



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.54 OF 2018

KINUTHIA NJOROGE JOHN ALIAS

KINUTHIA MIRAMBO.....PLAINTIFF/APPLICANT

VERSUS

STEPHEN NDICHU J. MUKIMA

(Sued as the personal representative of

KINUTHIA NGUGI NJOROGE (Deceased).....1ST DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR.....2ND DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT

RULING

The matter for determination is the Application dated **20th February 2018**, by the Plaintiff/Applicant herein seeking for the following orders;

1. That an order of injunction be and is hereby issued restraining the Defendants/Respondents whether by themselves their employees, servants and/or agents or assigns and/or any person whatsoever acting on their behalf and/or under their mandate and/or instructions from alienating, advertising for sale, selling, taking possession of leasing, transferring, charging or otherwise in any manner whatsoever interfering with parcel of Land No. Karai/Karai/ 36 pending the Hearing and Determination of this Suit.

2. Costs of Application be provided for.

The Application is supported by the annexed **Affidavit of Kinuthia Njoroge John, alias Kinuthia Mirambo** and which is premised on the grounds that around **1957**, the Plaintiff was allocated the parcel of land **No.Karai/Karai/36** by the then **Githunguri Sub County Council Branch of Agricultural Development Corporation**, to hold it as a trustee of his father's family being the first born. As he had low level of education, he was unable to understand much about subsequent registration and his half-brother **Kinuthia Ngugi Njoroge (Deceased)** took advantage and registered himself as the absolute owner of the suit land. He impersonated the Plaintiff before the **ADC Githunguri** and had the original minutes allocating the Plaintiff the suit land changed from the Plaintiff's proprietorship to his and purported to have bought the land.

Further that he unlawfully acquired absolute title and the title ignores the fact that it was family land. The Plaintiff's house and that of his half-brother's house had been using their equal shares of the suit land and his own brother was buried in the suit land. The Plaintiff has learnt that the suit land risk being distributed as part of the estate of his deceased brother **Kinuthia Ngugi Njoroge** in **Kiambu Succession Cause No. 70 of 2017** and unless the Application is allowed, the Plaintiff and his Mother's household interest in the suit land will be prejudiced.

In his **Supporting Affidavit**, he reiterated the grounds on the face of the Affidavit and further averred that his father had two wives and when the suit land was allocated to him, he permitted all the members of the his father's family to use it. He averred that the late **Kinuthia Ngugi Njoroge** and him belonged to separate mothers and having survived his siblings, he occupied half a share of the suit land which share was for his mother's household. He was unaware that the Government had began issuance of titles in the area and he later learnt that his half-brother impersonated him and misrepresented himself before **Githunguri Sub County** who changed the allocation as evidenced by **KNJ-2**.

He further averred that his brother in his lifetime did not use the name **Kinuthia Mirambo** and if he did, he would not need to change proprietorship. He alleged that he used the name **Kinuthia Mirambo** from birth and used in alterations with his other names **Njoroge John** until he was issued with an Identity Card. He further averred that his half-brother could not have acquired absolute title of the suit land if he

did not flout procedures and laws of registration and the purported purchase is one of the manifestations of how he schemed to improperly acquire the land.

He averred that he learnt that his half-brother was registered as the proprietor of the parcel of the suit land when **Summons for Revocation** was filed in the **Succession Cause No.79 of 2016**, which is pending hearing and determination at the **High Court in Kiambu**, where it is one of the cause property listed therein as fully belonging to the Estate of the **Deceased Kinuthia Ngugi Njoroge**. He further averred that his Advocates have advised him that if his late brother improperly acquired the title, it does not extinguish his trust interest in the land which he still holds as his father's trustee. It was his contention that the suit land was his late father's family land and if the title is not cancelled, they would lose their lifetime entitlement. He further averred that his deceased half-brother recognized that his mother's household was entitled to their share as he consented to burying his brother on the suit land where his mother was cultivating.

The Application is opposed and the 1st Defendant filed a **Replying Affidavit** sworn on **10th April 2018** and averred that he is the **Executor** of the **Will** of the late **Njoroge Ngugi alias George Njoroge Ngugi** and not a beneficiary of the suit land and any orders issued against him will have no effect as the beneficiaries are not party to the suit. Further that he has been advised by his Advocates that the orders sought in this Application are not available against the 2nd and 3rd Defendants. He denied that the suit land was family land and contented that the **Will** of the **Late Ngugi Njoroge** is very clear that it was his property and the Plaintiff has no interest in the suit property having confirmed the same to him and that is why his signature evolves as evident by **annexture SNM-1**.

He further averred that **Leah Njoki Thitu** and **Kinuthia Njoroge Mirambo** are illiterate and cannot be said to have signed the witness statements. He stated that both brothers were called **Kinuthia Mirambo** and the **late Ngugi Njoroge** changed his name to avoid conflict with his step brother whom they shared the name as per the **Kikuyu Customs**. It was his contention that the **late Ngugi** bought the land and **Ayub Kinuthia alias Kinuthia Mirambo** was the one who carried out sub-division of the suit land after the death of **Ngugi Njoroge** so as to keep peace. He further averred that their father died before the **late Ngugi Njoroge** bought the suit land and that the deceased appeared before **Ndeiya Karai Arable Scheme Committee** to have change of names. He denied that the father to the **late Ngugi Njoroge** owned the suit land.

The Application was canvassed by way of written submissions and the Applicant through the **Law Firm of LN Muchiri & Co. Advocates** filed their submissions on the **7th May 2017**. It was submitted that there are two issues for determination, one being whether the Honourable Court has powers to preserve the suit property pending hearing and determination of the suit and two, whether the Application merits the Relief sought. The Applicant relied on various decided cases and provisions of the Law amongst them the case of **Mawji...Vs...US international University & Another (1976) KLR 185** where the court stated;

“The doctrine of lis pendens under Section 52 of TPA is a substantive law of general application. Apart from being in the statute, It is a doctrine equally recognized by common law. It is based on expedience of the Court. The doctrine of lis Pendens is necessary for final adjudication of matters before the Court and in the general interests of public policy and good effective administration of Justice.....”

The 1st Defendant through the **Law Firm of Kaburu Miriti & Co. Advocates**, filed their submissions on the **3rd July 2018** and submitted that the issues for determination are the ones laid out in the case of **Giella...Vs...Cassman Brown**. And submitted that the Plaintiff has not established a prima facie case and therefore no harm can be occasioned to him resultantly no inconvenienced will be caused. They relied on the case of **Amicabre Travel Services Ltd versus Alios Kenya Finance Limited (2014) eKLR**, where the Court held that;

“The Court requires tangible evidence when considering an application for interlocutory injunction pending hearing and determination of the suit. It is incumbent upon the applicant to submit a cogent case during the interlocutory stage to show that it has an arguable case. This is important because at this time, the court would not have an opportunity to listen to all evidence in support of each party's case.”

The Court has now carefully read the Application together with the **Supporting Affidavit**, the **Replying Affidavit** and the **submissions** by the parties and considered them. There are two issues for determination before Court:-

a) Whether Stephen Ndichu Mukima is bound by the orders made by Court as an Executor of the Estate of Kinuthia Ngugi Njoroge.

b) Whether the Applicant has established the threshold for grant of Interlocutory Injunction.

a. Whether Stephen Ndichu Mukima is bound by the orders made by Court as an Executor of the Estate of Kinuthia Ngugi Njoroge

The 1st Respondent being the **Executor** of the Estate of the deceased has been rightly sued and though he may not be a beneficiary of the Estate he is obligated to follow the orders against the Estate of the deceased.

The Court in **Re Estate of Thiong'o Nginyayu Muthiora (Deceased) (2013) eKLR** stated that:-

“The Executor in this case who is named in the instant application as the respondent is the personal representative of the deceased as grant of probate was made to him He represents the deceased so far the affairs of the deceased concerning the estate property are concerned..... He holds the legal title to the assets which make up the estate He is the person to be sued by third parties over the Estate or to sue such third parties to protect the Estate.”

b. Whether the Applicant has Established the threshold for Grant of a temporary Injunction

A court has discretion on whether or not to grant a temporary injunction. In deciding whether or not to grant a temporary Application the Applicant must first satisfy three principles that have been enumerated in the case of *Giella...Vs....Cassman Brown (1973) E.A 358*

1. An Applicant must show a *prima facie* with a probability of success.

2. An interlocutory injunction will not be normally granted unless the Applicant might otherwise suffer irreparable injury which will not adequately be compensated by an award of damages.

3. If the Court is in doubt, it will decide an application on the balance of convenience.

1. Whether Applicant has established a Prima facie Case

A *prima facie* case has been defined in the case of *Mrao Ltd....Vs... First American Bank of Kenya LTD (2003) KLR 125* as:-

“A *prima-facie* case in a civil application includes but is not limited to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself concludes 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.”

The Applicant has to first establish a *prima-facie* case before the other principles can be looked at. In his *Supporting Affidavit*, the Applicant has alleged that the suit land belonged to his father and the 1st Defendant only acquired title by taking advantage of his illiteracy and transferring the suit land to his name by misrepresenting himself. He also alleged that his brother has been buried in the suit property and they continue to cultivate their share of the suit land that belonged to their mother, an allegation that has not been rebutted by the 1st Defendant. Going by their assertions, I would think that if this allegations were to be proved, then the Applicant’s rights would have been infringed

Allegations of fraud and misrepresentation have been pleaded by the Applicant, though the 1st Respondent has produced a title evidencing his registration, title would be defeasible if it is established that title to the suit land was acquired by either fraud, illegally and unprocedurally. Further no explanation has been given by the 1st Defendant as to why he bought land that was already in his name.

The position of the holder of a title deed is well stated under *Section 26 (1)* of the *Land Registration Act* that provides:-

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and be subject to challenge except;

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

At this stage I am not required to decide with finality whether the evidence is worthy of credit or whether it is believed as the same is left for parties to adduce evidence during trial. I however find that the Applicant has a genuine and arguable case considering the issues of allegations of Fraud and Misrepresentation. The Court finds that the Applicant has established a *prima-facie* case with probability of success at the trial.

2. Whether the Applicant will suffer irreparable Injury.

It was the Applicant’s contention that they have been cultivating the land and they continue to cultivate the land and if the injunction is not granted, there is a risk of the suit land being distributed as part of the first Respondent’s estate and this would mean that the Applicant will not be able to recover the same. In the case of *Niaz Mohammed Jan Mohamed... Vs...The Commissioner of Lands (1996) eKLR*, the Court stated that:-

“It is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turns out to have been the case.”

The Applicant’s chances of suffering harm that would not be capable of being compensated by award of damages is high considering this is land that they have been in occupation of and continue to cultivate. If the suit land is distributed to the beneficiaries of the Estate of the 1st Respondent and for any reason they further dispose of the land, the Applicant would have a cumbersome time in recovering land and as alleged this is a family land, then an award of damages may not be the best compensation.

3. Where does the balance of convenience tilts

The Applicant has asserted that he is in possession of half of the suit property and they have been for a number of years. The balance of convenience always tilts in favour of maintaining the *status quo* and the *status quo* is that the Applicant is in occupation of half of the suit property. I therefore find that the balance of convenience tilts in favour of the Applicant. See the case of *Agnes Adhiambo Ojwang ..Vs.. Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000*, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

Having now carefully considered the **Notice of Motion** dated **20th February 2018**, the **Court finds it merited and it is allowed entirely in terms of prayer No.3 with costs being in the cause.**

It is so ordered.

Dated, Signed and Delivered at Thika this 13th day of March 2019.

L. GACHERU

JUDGE

13/3/2019

In the presence of

Mr. Omu holding brief for M/S Muchira for Plaintiff/Applicant

No appearance for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE

13/3/2019