



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ELC 732 OF 2014**

**NELLY WANJIRU KANYARI.....PLAINTIFF**

**-VS-**

**KENNEDY KANYARI .....1<sup>ST</sup> DEFENDANT**

**ELIZABETH NYARUIRU NJEGA .....2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR KIAMBU.....3<sup>RD</sup> DEFENDANT**

**RULING**

The matter coming up for determination is the *Notice of Motion application* dated **11<sup>th</sup> June 2014** , brought by the plaintiff herein *Nelly Wanjiru Kanyari* under *Order 40 Rules 1,2,&4 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act* and all enabling provisions of law. The applicant has sought for these orders.

***a. That a temporary injunction be given to restrain the Respondents from encroaching or subdividing ,entering or in any other way interfering with the Plaintiff's quiet possession of LR No. Kabete/ Nyathuna/T 240, pending the hearing and determination of this suit.***

***b. That the court do issue such other or alternative orders as it may deem fit to grant.***

The application is premised on the grounds stated on the face of the application and on the supporting affidavit of the applicant herein. The grounds in support of the application are:-

***i. The applicant is the registered proprietor of the suit premises and is in actual possession thereof.***

***ii. That on 29<sup>th</sup> May 2014, the Respondents entered the suit premises purportedly to set boundary between some parcels that are strange to the applicant.***

***iii. That the applicant is apprehensive that if the Respondents are not restrained, they will dispossess or inevitably waste the applicant's land thus causing the applicant irreparable loss and detriment.***

In her Supporting Affidavit, the applicant *Nelly Wanjiru Kanyari*, averred that she resides in the suit property *Kabete /Nyathuna T.240* and she inherited this parcel of land together with another *Kabete/*

**Nyathuna/144** from her late husband **Kanyari Mweya**, who died on **1<sup>st</sup> February 1963**. It was her further averment that she inherited this land together with her stepson **Wilson Njoroge Kanyari**, who disappeared without trace in 1977. Further that by a letter dated **19<sup>th</sup> November 2013**, the Respondents Advocates requested her to move from the suit plot which was described as **Kabete/Nyathuna/T 363**. She contended that by a letter dated **13<sup>th</sup> May 2014**, the 3<sup>rd</sup> Respondent on instructions from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents summoned her to attend

before him for setting of boundaries in relation to the said **LR No.Kabete/Gikuni/T 363**. She further contended that the Respondents went to her land on **29<sup>th</sup> May 2014**, accompanied by police officers and they purportedly intended to subdivide the land. However after she protested, the Respondents left but threatened to return and set up the alleged boundary. She is therefore apprehensive that if the Respondents are not restrained, they will invade her suit property thus wrenching the land from her and which action will cause loss and detriment to her.

The application is contested. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents swore a joint Replying Affidavit and averred that they are the children of the late **Wilson Njoroge Kanyari** who was survived by their mother **Josephine Wangari** and the Respondents. Further that the Plaintiff/Applicant is their step grandmother and she was jointly registered as the proprietor of a parcel of land known as **Kabete/Gikuni/T 240** in equal shares with their late father in **November 1984**. Further that on **October 1987**, the said parcel was sub-divided into two portion wit;

**a) Kabete /Gikuni/T 362 for Nelly Wanjiru Kanyari ( Appl)**

**b) Kabete /Gikuni/ T 363 for Wilson Njoroge Kanyari .**

They further averred that the said portion was pursuant to **Succession Cause**

**No. 39 of 1978** filed at Kikuyu Law Court as per annexure **KNI**. It was their contention that they inherited their father's parcel **Kabete/Nyathuna/363** as evidenced by annexure **KN3**. Further that they now reside on **Kabete /Gikuni/T 363** while the Plaintiff resides in **Kabete /Gikuni/T 362**. It was their further contention that **Kabete/Nyathuna/T240** does not exist on the ground and therefore applicant cannot injunct them and the application is misplaced. The Respondents contended that they have not encroached on the land known as **Kabete/Nyathuna/T 240** but it is the Plaintiff who has encroached on their parcel of land known as **Kabete/Gikuni/363**. They further contended that the dispute can only be resolved by the Land Registrar Kiambu, who should visit the plot and ascertain the boundary then confirm same on the ground.

The applicant filed a supplementary affidavit and averred that she is still in possession of original title for **Kabete/Nyathuna/T240**, and she is in possession of the suit land. Further that she never appeared before any **Land Control Board** concerning partition or transfer. That she carried a search in **November 2013**, and the search revealed that the suit land is still in her name and that if **Wilson** as per annexure **NWK 1**.

The parties herein canvassed this Instant Notice of Motion by way of

written submissions. The application is contested and the Court has now considered the said Notice of Motion, the written submissions and the relevant laws. The issue for determination is whether the applicant is deserving of the orders sought.

The applicant has sought for injunctive order which is an equitable relief. The said equitable relief is granted at the discretion of the Court.

However the said discretion must be exercised judicially. See the case of **Hasmukh Khetshi Shah vs. Tinga Tranders Ltd., Civil Appeal No. 326 of 2002 KLR 4 628**, where the court held that:

***“It must be stated at the outset that the granting of the interim injunction is an exercise of***

*judicial discretion”.*

In determining whether to grant or not to grant the orders sought, the court will be guided by the principles set out in the **Giella’s** case and later elucidated in other judicial pronouncements. See the case of **Kibutiri Vs Kenya Shell, Nairobi, High Court , Civil Case No. 3398/1980 ( 1981) LR 390** , where the court held that:-

**“ The conditions for granting of a temporary injunction in East Africa are well known and these are; First an applicant must show 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”**

See also **EA Industries Vs Trufods (1972) EA 420.**

For the Plaintiff herein to succeed, she needed to fulfil any of the above conditions. Firstly, the applicant needed to establish that she has a prima facie case with probability of success. So has the applicant herein established that she had a prima facie case with probability of success?. In the case of **Mrao Ltd Vs First American Bank Of Kenya Ltd & 2 Others [2003] KIR,** prima-facie case was described as :-

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

From the above description, it is clear that **prima facie case** means more than an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicant’s case at the trial.

The applicant herein has alleged that she is the registered owner of the suit property that is **Kabete /Nyathuna/T240** together with one **Wilson Njoroge Kanyari**. From the averments by the parties herein, it is evident that the said **Wilson Njoroge Kanyari** was a step son of the applicant and a father to the Respondents herein. It is also evident that the suit land was inherited from the late **Kanyari Mweya** and it was registered on the joint names of the applicant and the said **Wilson Njoroge Kanyari** . If the suit land is registered in the joint names of the applicant and **Wilson Njoroge Kanyari** , then the applicant is not the **sole absolute owner** of the suit property.

However the Respondents have alleged that the suit property is not **Kabete /Nyathuna/T240** but it was initially **Kabete /Gikuni/T 240**, which was in the joint names of the Plaintiff and **Wilson Njoroge Kanyari**. They further alleged that **Kabete /Gikuni/T240** was later partitioned and gave rise to **Kabete /Gikuni/T 362** for the Plaintiff/applicant and **Kabete /Gikuni/T 363** for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents herein. They attached copies of the Title documents.

The applicant also attached a copy of the Title document for **Kabete /Nyathuna/T240** in the joint names of **Nelly Wanjiru Kanyari** and **Wilson Njoroge Kanyari** issued on **25<sup>th</sup> October 1982** and a certificate of official search dated **25<sup>th</sup> November 2013**, which shows that the said parcel of land is in the joint names of the applicant and **Wilson Njoroge Kanyari** as per **25<sup>th</sup> November 2013**. However, the Respondents have attached a green card for partition of **Kabete /Gikuni/T 240**. The same was partitioned in 1987 and **Wilson Njoroge Kanyari** at registered as the owner of **Kabete /Gikuni/T363**. What is not clear is whether **Kabete /Nyathuna/T240** is the same as **Kabete /Gikuni/T 240**. That can only be determined by calling evidence from the Kiambu Lands Office. The officials from the Kiambu Lands Office would be in a position to shade light at the main trial as to which is the exact description of the title on the ground and whether **Kabete /Nyathuna/T 240** is the same as **Kabete /Gikuni/T 240** and also whether title **Kabete /Nyathuna/T 240** is still existing .

What is not in doubt is that **Kabete /Gikuni/T 240** was partitioned and it gave rise to **Kabete /Gikuni/T 362** and **Kabete /Gikuni/T 363**. It is also evident that **Kabete /Gikuni/T 362** is in the name of **Nelly Wanjiru Kanyari** the applicant herein and **Kabete /Gikuni/T 363** in the names of 1<sup>st</sup> & 2<sup>nd</sup> Respondents as per the certificates of official search dated **2<sup>nd</sup> January 2014** and **15<sup>th</sup> November 2013** respectively.

The Court therefore finds that even if land parcel no **Kabete /Nyathuna/T 240** do exist, the same is not in the sole name of the Plaintiff/applicant herein but in joint name of plaintiff and **Wilson Njoroge Kanyari**, who is the father to the 1<sup>st</sup> & 2<sup>nd</sup> Respondents herein. The exact existence of the suit property as claimed has to be ascertained by calling of evidence from Kiambu Lands Office. The Court finds that the applicant has failed to demonstrate that she has a prima facie case with probability of success.

On the second principle of whether the applicant will suffer irreparable loss, which cannot be compensated by an award of damages, the Court finds that the applicant has alleged that she inherited plots **No. Kabete /Nyathuna/44** and the suit property **Kabete/Nyathuna/T 240** from her late husband. She further alleged that she lives on the suit property. It is evident that the suit property is registered in her name and that of **Wilson Njoroge Kanyari**. She does not own it solely. Applicant knew all along the ½ portion of the suit land is for the family of **Wilson Njoroge Kanyari** and 1<sup>st</sup> and 2<sup>nd</sup> Respondents are his children.

Applicant alleged that she resides on the suit property and so does the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. No evidence that applicant has constructed her residential property on the suit land, as no such evidence was attached. The Court do finds and holds that the applicant could certainly not have taken possession of the whole suit land if it exist and built on it knowing that she owned the property jointly with **Wilson Njoroge Kanyari** who though is alleged to have disappeared without a trace was the father to 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Court therefore finds that the applicant cannot allege that she will irreparably suffer loss which cannot be compensated by an award of damages.

On the 3<sup>rd</sup> limb of, if the Court is in doubt, to decide on a balance of convenience, the Court finds that indeed there is doubt as to whether the land in dispute is **Kabete /Nyathuna/T240** or **Kabete/Gikuni/T 240**, which was partitioned into **Kabete/Gikuni/362 and T 363**. That doubt can only be resolved by calling of evidence at the main trial and especially by witnesses from Kiambu Lands Office. Since the court finds that there is doubt, the Court holds and finds that the balance of convenience tilts in favour of maintaining the **Status Quo**. The Court of Appeal in the case of **Ougo v Otieno & another Civil Appeal No. 3 of 1987 (1987) eKLR** held that,

***“the general principle is that where there are serious conflicts of facts, the trial court should maintain status quo until the dispute has been decided on trial.***

Since there is a dispute herein, the best recourse would be to maintain the status quo. The **Status Quo** therefore is that each of the party herein, that is the Plaintiff and the 1<sup>st</sup> & 2<sup>nd</sup> Respondents to retain their respective portion of land as they have been retaining. Further that **none** of the **party herein** should have **any further** dealing on the whole portion of land and the dealing that the Court refers to is no **sub-dividing, surveying**, and/or marking of boundaries until the suit herein is heard and determined.

Further, the Land Registrar Kiambu to visit the land in dispute and ascertain the actual description of the suit land and also ascertain whether the said disputed parcel of land is **Kabete/Nyathuna/T 240** or the former **Kabete/Gikuni/T240** now partitioned into **Kabete/Gikuni/T362** and **Kabete/Gikuni/T363**. The above order to be extracted by the Plaintiff/ Applicant’s advocates and be served on the said Land Registrar Kiambu. The Land Registrar Kiambu, to prepare the report within a period of **60 days** from the date of this Ruling. Parties thereafter to take a mention date in the Registry to confirm that the Land Registrar Kiambu has complied with this Court Order. Since the parties herein are family members, costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this 6<sup>th</sup> day of *November, 2015*.

**L.GACHERU**

**JUDGE**

In the presence of

None attendance for the Plaintiff/Applicant

Mr Walusala holding brief for Mr Gitau for the Defendants/Respondents

Court Clerk : Hilda

**Court:**

Ruling read in open Court in the presence of Mr Walusala holding brief for Mr Gitau for the Defendants/Respondents and absence of Mr Mbigi for the Plaintiff/Applicant.

**L GACHERU**

**JUDGE**