



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 154 OF 2017

ALICE WARUGURU MBUI.....1ST PLAINTIFF

MARY MUTHONI MBUI.....2ND PLAINTIFF

VERSUS

ELIJAH MITHAMO MBUI.....DEFENDANT

RULING

The application before me is the Notice of Motion dated 22nd August 2018 brought under **Order 40 Rule 1 and 2 CPR, Section 1A, 1B and 3A CPA**. The applicant is seeking the following orders:

- 1. That this Honourable Court be pleased to issue a temporary injunction against the defendant restraining by himself, his agents and/or servants from interfering, alienating, cultivating and/or otherwise interfering with the defendant's rights in any way on land parcel number KABARE/NYANGATI/440 and all new numbers resultant from its sub-division or any part thereof pending the hearing and determination of this application.***
- 2. That this Honourable Court be pleased to issue an inhibition order against land parcel number KABARE/NYANGATI/440 and all new numbers resultant from its sub-division.***
- 3. That the Land Registrar Kirinyaga and Officer-in-charge Wanguru Police Station do ensure compliance with the Court order.***
- 4. That costs of this application be provided for.***

The application is premised on grounds apparent on the face of the application and a supporting affidavit sworn by Alice Waruguru Mbui on 22nd August 2018. That supporting affidavit is further supported by two Green Cards and two demand letters by the firm of Nduku Njuki & Co. Advocates. On 31st October 2018, the respondent filed a replying affidavit opposing the said application. When the application came up for inter-parties hearing on 1st November 2018, the parties agreed to canvass the same by way of affidavit evidence and written submissions.

APPLICANTS CASE

The 1st Plaintiff/Applicant in her supporting affidavit stated that the Defendant/Respondent is her brother and that their late father Mbogo Mbui (deceased) was the registered proprietor of all that parcel of land known as KABARE/NYANGATI/440. The Applicant also deponed that their father died in 1963 and their mother also died on 21st July 2017. The 1st Plaintiff also deponed that in connivance with the Provincial administration, the Respondent caused his name to be registered as proprietor of the suit land in 1972 or thereabout without the knowledge and has even kicked her and her children out of the suit land. It is further deponed that on 3rd June 2006, the Respondent proceeded to have the land sub-divided and even proceeded to cause further sub-divisions and allocated pieces of the land to his children and third parties to her detriment. The Applicant deponed that unless an order of inhibition is placed on any further dealings, she will suffer irreparable loss. She stated that the Respondent will not suffer any prejudice if the order is issued.

RESPONDENT'S CASE

The Respondent in his replying affidavit stated that after the death of his father in 1963, a Succession Cause was filed in relation to land parcel No. KABARE/NYANGATI/440 and the same was transmitted to him and that the Applicants did not object or oppose the transmission of the land to him and are now estopped from denying his ownership of the same. The Respondent also stated that the suit land parcel No. KABARE/NYANGATI/440 was closed on sub-division giving rise to 5 new numbers and the orders being sought cannot be issued. The Respondent further stated that an order of injunction cannot be granted as against the resultant parcels of land since the same are owned by individuals who are not parties to this application and would therefore amount to condemning them unheard.

APPLICANTS SUBMISSIONS

The Applicants submitted that they have demonstrated that the land in question is ancestral land initially registered in the name of their late father. It is further submitted that the issue of how the registration was changed from their late father to the Respondent is a subject for determination by this Honourable Court. The Applicants submitted that the Respondent would be tempted to dispose of or alienate the suit land which will highly prejudice them as the land may not be recovered and the Respondent may not be in a position to compensate them.

RESPONDENT'S SUBMISSIONS

The Respondent on his part submitted that the Applicants have not proved their case for the grant of injunction orders as laid out in the case of ***Giella Vs Cassman Brown & Co. Ltd & Another (1973) E.A 358***. The Respondent submitted that the Applicants have not shown that they have a prima facie case. The Applicants have not also demonstrated that they stand to suffer irreparable loss should the order not be granted. The Respondent also submitted that the land which is the subject of this case was transmitted to him after he petitioned through a Succession Cause. He stated that the legal process was followed and the Applicants were well aware of what was going on throughout the succession process and they neither objected nor protested. The Respondents further submitted that the application seeks for orders of injunction against parcel No. KABARE/NYANGATI/440 and all resultant parcels of land. The Respondent states that this Court cannot grant orders against a title that is non-existent. He submitted that the Applicants have not made attempts to ascertain the resultant parcels which were sub-divided from land parcel No. KABARE/NYANGATI/440. He submitted that the Applicants have not been vigilant in conducting their case as they do not know which parcels of land they seek orders against. He cited the equity maxim that says "***equity aids the vigilant not the indolent***". He submitted that the words "***Resultant parcels***" are vague and quite ambiguous and to grant such orders would amount to granting orders in vain. Lastly, the Respondents submitted that the resultant parcels of land which are sub-divisions of land parcel No. KABARE/NYANGATI/440 have been transferred and registered in the names of third parties who are not parties in this suit. It is submitted that it was the responsibility of the Applicants to ascertain ownership of the parcels of land resultant to the sub-division and enjoin them in this suit. He cited the following cases:

- (1) ***Giella Vs Cassman Brown Co. Ltd (1973) E.A 358***.
- (2) ***Kenya Commercial Finance Co. Ltd Vs Afraha Education Society (2001) Vol. 1 E.A 86***.
- (3) ***Section 76 Law of Succession Act***
- (4) ***Eric Vs J. Makokha & 4 Others Vs Lawrence Sagini & 2 Others (1994) e K.L.R***
- (5) ***Basil Criticos Vs Attorney General & Others (2016) e K.L.R***
- (6) ***Vijay Marjanza Vs Nansigh Madhasleigh Darba & Another (2000) e K.L.R***
- (7) ***Kiprotich Arap Chepkwony Vs Simon Langat & 3 Others (2017) e K.L.R***

ANALYSIS AND DECISION

The Applicant in this application is seeking an injunction order whose principles have been set out in the celebrated case of ***Giella Vs Cassman Brown Co. Ltd & Another (1973) E.A 358***. The Applicant is seeking restraining orders against the Respondent by himself, his agents and/or servants from transferring, alienating, cultivating and/or otherwise interfering with his rights on land parcel No. KABARE/NYANGATI/440 and all new numbers resultant from its sub-division or any part thereof. The Green Card attached to the supporting affidavit shows that the suit land No. KABARE/NYANGATI/440 had restriction removed on 20th February 2006 and in entry No. 6 dated 7th June 2006, land was transferred to one Mithambo Elijah Mbui and a new title deed issued on 12th June 2006. Again on 13th June 2010, title closed on sub-division after the suit land was sub-divided into parcel No. KABARE/NYANGATI/1061 and 1062. The portion No. KABARE/NYANGATI/1061 was transferred to Mithambo Elijah Mbui and title closed after sub-dividing the land into portions registration No. KABARE/NYANGATI/5344, 5345, 5346, 5347 and 5348. The five portions have not been shown who the registered owners are. The Applicant wants this Court to issue an injunction order against the Respondent and other parties whose identities are not disclosed. From the documents attached to the supporting affidavit, the Respondent is the registered owner of the resultant portion of land registration No. KABARE/NYANGATI/1061. The other portions which are sub-divisions of that parcel into parcel Nos. KABARE/NYANGATI/1061 and 1062. The portion No. KABARE/NYANGATI/1061 was transferred and registered in the name of the Respondent Mithambo Elijah Mbui who further sub-divided the land into five (5) portions before the land was closed on sub-division. The five (5) portions are:

KABARE/NYANGATI/5344, 5345, 5346, 5347 and 5348.

It has not been shown who the new proprietors of the five (5) resultant portions are. It would be a futile order for me to issue injunction orders against persons whose names are not disclosed. The rules of natural justice demands that a party be heard before issuing adverse orders against him. The Applicants have not done any diligence to find out the registered proprietors of the resultant parcel No. KABARE/NYANGATI/1062 and KABARE/NYANGATI/5344, 5345, 5346, 5347 and 5348. Since the Applicant has demonstrated to the satisfaction of this Court that the land in question L.R. No. KABARE/NYANGATI/1061 is a sub-division of the original land No. KABARE/NYANGATI/440 which is an ancestral land, I find that the first and second principles for the grant of an injunction has been established. First, I find that a prima facie case has been shown and that the Applicant will suffer injury that damages may not be an adequate compensation. An ancestral land is where a person has special attachment to his ancestors. The Applicant may not get another land where he can connect with his ancestors. In the circumstances, I find that damages will not be an adequate compensation. In the result,

the application dated 22nd August 2018 is allowed in the following terms:

(1) A temporary injunction be and is hereby granted in favour of the Applicants against the Respondent by himself, his agents and/or servants from transferring, alienating, cultivating and/or otherwise interfering with the plaintiffs' rights in any way over land parcel No. KABARE/NYANGATI/1061 or any other part thereof pending the hearing and determination of this suit.

(2) An order of inhibition is hereby placed on the said parcel of land No. KABARE/NYANGATI/1061 from being transferred, sub-divided or interfering in any other way pending the hearing and determination of this suit.

(3) The costs of this application to be costs in the cause.

READ and SIGNED in the open Court at Kerugoya this 16th day of January, 2019.

E.C. CHERONO

ELC JUDGE

16TH JANUARY, 2019

In the presence of:

1. Mr. Nduku Njuki for Applicant
2. Mr. Kagio for Respondent
3. Mr. Mbogo Court clerk.