



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 220 OF 2014**

**NANCY WANGITHI WAMUGUNDA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH MUGO GITHAKA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RICHARD MUREITHI GITHAKA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JOYCE WANGITHI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JOSEPH WANJAU GITUTO....4<sup>TH</sup> INTENDED DEFENDANT/RESPONDENT**

**RULING**

This is in respect to the plaintiff's Notice of Motion dated 27<sup>th</sup> September 2017 in which she seeks the following orders:

**1. Spent.**

**2. Spent.**

**3. That the Honourable Court be pleased to issue an injunction restraining the defendants from alienating, sub-dividing, transferring, selling and carrying out any construction on the land parcels No. INOI/MBETI/1334, 1333, 1301 and 746 pending the hearing and determination of this suit.**

**4. That the Honourable Court be pleased to grant leave to the plaintiff to further amend the plaint and include the 4<sup>th</sup> intended defendant as a defendant in this suit as per the annexed draft copy of the amended plaint.**

**5. That the costs of this application be provided for.**

The application is based on the grounds set out therein and is also supported by the affidavit of the plaintiff **NANCY WANGITHI WAMUGUNDA**.

The gravamen of the application is that the 1<sup>st</sup> defendant has caused land parcel No. INOI/MBETI/747 to be sub-divided into parcels No. INOI/MBETI/1301 and 1302 after which he again sub-divided parcel No. INOI/MBETI/1302 into INOI/MBETI/1333 and INOI/MBETI/1334. The 1<sup>st</sup> defendant then sold land parcel No. INOI/MBETI/1333 to the proposed 4<sup>th</sup> defendant while this case is still pending in Court and

therefore if the orders sought are not granted, this suit shall lack meaning and the plaintiff shall be litigating in vain.

The application is opposed and by a replying affidavit filed by the 1<sup>st</sup> defendant **JOSEPH MUGO GITHAKA** and sworn also on behalf of the 2<sup>nd</sup> defendant **RICHARD MUREITHI GITHAKA**, it is deponed, inter alia, that the 1<sup>st</sup> defendant has put up houses and a shop on his land and the orders sought will prejudice him and the plaintiff utilizes land parcel No. INOI/MBETI/745 where she has planted her tea. That the 1<sup>st</sup> defendant has sold a small portion to enable him pay school fees for his children.

The application has been canvassed by way of written submissions which have been filed both by **MRS R. MAKWORO** advocate for the plaintiff and **MR. J. NDANA** advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

I have considered the application, the rival affidavits and the submissions by counsel.

This being an application for temporary injunction pending trial, it will be determined in line with the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:

- 1. The Applicant must establish a prima facie case with a probability of success.***
- 2. A temporary injunction will not normally be granted unless the Applicant shows that he will suffer irreparable injury that cannot otherwise be compensated by an award of damages.***
- 3. If in doubt, the Court will determine the application on a balance of convenience.***

A prima facie case, as defined in **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)**, is:

***“..... A case 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”.***

In **NGURUMAN VS JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No. 77 of 2012**, the Court of Appeal added the following:

***“The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed”.***

The Court then went on to add that:

***“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation”.***

From the pleadings herein, the plaintiff’s suit is predicated on a pleading of fraud. She claims that her deceased father who passed away on 13<sup>th</sup> May 2003 and was also the father to the 1<sup>st</sup> and 2<sup>nd</sup> defendants was the proprietor of land parcel No. INOI/MBETI/13 which on 29<sup>th</sup> November 2002 was closed and that land was sub-divided into parcels No. INOI/MBETI/744, 745, 746 and 747. That before he died, the deceased had given the plaintiff 1087 stems of tea in 1990. In 2011, the plaintiff discovered that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had been issued with title deeds to land parcels No. INOI/MBETI/747 and 746 on 15<sup>th</sup> June 2011 and 28<sup>th</sup> October 2011. Her case is that this transaction must have been done fraudulently

because their father had long died. If that is the plaintiff's case, and I believe it is because that is what she has pleaded in her amended plaint which I shall be dealing with shortly, then I do not discern what prima facie case she has established. In reply to that application, the 1<sup>st</sup> defendant has deponed in paragraph 6 of his replying affidavit as follow:

***“That the Applicant utilizes land parcel No. INOI/MBETI/745 where her tea bushes are planted”***

That averment was not rebutted and in the circumstances, this Court can only conclude that the plaintiff has no issue with parcel No. INOI/MBETI/745 which, as per the copy of records, is still registered in the names of her late father and which is the one she has herself pleaded was given to her in 1990 with 1087 stems of tea. In her amended suit, she appears only to have an issue with land parcel No. INOI/MBETI/747 which has been sub-divided into INOI/MBETI/1301 and 1302 and INOI/MBETI/746. However, it cannot be that only the registration of INOI/MBETI/747 and 746 were fraudulent and not INOI/MBETI/744 and INOI/MBETI/745. Either the whole transaction was fraudulent or legal but not a mixture of both.

Secondly, the plaintiff takes issue with the sub-division of land parcel No. INOI/MBETI/13 into parcels No. INOI/MBETI/744, 745, 746 and 747 on the ground that it was done when her father was already deceased. However, a perusal of the Green Card to land parcel No. INOI/MBETI/13 shows that it was closed on 27<sup>th</sup> November 2002 on sub-division of which was some four (4) months before her father died. Therefore land parcels No. INOI/MBETI/744, 745, 746 and 747 were in existence during the life time of her late father and it is not clear why this suit was not filed then or why fraud is being imputed upon the 1<sup>st</sup> and 2<sup>nd</sup> defendants and not her late father. The plaintiff having pleaded that her late father gave her a portion with tea stems and the 1<sup>st</sup> defendant having stated that the portion is INOI/MBETI/745 which she utilizes and which has not been rebutted and bearing in mind that that portion is not the subject of this suit, there is clearly no prima facie case established to warrant the grant of an order of interlocutory injunction pending trial. And as was held in the NGURUMAN case (supra),

***“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration”***

This is because the three limbs of the test set out in the GIELLA case (supra) are to be considered sequentially so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt, then it will consider the third condition. In the circumstances, since no prima facie case has been established, that is the end of the road for the plaintiff in the application for a temporary injunction pending trial which I must dismiss.

The plaintiff also seeks leave to further amend the plaint and include the 4<sup>th</sup> intended defendant as a defendant. The ground upon which that prayer is sought is because the intended 4<sup>th</sup> defendant has acquired land parcel No. INOI/MBETI/1333 which is a sub-division of land parcel No. INOI/MBETI/1302 which itself was a sub-division of land parcel No. INOI/MBETI/747 which is the subject of this suit. Order 8 Rule 3 (1) of the Civil Procedure Rules donates to the Court power to amend pleadings “..... at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such manner as it may direct.....” In the case of EASTERN BAKERY VS CASTELINO 1958 E.A 461, the then Court of Appeal for East Africa held that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side. And in CENTRAL KENYA LTD VS TRUST BANK & OTHERS (2000 e K.L.R.), the Court of Appeal stated that:

***“..... A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits provided there has been no undue delay, that no new or inconsistency cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side”***

The main consideration by a Court must therefore be whether the amendment sought is necessary for the determination of the suit and if any prejudice will be caused to the other party for which costs will not be an adequate compensation. In this case, the trial is yet to commence and so the case is in its early stages and there is no delay. The intended 4<sup>th</sup> defendant is now the proprietor of a portion of land parcel No. INOI/MBETI/1333 which is a resultant sub-division of the land parcel No. INOI/MBETI/747 which is the subject of this suit and it is in fact in the interest of the intended 4<sup>th</sup> defendant to be enjoined in this suit so that he can protect his interest. I see no prejudice that will be caused either to him or the other parties and none has been alleged. That prayer is therefore well merited and I allow it.

Ultimately therefore, having considered the plaintiff's Notice of Motion dated 27<sup>th</sup> September 2017, I make the following orders:

- 1. The prayer for temporary injunction is rejected.***
- 2. Leave is granted to the plaintiff to further amend the plaint to include the 4<sup>th</sup> intended defendant as a defendant in this suit as per the annexed copy of the further amended plaint which should be served on all parties within 15 days of this ruling.***
- 3. The intended 4<sup>th</sup> defendant shall have 15 days from the date of service upon him of the further amended plaint to file and serve his defence.***
- 4. Costs shall be in the cause.***

Having said so, it appears to me that the main protagonists in this case are the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants who are siblings. The plaintiff's case is that her deceased father gave her some 1087 stems of tea bushes prior to his death in 1990. From the 1<sup>st</sup> defendant's replying affidavit, it is suggested that those tea bushes are on land parcel No. INOI/MBETI/745 which is still registered in the names of their late father as per the documents herein. In their defence filed herein on 12<sup>th</sup> August 2014, the 1<sup>st</sup> and 2<sup>nd</sup> defendants pleaded as follows in paragraph eight (8):

***“The defendants aver that the plaintiff should file Succession Cause for land parcels number INOI/MBETI/744 and 745 which our deceased father intended to transfer to them (sic)”***

It appears to me that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are conceding that their late father intended to transfer land parcels No. INOI/MBETI/744 and 745 to their sister the plaintiff and they are inviting her to file for succession in that regard. Surely I do not see why judicial time and resources of the parties should be expended in this dispute when the cheapest and easiest route open to them is to consider an out of Court settlement. I must repeat what I have previously informed parties before that whereas Courts exist to solve disputes, they are not necessarily the best forum particularly in cases involving family. That is why under ***Article 159 (2) (c) of the Constitution***, alternative forms of dispute resolution mechanisms are to be promoted. I invite the parties with the aid of counsel to pursue that option.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> JANUARY, 2018**

Ruling dated, delivered and signed in open Court at Kerugoya this 26<sup>th</sup> day of January 2018

Mr. Ngigi for Mr. Ndana for Defendants present

Mr. Ndegwa for Ms Makworo for Plaintiff present

Plaintiff present

1<sup>st</sup> Defendant present.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> JANUARY, 2018**