



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.581 OF 2017

EDWARD GITUA RIBIRU.....1ST PLAINTIFF/AAPPLICANT

JANE WANJIRU MATINDI.....2ND PLAINTIFF/APPLICANT

JOYCE MUMBI GITAU.....3RD PLAINTIFF/APPLICANT

VERSUS

JOSEPH GITAU RIBIRU.....1ST DEFENDANT/RESPONDENT

EDWARD MUTINDI RIBIRU.....2ND DEFENDANT/RESPONDENT

JOHN WAGACHA RIBIRU.....3RD DEFENDANT/RESPONDENT

JOSPHAT KAMAU RIBIRU.....4TH DEFENDANT/RESPONDENT

MARY MUTHONI.....5TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the Application dated 16th May 2017, by the Applicants herein seeking for the following orders:-

1. That the Honourable Court be pleased to issue a temporary injunction restraining the parties from wasting, damaging, alienating and developing the said properties of the Plaintiffs pending the hearing and determination of their application and suit.

2. That the costs of this Application be provided for.

The Application is premised on the grounds stated on the face of the Application and the **Supporting Affidavits of Edward Gitaru Ribiru**. In their grounds in support of the Application, the Applicants have alleged that the 1st Plaintiff was the registered proprietor of **Kabete/Kibichiko/**

138, and he had eight children but two of his sons are deceased. He divided his property among his remaining children including his grandsons and their mother the Defendants who are sons and wife of his deceased son **Peter Ribiru**. Since the subdivision of the property the Defendants have encroached on the land belonging to the 1st, 2nd and 3rd Plaintiffs/Applicants being **Kabete/Kibicho/2564** and **Kabete/Kibichiko/2560** and resultantly causing mayhem.

In his **Supporting Affidavit** the 1st Plaintiff reiterated the grounds on the face of the Application. He averred that the Defendants/Respondents have made several attempts to evict and dispossess him off his property, commenced farming activities hence hindering him any opportunity to plant and have trespassed and encroached on the 2nd and 3rd Plaintiffs'/Applicants' properties and commenced illegal developments which have hindered enjoyment of their properties. He alleged that despite demands to the defendants they have refused to leave as they also physically assault him and verbally abuse him as they are of the opinion that his daughters are not entitled to the property.

The 2nd Plaintiff in her supporting Affidavit averred that she is the daughter of the 1st Plaintiff and the proprietor of **Kabete/Kibichiko/2564**. She averred that her father sub divided his land and she got a title deed for her apportioned property and she has developed part of it by putting up rental houses. She alleged that in **2016**, the Defendants/Respondents encroached and harvested her Nappier grass without her consent and put up both semi-permanent and permanent illegal developments on the portion she had left undeveloped as evidenced by

annexture JWM-2 and they have assaulted her upon being confronted.

The 3rd Plaintiff in her *Supporting Affidavit* also reiterated the averments made by the 2nd Plaintiff.

The Application is opposed and the 5th Respondent filed an *uncommissioned Replying Affidavit* filed on **18th November 2017**. She averred that the Application is *frivolous* and an *abuse* of the court process. She further averred that she was married to the 1st Plaintiff's son and they used to live peacefully on the 1st Plaintiff's parcel of land **Kabete/Kibichiko/138**, and soon after her husband's death the 1st Plaintiff demanded that they move out of the portion of land which lies on Parcel **No.Kabete/Kibichiko/2557**. She averred that she later came to learn that the 1st Defendant had sub divided his land and allocated them a parcel of land different from what they were living in and her husband is buried there which has now been designated as **Kabete/Kibichiko/2556**. She further averred that although the 1st Plaintiff claims to have sub divided the land the same has not been done on the ground. She alleged that though 1st Plaintiff has been demanding they move to what is now Land parcel Number **Kabete/Kibichiko/2556**, he has not shown them the title deed and she denied encroaching onto the Plaintiffs land , She averred that in a meeting held on **14th February 2017**, it was agreed that the sub division done by the Plaintiff in **2009**, be cancelled and it be done afresh and the land would be divided into 3 portions and her and her sons would get one portion and that the 2nd and 3rd Plaintiff's agreed to this. Further following the said meeting, her sons started constructing a semi-permanent house in the portion they had been living in. She further averred that the Plaintiffs have been disrupting peace in her house and threatened her severally and she has reported to the police as she is unable to visit her husband's grave. She averred that the 2nd and 3rd Plaintiffs do not live in the suit property and stated that the Respondents have a right to live in the portion of land that they are living in as they have developed it.

The 1st Plaintiff filed a *Supplementary Affidavit* sworn on the **8th April 2018** and averred that he subdivided his land as per the *Mutation Form* annexed as **EGR-1** and allocated each beneficiary their plot equitably and he denied the allegations that he interchanged the 5th Defendant's plot with another. That the subdivision was done and each beneficiary was satisfied having held various family consultations. He averred that the Respondents should cease from interfering, alienating, wasting the Plaintiffs parcel of land and causing disturbance.

The 2nd Plaintiff also filed a *Supplementary Affidavit* sworn on **8th April 2018**. She reiterated that she is the registered proprietor of **Kabete/Kibichiko/2564**, and the Defendants'/Respondents' illegal developments remain on her land.

The Application was canvassed by way of written submissions and the Applicants through the *Law Firm of Paul Kinyanjui & Co. Advocates* filed their submissions on the **5th June 2018**. They submitted that an Injunction is an equitable remedy and thus the court hearing the Application has discretion in making a decision on whether or not to grant the Application. The Court was therefore urged to allow the Application.

The 5th Defendant filed her submissions on **19th June 2018**, through *Pamela Wanjiru Advocate* and submitted that she has fulfilled the requirements of granting of Orders of Injunction and the Defendants stand to suffer irreparable harm if the application herein is allowed.

She further submitted that she has a map showing that the suit land is yet to be subdivided. She further submitted that she has been in occupation and use of parcel **No.Kabete/Kibichiko/138**, for a long time and should not be ordered to move out at this stage.

This Court has carefully considered the available evidence and the annexures thereto. There is the doubt that the 1st Plaintiff was the owner of **LR.No.Kabete/Kibichiko/138**, wherein he lived thereon with his children, the Defendants/Respondents included.

There is also no doubt that the Defendants/Respondents are the family of his late son **Peter Ribiru**, who allegedly died in the **year 2006**. There is also no doubt that the 2nd and 3rd Plaintiffs/Applicants are the daughters of the 1st Plaintiff who are married and do not live on the suit property.

It is also evident that the Defendants/Respondents have lived on this suit property before the demise of **Peter Ribiru** and thereafter. However, the 1st Plaintiff has now subdivided land parcel **No.Kabete/Kibichika/138**, into various plots.

From the subdivision, **Jane Wanjiru Matindi** became the proprietor of **Kabete/Kibichiko/2564** and **Joyce Mumbi Gitau** became the proprietor of **Kabete/Kibichiko/2560**. Their titled deeds were issued on **29th March 2017**. The 5th Defendant has averred that the said subdivisions were done without the consultation of the Defendants/Respondents who were occupying where suit property **Kabete/Kibichiko/2564** is allegedly located. It was their contention that the Plaintiffs/Applicants are now threatening to evict them from their portion of land which they have occupied for long.

At this stage, the Court is not called upon to decide the disputed issues with finality. The Court is only supposed to determine whether the Applicants have established the threshold for grant of injunctive orders as stated in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358**. These principles are:

- a) *The Applicant must establish that he has a prima facie case with probability of success.*
- b) *That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.*
- c) *When the Court is in doubt, to decide the case on a balance of convenience.*

In the *Notice of Motion*, the Applicants have sought for injunctive orders seeking to restrain the Defendants from interfering with the said

properties. However, they have not stated which properties they are seeking the Defendants to be restrained from, given that the initial land parcel was subdivided into various portions of land. Failure to have and/or indicate the parcels of land in dispute means that the prayers sought are not clear and are ambiguous. Therefore, the Court cannot tell from a cursory look of the prayers in the **Notice of Motion** herein which properties are to be preserved or protected by injuncting the Defendants herein. The Court finds that the Plaintiffs have not established that they have a *prima-facie* case with probability of success at the trial.

On the second limb, even if the suit property had been indicated, it is evident that the Defendants/Respondents have lived on the suit property for long. The titles by the 2nd and 3rd Defendants were acquired on **29th March 2017**, a few months before this suit was filed. The Defendants/Respondents have alleged that they are being forced to move out of the portion of land where they have lived and occupied and where their deceased father and husband to 5th Defendant was buried. The Plaintiffs have alleged that the Defendants' allegations are false and they have their own portion of land which they are not willing to move to. These are issues that can only be determined in the full trial and not at this interlocutory stage.

It is evident that the 2nd and 3rd Plaintiffs do not live on the suit property but the Defendants do. Therefore there is no evidence that the 2nd and 3rd Plaintiffs will suffer irreparable loss which cannot be compensated by an award of damages.

On the third limb, the Court finds that even if it may be in doubt on whether the 1st Plaintiff has indeed catered for the family of his late son **Peter Ribiru**, who are the Defendants herein, the Court finds that the balance of convenience tilts in favour of maintaining the *status quo*. The *status quo* herein is that the Defendants/Respondents should remain occupying and using the portion of land that they have been using until the suit herein is heard and determined. See the case of **Virginia Edith Wambui...Vs....Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.

Consequently, the **Court finds that the Notice of Motion dated 16th May 2017, is not merited.** The **same is dismissed entirely with costs being in the cause.**

The parties to prepare the main suit for hearing expeditiously so that the disputed issues are resolved once and for all.

It is so ordered.

Dated, Signed and Delivered at Thika this 18th day of March 2019.

L. GACHERU

JUDGE

18/3/2019

In the presence of

Mr. Njau Paul for 1st, 2nd and 3rd Plaintiffs/Applicants

No appearance for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

No appearance for 4th Defendant

Mr. Onami holding brief M/S Pamela Njiru for the 5th Defendant

Lucy - Court Assistant

L. GACHERU

JUDGE

18/3/2019