



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO.362 OF 2017**

**JACINTA WANJIKU GITURU.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH KIMANI WAINAINA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GEORGE MUCHERU KAGWIRI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**GITHUNGURI CONSTITUENCY**

**RANCHING COMPANY LIMITED.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JOSEPH KIMANI GITURU.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**LAND REGISTRAR THIKA,**

**THROUGH THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

This matter is coming up for determination of the Application dated **22<sup>nd</sup> March 2017**, by the Plaintiff/Applicant herein seeking for the following orders;

***1. Pending the hearing and determination of the main case an order of injunction issue specifically against the Land Registrar Thika Land registry restraining him from processing registering or executing any instrument of transfer or any form of disposition in respect of L.R No.Ruiru/Ruiru Kiu Block 2/3475 or any subdivision made therefrom the stated LR No.Ruiru/Ruiru Kiu Block 2/3475.***

***2. Pending the full hearing and determination of the main case an order of injunction do issue to restrain the Defendants whether acting by themselves or through their agents, Servants or anybody acting for them, through them or claiming any right through them from entering upon or being on, subdividing and demarcating, fixing beacons and cutting roads, transferring and generally from dealing with L.R No.Ruiru/Ruiru Kiu Block 2/3475 as a whole or any part thereof or subdivision in any manner whatsoever.***

***3. The costs of this motion be met by the Respondents jointly and severally in any event.***

The Application is supported by the grounds stated on the face of the Application and the **Supporting Affidavit** of **Jacinta Wanjiku Gituru**, the Applicant herein. The Applicant alleged that the suit land belongs to her but the 3<sup>rd</sup> and 4<sup>th</sup> Defendants through fraudulent and illegal means sold the parcel of land to the 1<sup>st</sup> Defendant. That all the Defendants herein including the registrar conspired to create an illegal title to the property for transfer to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Damage likely to arise from the Plaintiff losing the suit land cannot be compensated in monetary terms and it is therefore in order that the orders sought at this stage be allowed.

In her **Supporting Affidavit**, the Applicant averred that she acquired the suit land together with her husband by balloting when they bought membership shares into **Githunguri Constituency Ranching Company Limited**. That after the death of her husband on **25<sup>th</sup> March 1978**, she remained the sole shareholder and member and continued to make further payments to increase her shares. She further averred that in **1985**, they balloted for a piece of the Ruiru land upon which she acquired ballot **No.1522**, that entitled her to **1<sup>1</sup>/<sub>4</sub> acres** of the land and a commercial subplot near Ruiru town. She was then issued with share certificate **No. B3399** and her land was designated as **Plot No. 3475** as evidenced by **Annexure JWG-2**.

She further averred that at one time her Identity card went missing and she retrieved it from her son one **Joseph Kimani**. She later also learnt that her share certificate **No.B3399** designated as **Plot No.3475**, to the Ruiru land was missing and she reported the loss to **Gathage Police Post** and thereafter proceeded to the offices of **Githunguri Ranching Company Limited** where Notice of the loss and the Police Abstract were entered into their records. She averred that she was advised the old share certificate had been cancelled and she was issued with a new one being **No.B3572**.

She alleged that sometime in **2011**, she visited her parcel of land and

found somebody had started demarcating it. She thereafter reported the matter at the **CID Ruiru** and her son **Joseph Kimani Gituru** was arrested and charged and he pleaded guilty. It was then discovered that her son fraudulently entered into an agreement to sell the land to **Joseph Kimani Wanaina**, and despite her reporting the loss to **Githunguri Ranching Company Limited**, the **Company** fraudulently issued another ballot and share certificate and clearance certificate to her son to facilitate the sale. **Joseph Maina Kimani** had proceeded to have a title issued out in his name by the **Land Registrar, Thika** on the authority of the share and clearance certificates.

She averred that she had since learnt that somebody is trying to subdivide, demarcate and probably sell the land and if the land is lost she will suffer grave and irreparable damage.

The 3<sup>rd</sup> Respondent's Chairman filed a **Replying Affidavit** sworn on the **6<sup>th</sup> June 2017**, in support of the Application and averred that the document averred to have been issued by his office on **17<sup>th</sup> April 1998**, and certificates are false as the same are not in their records. According to their records, the Applicant is the owner of land parcel **No.Ruiru/ Ruiru Kiu Block 2/3475**, and she was issued with copies of the certificates. He is aware that the Plaintiff had lost her ownership documents. Further that he was not aware how the 4<sup>th</sup> Respondent obtained the documents as they have no records of the same and the Directors who signed them are now deceased and unable to verify.

The application is opposed.

The 1<sup>st</sup> Respondent filed a **Replying Affidavit**, sworn on **6<sup>th</sup> March 2018**, and alleged that the Applicant, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are colluding to hoodwink the cause of justice as he has never complained to the police that the 4<sup>th</sup> Respondent had obtained money from him by false pretence and the case must have arisen through collusion. He averred that if orders were to be issued against him, they will be in vain as he has no interest in the suit land. He admitted to have purchased the land from 4<sup>th</sup> Respondent in the **year 2003** and later sold it to 2<sup>nd</sup> Defendant/

Respondent who has since subdivided the same and sold to 3<sup>rd</sup> Parties who have developed thereon.

The 2<sup>nd</sup> Respondent also in opposition to the Application filed his **Replying Affidavit** sworn on **14<sup>th</sup> December 2017** and averred that he purchased the suit land and a title deed was issued in his name on **10<sup>th</sup> May 2011**. He later obtained the **Land Control Board Consent** and subdivided the land. Upon registration of the mutation, title to the suit land was closed and he was issued with **10 title deeds** and he sold the land to 3<sup>rd</sup> parties who are now the registered owners. He contended that the orders sought are in respect of non-existence title. Further that the transfer of share certificate from **Gituro Gakuru** to the Applicant was done illegally and in contravention of **Section 5** of the **Law of Succession**.

The 5<sup>th</sup> Respondent's **Replying Affidavit** was sworn on the **4<sup>th</sup> of December 2017** by **Thika Land Registrar**. He averred that the register of the suit land was opened on **13<sup>th</sup> October 2003** in the name of the 1<sup>st</sup> Defendant. The land was later transferred to the 2<sup>nd</sup> Defendant and a title issued, and it has since been closed on subdivision to 10 plots and sold to 3<sup>rd</sup> parties except two subdivisions which are still registered in his name and it might be difficult to comply with the orders sought because of the registered interests of other parties who are not parties to the suit.

The Application was canvassed by way of written submissions and the Plaintiff/Applicant through the **Law Firm of Namada Simoni & Co. Advocates**, filed their submissions on **22<sup>nd</sup> June 2018** and submitted that the Applicant has established a *prima facie* case and will suffer irreparable harm and that the balance of convenience tilts in their favour.

The 1<sup>st</sup> Respondent through the **Law Firm of Mbiyu Kamau & Co. Advocates** submitted that the Applicant has not established a *prima facie* case as the subject matter does not exist and the suit appears to have been brought outside the Limitation period of **6 years**.

The 2<sup>nd</sup> Respondent through the **Law Firm of J.K Ngaruiya & Co. Advocates**, filed their Submissions on **5<sup>th</sup> July 2018** and submitted that the Applicant's Application has not met the threshold for grant of injunction and if the orders are issued, other 3<sup>rd</sup> Parties will face a lot of inconvenience.

The 3<sup>rd</sup> Respondent through the **Law Firm of Kaingati Kamonjo & Co. Advocates** submitted that the suit property belonged to the Plaintiff according to their records.

After careful consideration of the application, the **Supporting Affidavit** and the **Replying Affidavits** of the Respondents, together with the submissions thereto, there are two emerging issues that arise for determination;-

- i. Whether the suit has been brought outside the Limitation period under the Limitation of Actions Act.**
- ii. Whether the Applicant has established the threshold for an interim injunction.**

**i. Whether the suit has been brought outside the Limitation Period under the Limitation of Actions Act.**

The Applicant in her Supporting Affidavit has pleaded that the suit

land was transferred to the 1<sup>st</sup> Respondent and subsequently to the 2<sup>nd</sup> Respondent through illegal and criminal acts. The suit is therefore premised on fraudulent activities. From the Affidavit, I am unable to confidently determine when the fraudulent activities occurred and it would therefore be premature to determine whether the suit is brought outside the Limitation of Actions Act at this stage.

When faced with a similar situation, the court in the case of Pius Kipchirchir Kogo...Vs...Frank Kimeli Tenai (2018) eKLR, stated that:-

***“I have considered the Affidavit, the suit is premised on fraud and that time begins running when the fraud was discovered. And it would be premature to apply the provision of Limitation of Actions Act without hearing the Plaintiff as it cannot be ascertained when fraud was discovered”.***

Even so I have noted that the 1<sup>st</sup> Respondent has submitted that the Limitation period of action is 6 years. Section 7 of the Limitations of Actions Act provides that:

***“An action to recover land may not be brought after the end of twelve years from the date on which the right accrued. Going by the allegations of the 1<sup>st</sup> Respondent, a term of six years is therefore not the Limitation period within which to file a suit to recover land but 12 years”.***

**ii. Whether the Applicant has established the threshold for an interim injunction.**

The power to grant temporary injunction is in the discretion of the court and in exercising its discretion, the court is guided by the principle set out in the celebrated case of Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358. In the said principles, the Applicant has to establish that; ***there is a prima-facie case, that she would suffer irreparable harm and that the balance of convenience tilts in his/her favour.***

For the court to determine where there is a prima-facie case, the court would first have to look at whether there is a right that has been infringed and the probability of success. From the Affidavits presented before court, the Applicant has alleged that she is the owner of the suit property and the 4<sup>th</sup> Respondent through fraudulent acts transferred the suit land to the 1<sup>st</sup> Respondent.

Prima-facie case was described in the case of Mrao...Vs...First American Bank of Kenya Ltd & Others (2003)KLR, to mean:-

***“A case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.***

From the available evidence, it is evident that the Applicant is claiming ownership of LR.No.Ruiru/Ruiru Kiu Block 2/3475. That is the parcel of land that she seeks injunctive orders against the Defendants/

Respondents herein. However from the available evidence, it is not in doubt that this suit property was sold to the 1<sup>st</sup> Respondent by the 4<sup>th</sup> Respondent way back in the **year 2005**. Later the 1<sup>st</sup> Respondent sold the suit property to 2<sup>nd</sup> Respondent who has allegedly subdivided the original title Ruiru/Ruiru Kiu Block 2/3475, into various parcels of land.

The **Land Registrar Thika** alleged that the new subdivisions ranges from Ruiru/Ruiru Kiu Block 2/8160 - 8169 and that most of these new subdivisions have been sold to other third parties. The said third parties are not parties to this suit. The Plaintiff/Applicant has not sought injunctive orders over the new subdivisions.

As confirmed by 5<sup>th</sup> Respondent, title No.Ruiru/Ruiru Kiu Block 2/3475, was closed upon subdivision. It would therefore be difficult to enforce any injunctive orders against a closed title. It is trite that injunctive orders cannot be issued to an event that has already occurred or one that has been overtaken by events. See the case of Jane Kemunto Mayaka..Vs...Municipal Council of Nakuru & Others, HCCC No.124 of 2005, where the Court held that:-

***“injunctions are issued to prevent the occurrence of an event that is threatened to occur, that would likely injure an applicant and are not issued where such an event has taken place.....”***

Having found that the actions sought to be enjoined have already occurred, the Court finds that the Plaintiff/Applicant has not established that she has a prima-facie case with a probability of success.

On whether the Plaintiff/Applicant can be compensated by an award of damages, it is evident that this suit property herein is quantifiable. In the event the Court finds that the transaction was illegal, unlawful and shrouded by fraud, then the Plaintiff/Applicant can be compensated by an award of damages. See the case of Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322, where the Court held that:-

***“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should***

***normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.***

On the 3<sup>rd</sup> limb, the Court is not in doubt. However, even if it was to decide on a balance of convenience, the Court finds that the same tilts in favour of maintaining *status quo*. The *status quo* herein is what is prevailing on the ground. 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”.***

Having now carefully considered the *Notice of Motion* dated 22<sup>nd</sup> March 2017, the *Court finds it not merited. The same is dismissed entirely with costs being in the cause.*

The parties to comply with Order 11 within the next 45 days from the date hereof and then set the matter down for hearing.

It is so ordered.

***Dated, Signed and Delivered at Thika this 18<sup>th</sup> day of March 2019.***

**L. GACHERU**

**JUDGE**

**18/3/2019**

In the presence of

No appearance for Plaintiff/Applicant

Mr. Kimemia holding brief for Mr. Mbiyu Kamau for 1<sup>st</sup> Defendant/Respondent

No appearance for 2<sup>nd</sup> Defendant/Respondent

No appearance for 3<sup>rd</sup> Defendant/Respondent

No appearance for 4<sup>th</sup> Defendant/Respondent

No appearance for 5<sup>th</sup> Defendant/Respondent

Lucy - Court clerk

**L. GACHERU**

**JUDGE**

**18/3/2019**