



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC SUIT NO. 48 OF 2018**

**JECINTA NDUTA** suing in her capacity as the surviving Administrator of the Estate of the

**Esther Gathoni (deceased).....PLAINTIFF**

**=VERSUS=**

**GRACE WAIRIMU MACHUA.....1<sup>ST</sup> DEFENDANT**

**ROSEMARY WAMAITHA KAMAU.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff/Applicant is the administratrix of the estate of Esther Gathoni (deceased) who is the registered owner of L.R Dagoretti/Mutuini/92 (suit property). The Applicant filed a Notice of Motion dated 2<sup>nd</sup> February, 2018 in which she sought the following orders:-

**1. Spent**

**2. Spent**

**3. Spent**

**4. That an Order of injunction be issued to restrain the Defendants/Respondents herein, their relatives, employees, servants, representatives, agents, whomsoever acting on their behalf and any other person whomsoever from entering, farming, trespassing, operating or continuing with any dealings whatsoever on land Reference No. Dagoretti/Mutuini/92 pending the hearing and determination of the main case herein.**

**5. That the OCS Riruta Satellite Police Station in Nairobi County assisted by the Chief Mutuini Location in Dagoretti, Nairobi be directed to ensure compliance with Order 4 above and to ensure the peace, law and order prevails.**

**6. That the Land Registrar in charge of Dagoretti Land Registry and or the Land Registrar with the jurisdiction over Land Reference No. Dagoretti/Mutuini/92 be ordered to remove any and all cautions placed against Land Reference No. Dagoretti/Mutuini/92 forthwith.**

**7. That the Plaintiff/Applicant be awarded costs of this application.**

2. The Applicant contends that the Respondents are trespassers to the suit property who have also caused restrictions to be registered against the title to the suit property and that the Respondents attempted to file summons for revocation of grant issued to her and her co-administrator who has since died but that the application by the Respondents for revocation of grant was dismissed vide a judgment delivered on 9<sup>th</sup> November, 2017 in Nairobi HC Succession Cause No. 2989 of 2004.

3. The Applicant has reported the Respondents and their families to the local administration who have warned the Respondents to desist from their trespass but that the Respondents have not heeded the warnings. It is on this basis that the Applicant is praying for the orders hereinabove.

4. The Respondents have opposed the Applicant's application through grounds of opposition dated 26<sup>th</sup> July, 2018 and filed in Court on 2<sup>nd</sup> August, 2018 as well as a replying affidavit sworn by the second Respondent on 18<sup>th</sup> December, 2018. The Respondents contend that the Applicant is not the sole beneficiary of the estate of the deceased and therefore the application is incompetent; that the grounds relied on the supporting affidavit do not support the Applicant's application and that the Respondents have been on the suit property for nearly forty(40)

years. The Respondents therefore urge the Court to dismiss the Applicant's application and maintain the status quo.

5. I have considered the Applicant's application as well as the opposition thereto by the Respondents. I have also considered the submissions filed by the Applicant as well as the Respondents. The only issues for determination are firstly, whether an injunction should issue in the manner prayed for and secondly whether an order should be made ordering removal of the restrictions registered against the title.

6. Whereas the Applicant calls the Respondents sporadic trespassers who have taken advantage of the fact that the beneficiaries of the estate of the deceased stay away from the suit property, documents availed show that the husbands of the Respondents purchased portions of the suit property from the beneficiaries of the estate of the deceased. The Respondents took possession and have put up their houses on the respective portions which they purchased.

7. One of the portions of the suit property was purchased in 1981. In October, 2007 the husbands of the Respondents who are now deceased filed summons for revocation of grant given in respect of the estate of the deceased. Though the application was dismissed, the Court observed that the issue of ownership could only be dealt with before the Environment and Land Court. It is therefore clear that the dispute did not begin in 2018 when this suit was filed.

8. The suit property is still in the name of the deceased. The Respondents cannot alienate it in any way as they have no title. The Respondents have been in possession and to grant an injunction in the manner prayed for would amount to granting a mandatory order which will result in their eviction before the suit is heard and determined.

9. The deceased was registered as owner of the suit property in trust of her children. It is some of her children who sold part of the property during their lifetime if the documents filed herein are anything to go by. It therefore follows that no injunction can be granted at the moment. Equally no order can be granted for the removal of the restrictions registered against the title. In any case I notice that the restrictions which were registered were to subsist until the conclusion of the summons for revocation. This is as per the search conducted on 4<sup>th</sup> April, 2012. If there are any other cautions or restrictions registered subsequently, there is no basis upon which this Court can order their removal.

I therefore find no merit in the Applicant's application which is hereby dismissed with costs to the Respondents.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 16<sup>th</sup> day of May, 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of Mr. Ng'ang'a for Applicant

Court Assistant Hilda