



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 890 OF 2012**

NJUGUNA NG'ANG'A.....1<sup>ST</sup> PLAINTIFF/APPLICANT

MOSES KURIA THAIRU (*suing for and as the administrator of the Estate of*

THAIRU MWARUNGU.....2<sup>ND</sup> PLAINTIFF/APPLICANT

=VERSUS=

GATHONI KURIA .....1<sup>ST</sup> DEFENDANT/RESPONDENT

EUNICE WANGUI KIBE.....2<sup>ND</sup> DEFENDANT/RESPONDENT

JOHN KAMAU KARUGU.....3<sup>RD</sup> DEFENDANT/RESPONDENT

REWELL KARUGU NJERI.....4<sup>TH</sup> DEFENDANT/RESPONDENT

*Jointly sued as the administrators of the Estate of KARUGU KURIA alias KARUGU MATERE*

**RULING**

1. This is the Notice of Motion dated 8<sup>th</sup> September 2016 brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010, Section 1 and 3A of the Civil Procedure Act and all enabling provisions of the law.

2. It seeks order:-

*(1) Spent.*

*(2) That this hounourable court be pleased to issue orders restricting the defendants, their agents and or servants from selling, entering, trespassing, further dealings, alienating, registration and or any other dealing against parcel of Land LR No. Kiganjo/Kiamworia/T.118 and Kiganjo/Gachika/766 pending the hearing and determination of this application and suit.*

*(3) That this honourale court be pleased to issue orders allowing the applicants to continue occupying the suit premises pending the hearing and determination of this application and or suit.*

*(4) That the above order be enforced by the OCPD, Gatundu Police Station.*

*(5) That costs of this application be provided for.*

3. The application is supported by the affidavit of Njuguna Nganga the 1<sup>st</sup> plaintiff/applicant sworn on the 8<sup>th</sup> September 2016.

4. The application is opposed. There is a replying affidavit sworn jointly by the defendants/respondents on the 11<sup>th</sup> November 2016.

5. On the 21<sup>st</sup> September 2016, the court directed that the application be disposed by way of written submissions.

6. It is the plaintiff's/applicant's submissions that they have been in possession of the suit parcels for a period exceeding 12 years. The defendants/respondents upon obtaining title to the property have now threatened to evict the plaintiffs despite being aware of their claim for adverse possession. They stand to be declared destitute if the orders are not granted. They pray that the application be allowed.

7. It is the defendants'/respondents' submissions that they are the administrators of the estate of late Karugu Kuria alias Karugu Matere (deceased) who died in 1959. The deceased never sold the suit property. The defendants/respondents filed a succession cause to the estate of the deceased which was not objected to. Thereafter the estate of the deceased was distributed accordingly among the beneficiaries.

8. The plaintiffs/applicants have not established a prima facie case with a probability of success. They have put forward the cases of **Mrao Ltd vs First American Bank of Kenya Limited [2003] eKLR; Nguruman Ltd vs Jan Bonde Nielsen & Others [2014] eKLR.**

9. The plaintiffs/applicants have not demonstrated that they will suffer irreparable injury or harm if the injunction is not granted. The balance of convenience tilts in favour of the defendants/respondents. They have put forward the cases of **Mbuthia vs Jimba Credit Corporation Ltd [1988] KLR; Kyagaro vs Kenya Commercial Bank & Another [2014] 1KLR 126.**

10. The plaintiffs/applicants' case is based on fraud, concealment of material facts. They have come to court with unclean hands. They have also put forward the case of **Republic vs The Registrar of titles Mombasa & 2 Others Exparte Emfil Limited [2012] eKLR.** They pray that this application be dismissed with costs.

11. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures. I have considered the written submissions of counsel and the authorities cited. The issue for determination is:-

*(i) Whether the plaintiffs'/applicants' case meets the threshold for grant of temporary injunction.*

*(ii) Who should bear cost?*

12. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Company Limited [1973] EA 358.** In the case of **Mrao Limited vs First American Bank of Kenya & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case.

13. Have the plaintiffs/applicants made out a prima facie case with a probability of success? It is not in doubt that they are not the registered proprietors of the suit properties. The defendants/respondents are. The plaintiffs/applicants claim is that of adverse possession. The same has not crystallised.

14. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another 1990 KLR 557 Bosire J (as he then was)** held that:-

*“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”*

I am not persuaded by the facts as presented by the plaintiffs/applicants that they deserve the kind of protection.

15. I am not satisfied that the plaintiffs/applicants have established a prima facie case with a probability of success at the trial.

16. I am also of the view that the plaintiffs/applicants have failed to demonstrate that they are likely to suffer irreparable loss which cannot be compensated by an award of damages if those orders are not granted.

17. I also find that the balance of convenience tilts in favour of the defendants/respondents who are the beneficiaries of the estate of late Karugu Kuria alias Karugu Matere.

18. In conclusion, I find no merit in this application and the same is dismissed. The costs of this application do abide the outcome of the main suit.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 14<sup>TH</sup> day of FEBRUARY 2019.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiffs

.....Advocate for the s Defendants

.....Court Assistant