



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
ENVIRONMENT AND LAND DIVISION  
ELC NO. 807 OF 2014

STEPHEN G.RURIGI GATHERU

JOHN KANYARI NJUGUNA

JOSEPH GITHUKA NJUGUNA.....PLAINTIFFS

VERSUS

THE ATTORNEY GENERAL.....1<sup>ST</sup> ..DEFENDANT

THE LANDS REGISTRAR ( KIAMBU).....2<sup>ND</sup> DEFENDANT

MARGARET NYAMBURA NJOROGE.....3<sup>RD</sup> DEFENDANT

RULING

The matter coming up for determination is the Notice of Motion application dated **13<sup>th</sup> June, 2014** brought by Plaintiffs herein brought under **Order 40 Rule (1) (a) and Order 51 of the Civil Procedure Rules, Section 1A, 1B 3A of the Civil Procedure Act, Cap 21 Laws of Kenya** and all other enabling provisions of the law. The applicants have sought for these Orders.

*a. That an interim injunction do issue restraining the Defendants by themselves , their agents, servants and or employees from making any entry in the register relating to Title No. **Kiambaa / Kanunga/280** pending the hearing and determination of this matter.*

*b. That costs of this application be provided for.*

The application was premised on these grounds;

*i. The 3<sup>rd</sup> Defendant irregularly and unprocedurally caused her name to be entered and registered in the land title No. **Kiambaa/Kanunga /280** .*

*ii. That there is a real and probable likelihood that the Defendants shall continue to cause further unlawful entries in the title register relating to land parcel No. **Kiambaa/kanunga /280** .*

The application was also premised on the annexed affidavit of the applicants' herein. They averred that

they are the beneficiaries of the Estate of **Rurigi Gatheru** alias **Rurigi Gathiru** and the parcel of land **Kiambaa/Kanunga/280** was distributed to them in equal share as lawful heirs as per annexure “**S.G.R.G.III**” . Further that the 3<sup>rd</sup> Defendant mischievously filed another Succession Cause **No.120 of 2012** in *Kiambu Law Courts* and obtained a Certificate of Confirmation of Grant dated **28<sup>th</sup> June, 2013** marked “**SGR III**”. Furthermore, the 3<sup>rd</sup> Defendant caused land parcel no **Kiambaa /Kanunga/280**, to be registered in her name and thus denied them their inheritance. They averred that they are apprehensive that the 3<sup>rd</sup> Defendant would transact further on the said parcel of land unless restrained by the Court.

The application is opposed. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants /Respondents filed their Grounds of Opposition and stated that the application is frivolous and vexatious. That the application is an abuse of the Court process and applicants have not established that they have a prima facie case with possibility of success nor that they will suffer any damage if matter is allowed to go for full trial. They prayed for dismissal of Plaintiff’s application.

The 3<sup>rd</sup> Defendant/Respondent also filed her Replying Affidavit and averred that she is the daughter in law of the deceased, **Rurigi Gatheru** alias **Rurigi Gathiru** She admitted that the deceased was the registered owner of the land parcel No. **Kiambaa/Kanunga /280** and the same was duly registered under his name on **29<sup>th</sup> May 1958**, after the conclusion of adjudication process. Further that the deceased disappeared during the time of emergency and has never been heard since then. Further that she filed for succession cause and was issued with Grant of Letters of Administration to the Estate of the deceased. Later the Grant was confirmed by the court on 26<sup>th</sup> June 2013 and **Nancy Wangari Thuo** and herself were made beneficiaries of the Estate of the deceased and were to share land parcel **No Kiambaa/Kanunga/280** equally as per *annexture MNW2*. Therefore the Orders issued in A Succession Cause **No.120/2012** were in accordance with the law and were never challenged by the Plaintiffs herein and they are still in force and still lawful and genuine. Further that the Plaintiffs are strangers to the Estate of the Deceased and they have no claim to the deceased’s Estate . That she has been living on the said parcel of land and the plaintiffs have no legal stand to file any claim on the deceased asset. She urged the Court to dismiss the Plaintiffs application.

The matter proceeded for hearing on **18<sup>th</sup> September, 2014**, wherein the parties submitted orally in Court. Applicants through **Stephen Rurigi**, the first Plaintiff prayed for injunction and relied on their affidavit. **Mr. Telel**, for 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on his grounds of opposition entirely and 3<sup>rd</sup> Defendant submitted that she lives on the parcel of land and that the applicants want to take the land away from her. Further applicants submitted that 3<sup>rd</sup> Defendant can be allowed to continue with cultivation on the parcel of land but not to sell it.

I have now considered the pleadings generally and the exhibits thereto and there is no doubt that the plaintiffs herein and the 3<sup>rd</sup> Defendant are claiming ownership of land parcel No. **Kiambaa /Kanunga/280**, through succession. There is no doubt that the parcel of land was initially registered in the name of **Gatheru Rurigi** alias **Gathiru Rurigi** since 1958. The said **Gatheru Rurigi** alleged disappeared without trace during the state of emergency. He has since been declared dead by two Court Orders. The first one is dated **28<sup>th</sup> September, 2009** issued at *Kiambu Law Court* wherein an application had been filed by **Margaret Nyambura Njoroge**, the 3<sup>rd</sup> Defendant. The 2<sup>nd</sup> Order was issued on 9<sup>th</sup> July 2010 through an Originating Summons filed by Plaintiffs herein.

There is also no doubt that the plaintiffs and the 3<sup>rd</sup> Defendant are relatives. What is also evident is that both the Plaintiffs and 3<sup>rd</sup> Defendant filed separate Succession causes over the same Estate of **Gatheru Rugiri** . The Plaintiffs and 3<sup>rd</sup> Defendant have all been declared beneficiaries of the Estate of **Gatheru Rurigi** . Since both the Plaintiffs and the 3<sup>rd</sup> Defendant have all been declared as beneficiaries of the Estate of the deceased and heirs of **LR No. Kiambaa /Kanunga/280** , the Court will have to determine who are indeed the rightful beneficiaries and heirs to the estate of the deceased. That can only be done by calling of evidence in a full trial.

The applicants have come to Court seeking for injunctive Orders. These are equitable remedies which are granted at the discretion of the Court. However, the said discretion must be exercised judiciously. See the case of **CMC Motors Group Ltd & Another Vs Evans Kegeche Boru , Civil Appeal No. 295 of 2001** where it was held as follows;

***“ In granting the injunctory reliefs, the superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge if it is satisfied that the learned Judge did not exercise his discretion judicially”.***

Since the applicants are seeking for injunctive relief they needed to establish the laid down principles for grant of such Orders as was stated in the case of **Giella Vs Cassman Brown & Co.Ltd 1973 EA 358.** These conditions are:-

- a. The applicant must establish that he has a prima facie case with probability of success.***
- b. That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c. When the court is in doubt, to decide the case on a balance of convenience.***

Have the applicants herein established that they have a prima facie case with probability of success?.

Ordinarily , prima facie case is to be deduced from the evidence adduced in Court and it means more than arguable case and the evidence must show an infringement of right and the probability of success of the applicants case at trial. See **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125.** where it was held that;

***“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 applicants herein have alleged that they are ***heirs*** of the deceased **Gatheru Rurigi** . The 3<sup>rd</sup> Defendant has also alleged that she is also a heir to the said estate and she obtained the suit property through succession. The suit land is indeed registered in her name. However, since both the plaintiffs and 3<sup>rd</sup> Defendant have alleged that they are legal and rightful beneficiaries of the Estate of the deceased that is an issue which can only be determined through calling of evidence in a full trial. At this stage, the Court cannot find conclusively who is to be believed or not through affidavit evidence. I find that the applicants herein have not established that they have a prima facie case with a prima facie case with probability of success.

The second issue to be established is that the applicants will suffer irreparable damages or loss which cannot be compensated by an award of damages. The applicants have not shown that the 3<sup>rd</sup> Defendant intends to sell the suit land. It is evident that the 3<sup>rd</sup> Defendant is the one using the suit property. No evidence that applicants herein have been in possession of the land or have been using it. There is also no evidence that 3<sup>rd</sup> Defendant has erected beacons on the suit land with intention of carrying out subdivision with intention of selling the same. If the Plaintiffs have not been in possession of the suit land and if 3<sup>rd</sup> Defendant intends to sell the suit land, then the applicants have not demonstrated that they will suffer irreparable loss which cannot be compensated by an award of damages. The purpose of seeking an injunction is to protect an immediate threatened or contravened right which if no injunction is granted the applicant would suffer irreparable loss. The applicants herein have not shown such threat exists.

On the 3<sup>rd</sup> aspect, the Court however is not in doubt and will not decide on the issue of balance of convenience. However, the 3<sup>rd</sup> Defendant is in possession of the suit property and if I was to decide on

that, I find that the balance of convenience would tilt in her favour. Further, the purpose of ***injunction*** in most case to keep things in **Status Quo** pending the trial. The Status Quo herein is that the 3<sup>rd</sup> Defendant is in possession of the suit property.

Having now considered the pleadings in totality, the Court finds that the applicants have not established that they indeed deserve the Orders sought. The upshot of the foregoing is that Status Quo prevailing herein is to be preserved until the suit is heard and determined. The applicants' application dated **13<sup>th</sup> June, 2014** has no merit and consequently, the same is dismissed with costs to the Defendants.

It is so ordered.

Dated, Signed and delivered this **2<sup>nd</sup> day of December, 2014**

**L. GACHERU**

**JUDGE**

In the Presence of:-

Stephen Rurigi ,John Kanyari & Joseph Githuka for the Plaintiffs/Applicant

None attendance for the 1<sup>st</sup> Defendant

None attendance for the 2<sup>nd</sup> Defendant

Margaret Nyambura Njoroge for the 3<sup>rd</sup> Defendant in person

Kamau: Court Clerk

**L. GACHERU**

**JUDGE**