



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 37 OF 2018

JOHNSON MACHARIA KABUTA.....1ST PLAINTIFF

ESTHER KAGONDU KABUTA.....2ND PLAINTIFF

JANE WANJA KABUTA.....3RD PLAINTIFF

DICKSON CHOMBA KABUTA.....4TH PLAINTIFF

VERSUS

WINFRED WANJIKU KABUTA.....1ST DEFENDANT

WILSON WACHIRA KABUTA.....2ND DEFENDANT

MAGDALENE WANJIRA KABUTA.....3RD DEFENDANT

WINSTONE MBURU MURIITHI.....4TH DEFENDANT

GRISHON KARIUKLI MURIUKI.....5TH DEFENDANT

SAMUEL GITAU MBAU.....6TH DEFENDANT

EPHANTUS MURIUKI MUGO.....7TH DEFENDANT

EDWARD NYAGAH GICHACHI.....8TH DEFENDANT

RULING

The plaintiffs/applicant filed the application dated 26th June 2018 and sought seven (7) prayers as follows:

(1) Spent.

(2) That the Honourable Court be pleased to issue a temporary injunction against the 1st, 2nd and 3rd defendants restraining by themselves, their agents and/or servants from wasting, selling, leasing, sub-dividing and/or transferring title numbers Kabare/Kiritine/2083 and 2084 until the hearing and determination of this application.

(3) That the Honourable Court be pleased to issue a temporary injunction against the 1st, 2nd and 3rd defendants restraining by themselves, their agents and/or servants from wasting, selling, leasing, sub-dividing and/or transferring title numbers Kabare/Kiritine/2083 and 20184 until the hearing and determination of the main suit.

(4) That the Honourable Court be pleased to issue a temporary injunction against the 4th, 5th, 6th, 7th and 8th defendants by themselves, their agents and/or servants from wasting, entering, leasing, constructing, sub-dividing and/or transferring title numbers Kabare/Ngiroche/1815, 1816, 1817, 1818, 1819 and 1820 pending the hearing and determination of this application.

(5) That the Honourable Court be pleased to issue a temporary injunction against the 4th, 5th, 6th, 7th and 8th defendants by themselves, their agents and/or servants from wasting, entering, leasing, constructing, sub-dividing and/or transferring title

numbers Kabare/Ngiriho/1815, 1816, 1817, 1818, 1819 and 1820 pending the hearing and determination of the main suit.

(6) That inhibitions do issue against the title numbers Kabare/Kiritine/2083, 2084 and 2085, title numbers Kabare/Ngiroche/1815, 1816, 1817, 1818, 1819 and 1820.

(7) That the costs of this application be provided for.

The application is supported by the affidavit of Esther Kagundu Kabuta sworn on 20th June 2018 and grounds apparent on the face of the said application.

On 7th December 2018, the 1st and 2nd Respondents filed grounds of objection through the firm of Maina Kagio & Co. Advocates opposing the application. On 23rd January 2019, the 4th, 5th, 6th, 7th and 8th respondents filed their replying affidavit through the firm of Munene Wambugu & Kiplagat Advocates again opposing the application. When the application came up for hearing on 18th July 2018, the parties filed a consent dated the same date in which they agreed to issue inhibition orders against the title numbers Kabare/Kiritine/2083, 2084 and 2085, title numbers Kabare/Ngiroche/1815, 1816, 1817, 1818, 1819 and 1820 as contained in prayer No. 6 of the application. The parties then agreed to canvass the other prayers.

I have looked at the application and the supporting affidavit. I have also looked at the pleadings by the parties particularly the plaint where the plaintiffs have raised issues of fraud in the transfer and acquisition of the suit properties by the defendants/respondents. What the applicants are seeking in the application is an order of injunction restraining the respondents by themselves, their agents, servants and/or anybody claiming under them from either wasting, selling, leasing, sub-dividing and/or transferring the suit properties pending the hearing of this suit.

An injunction is an equitable relief where the principles for the grant were laid down in the celebrated case of *Giella Vs Cassman Brown Ltd (1973) E.A 358*. These are:

1. The applicant must make out a prima facie case with a probability of success at the trial.

2. Normally an injunction will not be granted unless it can be shown that the applicant is likely to suffer irreparable injury which cannot be adequately compensated in damages.

3. If the Court is in doubt, it should decide on a balance of convenience.

Beside the three principles, a Court of equitable may also look at all the other circumstances including the conduct of the parties.

In the supporting affidavit sworn by the 2nd plaintiff/applicant, the plaintiffs/applicants deponed that together with the 1st, 2nd and 3rd respondents being children of the late Kabuta Kamau Alias Eric Anderson Kamau and Dainah Muthoni Kabala, they filed Succession Cause No. 230 before the Principal Magistrate's Court, Kerugoya in respect of the Estate of their late father Kabuta Kamau Alias Eric Anderson Kamau and that the Court directed that their mother who was the Administrix was to hold title numbers Kabare/Kiritine/62, Kabare/Ngiroche/504, Baragwi/Kariru/784 and plot number 2613 Ithareini and a rear room in trust for the 8 children. She annexed a copy of the said certificate of grant as EKK 1. The applicants also through the said Esther Kagundu Kabuta deponed that before the demise of their mother Dianah Muthoni Kabuta, she had sub-divided title number Baragwe/Kariru/994 into numbers 2384 – 2386 (3) for purposes of determination of trust but she passed on before the completion of the process. Copies of the register and certificate of official search were also annexed. The applicant also deponed that sometimes in April 2018, she conducted a search at the Lands office Kerugoya and discovered that the 1st, 2nd and 3rd defendants had fraudulently registered and transferred title numbers Kabare/Kiritine/62 and Kabare/Ngiroche/504 to themselves and thereafter fraudulently sub-divided the same into numbers Kabare/Kiritine/2083, 2084 and 2085. The 1st, 2nd and 3rd defendants also illegally and fraudulently sub-divided land parcel No. Kabare/Ngiroche/504 into numbers 1815, 1816, 1817, 1818, 1819 and 1820 and sold to 4th, 5th, 6th, 7th and 8th defendants. They further contend that they were not a party to the alleged transactions despite co-owners of the suit properties as shown in the certificate of confirmation marked EKK 1. These allegations of fraudulent registration and transfer have not been controverted in the replying affidavit or the grounds of objection filed by the respondents.

In my view, the applicants have satisfied this Court the first two principles for the grant of injunction orders. First, the applicant has established a prima facie case with probability of success at the main hearing. The applicant has also shown that they are entitled to the suit property through succession and also trust. A person who is entitled to some inheritance through succession and trust may not get an equivalent right elsewhere. I am also satisfied that the applicant will suffer irreparable injury which cannot adequately be compensated in damages. I therefore find the application merited and the same is allowed in terms of prayers 3, 5 and 6 thereof. The respondents shall bear the costs of this application. It is so ordered.

READ and SIGNED in open Court at Kerugoya this 15th day of February, 2019.

E.C. CHERONO

ELC JUDGE

15TH FEBRUARY, 2019

In the presence of:

1. Mrs. Magara holding brief for Mr. Ngigi for Plaintiff/Applicant
2. Mr. Kagio for 1st, 2nd and 3rd Respondents
3. 4th – 8th Defendants ‘ Advocate – absent
4. Court clerk – Kabuta – present