



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC MISC. APPLICATION NO. 3 OF 2020**

**IN THE MATTER OF ARTICLE 20(2), 21(1) AND (2), 23(1), 40(2) AND 165 OF THE CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE PROPERTY RIGHTS OF THE PETITIONER**

**AND**

**IN THE MATTER OF LAND REGISTRATION ACT. NO. 3 OF 2012**

**AND**

**IN THE MATTER OF L.R. NO. KABARE/GACHIGI/1178**

**AND**

**IN THE MATTER OF LAND DISPUTE TRIBUNAL NO. 14 OF 2003**

**BETWEEN**

**JANET WAWIRA MUGO.....PETITIONER/APPLICANT**

**AND**

**THE DISTRICT LAND REGISTRAR, KIRINYAGA COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JOYCE WAWIRA MUGO.....3<sup>RD</sup> RESPONDENT**

**RULING**

The Applicant has moved this Honourable Court vide a Notice of Motion dated 21<sup>st</sup> May 2020 seeking the following orders:-

*(1) Spent.*

*(2) That pending the hearing and determination of this application, the Honourable Court be pleased to issue a RESTRAINING ORDER against the 3<sup>rd</sup> respondent (who is working in cahoots with Police officers from Kianyaga Police Station) whether by herself, agents, servants and/or whomsoever acting under her authority or instruction from continued harassment, intimidation, and apprehension on any matter concerning the ownership of the suit land.*

*(3) That pending the hearing and determination of the petition dated 28<sup>th</sup> January 2020, the Honourable Court be pleased to issue a RESTRAINING ORDER against the 3<sup>rd</sup> respondent (who is working in cahoots with Police officers from Kianyaga Police Station) whether by herself, agents, servants and/or whomsoever acting under her authority or instruction from continued harassment, intimidation and apprehension on any matter concerning the ownership of the suit land.*

***(4) That the petition dated 28<sup>th</sup> January 2020 be heard and determined on priority basis.***

***(5) Costs.***

The said application is premised on the following grounds:-

- (a) That the applicant herein filed the Miscellaneous petition herein on the 28<sup>th</sup> January 2020.
- (b) Counsel for the petitioner served the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents with the said petition whereby Messrs Maina Kagio entered appearance on behalf of the 3<sup>rd</sup> respondent but are yet to make any substantive response thereof.
- (c) The 1<sup>st</sup> and 2<sup>nd</sup> respondents are represented by counsel from the Honourable Attorney General's office.
- (d) While the respondents are yet to show any interest in this dispensing with this matter, the 3<sup>rd</sup> respondent in collusion with Police officers from Kianyaga Police Station have severally harassed and intimidated the petitioner's family with a view to have this matter forcibly withdrawn from Court.
- (e) While the petitioner reported (at Kianyaga Police Station) the fraudulent dealings of the 3<sup>rd</sup> respondent on the suit land vide number 18/23/07/2019, she is yet to know the outcome thereof even after incessantly calling the Officer in charge of the matter.
- (f) While her complaint is yet to be fully investigated, Police officers from the same station have summoned one Jeremiah Wachira (petitioner's son) to appear at the station on the 21<sup>st</sup> May 2020 in allegations that he has maliciously damaged property on the suit land.
- (g) It would be prudent for the petition be heard and determined forthwith to avoid the escalation of animosity and violence amongst the parties concerned who also happen to be members of the same family.
- (h) The conduct of the 3<sup>rd</sup> respondent/her heirs, servants and/or proxies is mischievous to say the least.
- (i) It is very ironical that the 3<sup>rd</sup> respondent who fraudulently transferred the suit land to her name still continues to harass and intimidate the petitioner herein who is the legitimate owner of the land.

#### **Applicant's Statement of Facts**

The application is supported by the affidavit of one Gichuki Karuga, advocate who deponed as follows:-

- (i) That he is one of the sons of the petitioner herein.
- (ii) That he is authorized to swear this affidavit on behalf of the applicant/petitioner herein.
- (iii) That being the advocate representing the petitioner/applicant, he served the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents with the petition herein whereby Messrs Maina Kagio entered appearance on behalf of the 3<sup>rd</sup> respondent but are yet to make any substantive response thereto four months down the line.
- (iv) That while the respondents are yet to show any interest in dispensing with this matter, the 3<sup>rd</sup> respondent in collusion with Police officers from Kianyaga Police Station have severally harassed and intimidated them with a view to have this matter forcibly withdrawn from Court.
- (v) That while the petitioner reported the fraudulent dealings of the 3<sup>rd</sup> respondent on the suit land vide number 18/23/07/2019, they are yet to know the outcome thereof after incessantly calling the Officer-in-charge of the matter.
- (vi) That while her complaint is yet to be fully investigated, Police officers from the same Police Station have summoned him to appear at the station on the 21<sup>st</sup> May 2020 (past) on allegations that he maliciously damaged property on the suit land, which is a blatant lie aimed at intimidating them.
- (vii) That it would be prudent for the petition to be heard and determined forthwith to avoid the escalation of animosity and violence amongst the parties concerned who also happen to be members of the same family.
- (viii) That the conduct of the 3<sup>rd</sup> respondent/her heirs, servants and/or proxies is mischievous to say the least.
- (ix) That it is very ironical that the 3<sup>rd</sup> respondent who fraudulently transferred the suit land to her name still continues to harass and intimidate them whereas their mother is the legitimate owner of the suit land.
- (x) That if the 3<sup>rd</sup> respondent had any legal/proprietary rights on the suit land, it would have been easier, prudent and logical for her

to make a substantive response to the petition dated 28<sup>th</sup> January 2020 so that this protracted dispute can be heard to a logical conclusion instead of using the Police to intimidate them.

(xi) That I would also pray that the Officer Investigating the fraud complaint be summoned before this Honourable Court to shed light on how far he has gone with the investigations.

### **3<sup>rd</sup> Respondent's Statement of Facts**

The 3d respondent also filed a replying affidavit in opposition to the application herein and deponed as follows:-

(a) That this matter is a civil suit disguised as a Constitutional petition so as to evade the strict procedures in the Civil Procedure Rules and also the rigours of cross-examination.

(b) That her husband was known as Mugo Mbogo, who is now deceased. That her late husband had two wives, her and the petitioner herein.

(c) That the petitioner Janet Wawira Mugo has six children, 2 sons and 4 daughters. That she is the first wife of the deceased.

(d) That her late husband had 2 parcels of land, namely parcel number MWERUA/KABIRIRI/529 measuring 10 acres which had been purchased and parcel number KABARE/GACIGI/376 which is ancestral land measuring about 4.5 acres approximately 1.8 Hectares.

(e) That her late husband sub-divided parcel No. MWERUA/KABIRIRI/529 into 3 portions of 5 acres, 2 ½ acres and 2 ½ acres.

(f) That 5 acres for her late husband while 2 ½ acres were for her and the remaining 2 ½ acres were for her co-wife the petitioner herein. Her late husband and the petitioner sold their portions but she remained with her portion and that there is no dispute in land respect of land parcel No. MWERUA/KABIRIRI/529.

(g) That her late husband had also sub-divided the ancestral land number KABARE/GACHIGI/376 into 4 portions namely KABARE/GACHIGI/1177, 1178, 1179 and 1180.

(h) That her late husband gave land parcel number KABARE/GACHIGI/1177 to the petitioner's son, Evan Mbogo Mugo.

(i) That her late husband also gave land parcel No. KABARE/GACHIGI/1179 to the other son of the petitioner, Jeremiah Wachira Mugo.

(j) That though both sons of the petitioner each received land, none of her sons received anything.

(k) That the other two remaining portions being land parcels number KABARE/GACHIGI/1178 and 1180 were meant for her and her three (3) sons.

(l) That during his sunset years, her husband seemed to be biased against her in favour of the first wife who is the petitioner herein.

(m) That mysteriously, the other two portions namely parcel number KABARE/GACHIGI/1178 and 1180 were jointly registered in his name and that of the petitioner without her knowledge during those sunset years when he was quite advanced in age over 80 years old.

(n) That after the joint registration in a bizarre turn of events, the petitioner filed a reference before the Land Disputes Tribunal seeking to have those two portions of land to be registered in her name.

(o) That the Gichugu Land Disputes Tribunal gave an award, which was adopted as Court's judgment that her husband and his two wives to stay in a portion of 0.60 acres and that her sons who were not included in the case to stay in the portion of 2 acres.

(p) That the petitioner was dissatisfied and preferred an appeal to the Provincial Land Disputes Tribunal Appeal Appeals Committee whose award was adopted as an order of the Court. That the award was to effect that the two parcels of land number KABARE/GACHIGI/1178 and 1180 be shared by the two wives. That it was further declared that their husband was the owner of the two parcels of land and should be made a joint owner with the 1<sup>st</sup> wife after sharing the two parcels. That it was also directed that the caution registered against the title of land parcel No. MWERUA/KABIRIRI/529 be lifted so that it can be sub-divided with her husband getting 5 acres, the petitioner getting 2 ½ acres and her getting 2 ½ acres.

(q) That no appeal was filed against that decree or any Judicial Review proceedings filed.

(r) That all along, she has lived with her children in what became land parcel No. KABARE/GACHIGI/1178 measuring about 1 ¾ acres which initially they thought its 2 acres. Since each wife to get a portion. She got parcel No. KABARE/GACHIGI/1178 for her and her children while her co-wife, the petitioner got parcel No. KABARE/GACHIGI/1180 measuring one acre. That the house of the petitioner got in total 3 acres while her house got 1 ¾ acres.

(s) That her registration of land parcel No. KABARE/GACHIGI/1178 was pursuant to a decree emanating from a reference which had been initiated by the petitioner and failed. That the award of the Gichugu Tribunal was that the Executive officer of the Court was to be signing all necessary documents of transfer. That she has the title for her land and the petitioner has her title for her land.

(t) That her co-wife it appears also wants to get her portion of land parcel No. KABARE/GACHIGI/1178. That she alleges breach of her Constitutional right to property, yet appears to ignore Article 27 of the same Constitution on equality and freedom from discrimination. That the petitioner has six children and she also has six children. That the petitioner has two sons while she has three sons. That the petitioner already has 3 acres of land for her and her children while she has 1 ¾ acres for her and her children. That the petitioner describes herself as the owner of land parcel No. KABARE/GACHIGI/1178 which is a sheer greed and selfishness.

(u) That the petitioner has gone ahead to file succession proceedings at Kerugoya High Court being number 20 of 2018 yet she also complains that the two parcels do not form part of the estate of the deceased.

(v) That the issue of joint registration which the petitioner seems to be relying on was dealt with in the award which became a decree and which has not been challenged to-date. That their late husband was declared to have been the owner of the two parcels despite the purported joint registration. That the award and subsequent decree has not been challenged in this petition either.

(w) That the petitioner has cited the doctrine of jus accrescendi and the doctrine of survivorship envisaged in Section 102 (g) of the now repealed Registered Land Act Cap. 300. That those are not Constitutional issue and that no wonder the prayers sought are not anchored on any Constitutional provisions and that none is cited to have been violated as per the prayers.

### Analysis and Determination

I have considered the Notice of Motion dated 21<sup>st</sup> May 2020, the supporting affidavit and the further affidavit together with the replying affidavit and the annexures thereto. I have also considered the applicable law. The undisputed facts of this case are as follows:-

- (i) That the petitioner and the 3<sup>rd</sup> respondent are co-wives.
- (ii) That the husband to the petitioner and the 3<sup>rd</sup> respondent one Mugo Mbogo is now deceased.
- (iii) That land parcel No. KABARE/GACHIGI/1178 and 1180 were resultant sub-divisions of land parcel No. KABARE/GACHIGI/367.
- (iv) That land parcel No. KABARE/GACHIGI/1180 was initially registered in the name of Mugo Mbogo (deceased) on 27/8/1998 and the same transferred in the joint names of the said Mugo Mbogo and Janet Wawira Mugo on 31/8/1998.
- (v) That both the petitioner and the 3<sup>rd</sup> respondent live in the suit properties together with their families.
- (vi) That certificate was later issued in favour of Janet Wawira Mugo the same date on 31/8/1998.
- (vii) That upon the demise of Mugo Mbogo, the land was registered in favour of Janet Wawira Mugo on 19/3/2018.
- (viii) That on 8/8/2018, the registration of Janet Wawira Mugo was removed.
- (ix) That on 9/8/2018, Joyce Wawira Mugo was registered as proprietor of land parcel No. KABARE/GACHIGI/1178 vide an order issued in LDT No. 14/2003 dated 16/04/18.
- (x) That on the same date, a title deed was issued in favour of the said Joyce Wawira Mugo.

The applicant/petitioner has invoked the provisions of *Article 159 of the Constitution and Sections 1A, 1B CPA* for the orders sought. The applicant is seeking orders restraining the 3<sup>rd</sup> respondent from allegedly working in cahoots with third parties from continued harassment, intimidation and apprehension on any matter concerning the ownership of the suit land. The nature of the orders being sought by the applicant/petitioner are criminal in nature. Harassment and intimidation are complaints which border on criminality. The alleged complaints seem to be directed upon the Officer in charge, Kianyaga Police Station as can be shown in paragraph 6 of the supporting affidavit where he deposed as follows:-

***“6. That while the respondents are yet to show any interest in this dispensing with this matter, the 3<sup>rd</sup> respondent in collusion with Police officers from Kianyaga Police Station have severally harassed and intimidated us with a view to have this matter forcibly withdrawn from Court (attached herewith and marked JW 2 is a copy of summons from Kianyaga Police Station)”.***

The applicant has not joined the Officer-in-charge of Kianyaga Police Station to respond to the allegations being raised by the applicant in this application. Even assuming that the issues being raised in this application are civil in nature and the prayers being sought are injunctive orders which are discretionary in nature, the applicant has not established the threshold for the grant of the orders as set out in the celebrated case of *Giella Vs Cassman Brown Company Ltd (1973) E.A. 358* where the following three principals were set out:-

- (1) *The applicant must establish a prima facie case.*
- (2) *The applicant must show that he will suffer irreparable loss which cannot be compensated by an award of damages unless the application is granted and*
- (3) *Where the Court is in doubt, it may decide the application on a balance of convenience.*

From the affidavit evidence both in support and in opposition to the application, it is clear that the 3<sup>rd</sup> respondent is the current registered proprietor of the suit parcels of registration number KABARE/GACHIGI/1178 while the petitioner/applicant is the registered proprietor of land parcel No. KABARE/GACHIGI/1180.

On the second principle, the applicant has not shown that he will suffer irreparable injury that cannot be compensated by an award of damages. Deciding this matter on the third principle, I find and hold that the balance of convenience will be served by disallowing the application which I hereby do. As regards costs and considering that the parties in this case are family members, I order each party to bear her own costs. It is so ordered.

**Ruling READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 13<sup>th</sup> day of November, 2020.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms Wambui for 3<sup>rd</sup> Respondent
2. Petitioner/Advocate – absent
3. 1<sup>st</sup> Respondent/Advocate – absent
4. 2<sup>nd</sup> Respondent/Advocate – absent
5. Mbogo, Court clerk – present