



**Mbugua & another v Mbuthia & 9 others (Environment & Land Case 518 of 2016) [2020] KEELC 3986 (KLR) (19 November 2020) (Ruling)**

*Ann W Mbugua & another v Joan Wairimu Mbuthia & 9 others [2020] eKLR*

Neutral citation: [2020] KEELC 3986 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 518 OF 2016**

**BM EBOSO, J  
NOVEMBER 19, 2020**

**BETWEEN**

**ANN W MBUGUA ..... 1<sup>ST</sup> PLAINTIFF**

**MARY W WAMAGATA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOAN WAIRIMU MBUTHIA ..... 1<sup>ST</sup> DEFENDANT**

**JANE NJERI MAINA ..... 2<sup>ND</sup> DEFENDANT**

**ELIZABETH MAGOTHO MOCHE ..... 3<sup>RD</sup> DEFENDANT**

**CAROLINE WANYORA NDURU ..... 4<sup>TH</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KIAMBU ..... 5<sup>TH</sup> DEFENDANT**

**SAMUTA INVESTMENTS LIMITED ..... 6<sup>TH</sup> DEFENDANT**

**GRACE ANN WANGARI ..... 7<sup>TH</sup> DEFENDANT**

**PETER BRIAN NDURU ..... 8<sup>TH</sup> DEFENDANT**

**JOHN ALLEN WAMAGATA NDURU ..... 9<sup>TH</sup> DEFENDANT**

**KENNETH NJUGUNA NDURU ..... 10<sup>TH</sup> DEFENDANT**

**RULING**

1. The two plaintiffs brought this suit on 13/5/2016 through a plaint of even date. The plaint was amended on 20/11/2018. The amended plaint was further amended on 30/9/2019. Their case was that, together with the 1st defendant, 2nd defendant, 3rd defendant, 4th defendant, and one



Ferdinand Wamagata Gitingu, owned in equal shares, Land Parcel Number Dagoretti/Kinoo/3072. In or about October 2015, the 1st to 5th defendants caused the said land to be irregularly and unlawfully subdivided into Parcel Numbers Dagoretti/Kinoo/6248 to 6253. They itemized particulars of the alleged irregularity and unlawfulness. Among the itemized particulars was the filing of a miscellaneous application in court. They sought the following verbatim orders against the defendants:

- (a) An order for declaration that the obtained subdivisions being Dagoretti/Kinoo/6248-6253 were obtained unlawfully, are a nullity from the beginning and that they be cancelled and title do revert to the original Dagoretti/Kinoo/3072.
  - (b) An order for permanent injunction restraining the defendants jointly and severally through their agents, servants and or employees and whoever and whatsoever from dealing with the subdivision obtained therein until due process of subdivision is adhered to after they are nullified.
  - (c) An order that the resultant transfers of Dagoretti/Kinoo/6248 to Samuta Investments Limited; Dagoretti/Kinoo/6253 to Grace Ann Wangari; Dagoretti/Kinoo/6252 to Peter Brian Nduru by the 1st, 2nd and 3rd defendants were unlawful and thus the same be and are hereby cancelled.
  - (d) That the court orders a fresh valuation and subdivision of Dagoretti/Kinoo/3072 with the involvement of the plaintiffs and the 1st, 2nd, 3rd and 4th Defendants.
  - (e) That the honourable court directs that the original Dagoretti/Kinoo/3072 be subdivided equitably between all the daughters of the late Ferdinand Wamagata Gitindu (deceased) having factored in the value of the suit property prior to the disputed and unlawful subdivision.
  - (f) Costs of this suit be provided for, and or any other order be made as the court may deem fit and just to grant.
2. Together with the original plaint, the plaintiffs brought a notice of motion dated 13/5/2016 seeking interlocutory injunctive orders. The motion was, for unknown reasons, not prosecuted.
  3. What is now before court for determination is a subsequent motion by the plaintiffs, dated 10<sup>th</sup> February 2020, through which they seek the following injunctive orders against the defendants:-
    1. Spent.
    2. Spent.
    3. That this honourable court be pleased to issue an order for injunction to the defendants jointly and severally, their agents, workmen and agents, from any further dealings, dispositions, transactions, subdivision and further transfer of parcels of land known as Dagoretti/Kinoo/6248 to 6253 (originally known as Dagoretti/Kinoo/3072) pending the hearing and determination of this suit.
    4. That the honourable court issues an order for the 5th defendant to register the orders of the court in the present application against the titles subject to this suit.
    5. That costs of this application be in the cause.
  4. The application was supported by the 1st plaintiff's affidavit sworn on 10/1/2020. She reiterated their case as summarized in paragraph 1 above. She added that the 1st to 3rd defendants had transferred some of the resultant titles to the 6th to 10th defendants. She further deposed that they were apprehensive



that the 6th to 10th defendants would transfer the properties to other parties. She urged the court to grant them the injunctive orders.

5. The application was opposed by the 1st and 2nd defendants through a replying affidavit sworn on 15/7/2020 by Joan Wairimu Mbuthia (the 1st defendant). She deposed that the suit property was jointly registered in the names of the plaintiffs and the 1st to 4th defendants. They agreed to partition the suit property into six equal portions and procure individual titles. However, the plaintiffs refused to participate in the exercise and refused to sign the necessary documents. She added that owing to the plaintiffs' refusal, they sought the intervention of the Area Chief who summoned the plaintiffs on several occasions but they failed to appear before the Kikuyu SPMC Miscellaneous Civil Application No 6 of 2015 seeking orders that: (i) Parcel Number Dagoretti/Kinoo/3072 be partitioned into six equal portions and; (ii) The Executive Officer of the Court do execute any relevant documents that would help the 1st to 4th defendants effect the partition exercise.

Area Chief. The plaintiffs were also summoned by the District Land Registrar-Kiambu but they failed to show up. Consequently, they filed

6. The 5th to 10th defendants did not respond to the application.
7. The application was canvassed through written submissions. The plaintiffs' counsel filed submissions dated 3/3/202 in which he cited the decisions in *Giella v Cassman Brown & Co Ltd*, (1973) EA 358 and *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003 KLR 1215 and argued that the plaintiffs had shown a prima facie case because they had demonstrated that the 1st to 4th defendants illegally transferred the suit properties to the 6th to 10th defendants. Relying on the decision in *Julius Kipkeny Kolil & another v Kenya Commercial Bank & 2 others* [2013] eKLR, counsel submitted that, if the defendants were not enjoined, the plaintiffs were likely to suffer harm that would not be compensated by way of damages. On the third limb of the principle in *Giella v Cassman Brown* (1973) E.A. 358, counsel submitted that the balance of convenience tilted in the plaintiffs' favour because they had been denied their right to property and they stood to suffer great loss.
8. The 1st and 2nd defendants' counsel filed written submissions dated 17/7/2020. Counsel argued that the plaintiffs had not satisfied the criteria laid down in *Giella v Cassman Brown* (1973) E.A. 358 and in *American Cynamid Company v Ethicom Ltd* [1975] AC 396. Counsel added that the plaintiffs had failed to prove that the subdivisions were illegal. He further argued that the 1st and 2nd defendants had proved that the partition legally done.
9. On irreparable loss, counsel submitted that the plaintiffs did not stand to suffer irreparable damage since they had their individual parcels which had not been interfered with. Relying on the decision in *Nairobi Kiru Line Services Ltd v County Government of Nyeri & 2 others* [2016] eKLR, counsel submitted that the balance of convenience tilted in favour of the 1st, 2nd, 6th, 7th, 8th and 9th defendants who stood to suffer the most.
10. I have considered the application together with the response thereto. I have also considered the parties' respective submissions. Further, I have considered the relevant law and jurisprudence. The single question falling for determination in this application is whether the applicants have satisfied the criteria upon which our courts exercise jurisdiction to grant interlocutory injunctive reliefs.
11. The said criteria was articulated in *Giella v Cassman Brown* (1973) E.A. 358. First, the applicant is required to demonstrate a prima facie case with a probability of success. Second, the applicant is required to demonstrate that if the injunction is denied, he would stand to suffer injury that may not be indemnified through an award of damages. Third, should the court have doubt on both or either of the above two limbs, the application is to be decided on a balance of convenience. Lastly, at this



interlocutory stage, the court does not make conclusive or definitive findings on the key issues in the suit. Definitive and conclusive findings are reserved for judgment after trial.

12. The plaintiffs came to court alleging irregularity and unlawfulness in the process of partitioning Land Parcel Number Dagoretti/Kinoo/3072. They alluded to Kikuyu SPMC Misc Application No 6 of 2016 and contended that the said suit was a nullity ab initio and misconceived.
13. In the defendants' replying affidavit sworn by Joan Wairimu Mbutia, she denied the plaintiffs' allegations and deposed that the proprietors of Dagoretti/Kinoo/3072 agreed to partition the land so that each proprietor would own their respective share of the land in their respective names. The applicants refused to contribute towards partitioning costs and/or to sign the necessary documents. This prompted the 1st to 4th defendants to file Kikuyu SPMC Misc Application No 6 of 2015 in which they were granted the go ahead to partition the suit land. Further, the Executive Officer of the Court was allowed to execute any relevant documents to enable the 1st to 4th defendants to effect the partition. The plaintiffs subsequently filed an application for vacation of the said court orders but did not prosecute the application, leading to the discharge of the stay order which the court had granted to them. The plaintiff filed another application in the said suit and the said application remained unprosecuted as at the time of swearing the replying affidavit.
14. What emerges from the above interlocutory evidence is that the partition and the parceling of the resultant subdivisions was sanctioned by the Senior Principal Magistrate Court at Kikuyu in Misc Application No 6 of 2015. The impugned exercise was in essence, an enforcement of the orders of the Court in Kikuyu SPMC Misc Application No 6 of 2015. The plaintiffs have described the said suit as a "nullity ab initio and misconceived".
15. In my view, if the plaintiffs are aggrieved with the orders granted in Kikuyu SPMC Misc Application No 6 of 2015, the recourse available to them is to apply to the said court to set aside the said orders. Alternatively, they have a recourse of appeal against the orders in the manner provided by the law. That is not what they have done in the present suit. I do not therefore think the plaintiffs have demonstrated a prima facie case with a probability of success in this application. That being the finding of the court on the first limb of the principle in *Giella vs Cassman Brown* (1973) E.A. 358, I will not focus on the other limbs.
16. The net result is that the plaintiffs' notice of motion dated 10/2/2020 is dismissed for lack of merit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2020.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Wairimu holding brief for Ms Muriranja the Defendants

Court Clerk – June Nafula

