Gitura/293** as a trustee on behalf of the siblings. The Plaintiff argues that Joel Gicharu Wainaina allocated himself the entire property measuring 3.1 acres which he later disposed off to a purchaser in addition to having also acquired **LOC 5/Gitura/438** which belonged to her father in law.

In my view, the Plaintiff's claim that Joel Gicharu Wainaina was registered as the owner of **LOC 5/Gitura/293** as a trustee on behalf of the siblings has not been established and on the basis of the material and evidence placed before the court there is no basis to hold that there was such a trust. The said property was subject of succession proceedings in respect to the estate of **Wainaina Kamau Gatika**(deceased) who must have been the registered proprietor thereof. There is no evidence that **Joel Gicharu Wainaina** (deceased) was ever registered as owner of **LOC 5/Gitura/293**. From the facts and evidence tendered, **Joel Gicharu Wainaina** and the Plaintiff amongst others, were beneficiaries to the estate of **Wainaina Kamau Gatika** (deceased) and through a judgement delivered in Murang'a Senior Principal Magistrate Succession Cause no. 106 of 1995, the court distributed **LOC 5/Gitura/293** among the deceased's 2 houses in equal shares.

If the Plaintiff was dissatisfied with the mode of distribution proposed therein, her recourse lay in appealing against the aforesaid judgment and/or seeking the revocation of the grant therein if she felt there was any material non disclosure or concealment of any material facts. By laying claim to the suit property, the Plaintiff is essentially seeking re-distribution of **LOC 5/Gitura/293** which cannot be done in these proceedings. I find that a prima facie case with probability of success has not been established. Having failed to establish a prima facie case, the Court need not consider irreparable injury and balance of convenience as stated by the Court of Appeal in the case of **Nguruman Ltd vs. Jan Bonde Nielsen & 2 others Nairobi CA No. 77 of 2012**. The conditions for grant of temporary injunction that an applicant needs to satisfy are sequential such that if the first condition of establishing a prima facie case with a probability of success fails then of necessity the application for injunction must fail.

In the premises the plaintiff's application dated 2nd October 2013 fails and the same is hereby dismissed. This being a family matter I make no order for costs and each party shall bear their own costs for the application.

Orders accordingly.

Ruling dated, signed and delivered this 17TH day of JULY 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiff/Applicant

..... For the Defendant/Respondents