



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.573 OF 2017

ISABELLA WANJIKU KARANJA.....PLAINTIFF/APPLICANT

-VERSUS-

GICHIA B. MUNGAI1ST DEFENDANT/RESPONDENT

KABEBE JOHN MUNGAI.....2ND DEFENDANT/RESPONDENT

WAMUTI MUNGAI.....3RD DEFENDANT/RESPONDENT

KABEBE GEORGE MUNGAI.....4TH DEFENDANT/RESPONDENT

THE REGISTRAR OF LANDS, KIAMBU.....5TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated **18TH April 2017**, brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rules 1, 2, 3, 8, 10 & 11 of the Civil Procedure Rules and Section 99 of the Land Act 2012 and any other enabling provisions of law. The Applicant has sought for the following orders:-

1) Spent.

2) That a temporary injunction do issue to restrain the Defendants/Respondents herein either by themselves, their servants and/or agents from transferring, charging, subdividing, selling, alienating, entering into, constructing upon, farming and/or in any other way interfering in any manner whatsoever/however with the Plaintiff's/Applicant's quiet use and possession of the suit property LR.No.Kiambaa/ Kanunga/376.

3) That the Defendants be compelled by an order of this Honourable Court to deposit within 14 days from the date hereof to either the Plaintiff's Advocate or to the Deputy Registrar of this Honourable Court the original title for Kiambaa/Kanunga/376.

4) That the OCS and chief of the area do oversee the due execution of this Court Order.

5) Any other consequential order.

6) Costs of this application to be paid by the Defendant/Respondents.

This application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of the Applicant, **Isabella Wanjiku Karanja**. These grounds are:-

a) The Applicant is an Administrator of the Estate of the Late Charles Karuga Koinange vide Grant of Letters of Administration issued in Nairobi High Court, P&A Succession Cause No.998 of 2006.

b) Vide a Judgement delivered by the Honourable Court in High Court, Civil Case No. 1183 of 1983, Justice Osiemo declared that the suit property LR.No.Kiambaa/Kanunga/376 previously held by the Late John Mungai Gichia who was the father to the 4th Defendant/Respondent herein and later transferred to the said Defendants had actually been sold and fully paid for by Charles Karuga Koinange.

c) The Plaintiff/Applicant and her sibling one Marion Wambui Gitau alias Marion Wambui Koinange is the sibling who actively was gifted this parcel of her land as a gift inter vivos and has been cultivating and physically occupying the land over the years.

d) That the Defendants/Respondents have at all material times been aware of the Succession Cause No.6 of 1976 however it appears that at the close of the case, they failed to disclose to the Judge, the Plaintiff's interest in the suit property.

e) That the Plaintiff/Applicant's claim is for orders to compel the Defendants/Respondents jointly and severally to relinquish the title deed for LR.No.Kiambaa/Kanunga/376, and to have the same annulled from their names and transferred to the name of Marion Wambui Gitau being the rightful owner of the suit land.

f) The Plaintiff contends that full consideration for purchase of the land was paid by her deceased father and proceedings in courts of concurrent jurisdiction have recognized the deceased's father's interest.

g) The possession of the land has remained in control of the Plaintiff/Applicant.

h) The Defendants had repeatedly undertaken to transfer the land to the Plaintiff/Applicant and only reneged on the promise recently.

i) The activities of the Defendants have subjected the Plaintiff to irreparable loss, damage and harm.

j) It is in the interest of justice that the orders sought be granted to avert gross miscarriage of justice to the Plaintiff/Applicant.

In her supporting affidavit, the Applicant reiterated the contents of the grounds in support of the application and further averred that a restriction was entered on the subject title but the same was mischievously removed as evident from **annexture IWK4**. Further that the Defendants/Respondents have encroached on the suit parcel of land and have started cultivating until when the matter was reported to the area chief that they stopped the illegal activities on the farm. Therefore, it is in the interest of justice that the orders sought should be granted to avert gross miscarriage of justice.

The application is contested and **John Mungai Kabebe**, the 3rd Defendant filed a **Replying Affidavit** on his behalf and on behalf of the other Defendants having been granted authority to do so by the other Defendants. He averred that the Applicant has blatantly misled the court by misinterpreting the Judgement of **Hon. Justice Osiemo** in asserting that the said Judge declared that the suit property **LR.No.Kiambaa/Kanunga/376**, had actually been sold and fully paid for by the late **Charles Karuga Koinange**. He further alleged that there was no proprietary right in the property alleged to have been bought by **Charles Karuga Koinange (deceased)** and the said deceased could not have gifted a property that he did not have any proprietary right. He further averred that there was no written sale agreement and

that the Judgement of **Osiemo J.** addressed the issue of *locus standi* of one of the registered inheritors of the property in issue. He also averred that the alleged restrictions said to have been placed on the property are irregular and only serve to intimidate the registered proprietors to submissions as the Applicant has no legal right or interest that is capable of attaching to the suit premises. Therefore, the Applicant or anyone on the suit premises is a trespasser and should be removed. The Defendant denied having any knowledge or promise or offer to transfer the suit land to the Applicant. He also denied that the Applicants are in possession of the suit land. He urged the Court to dismiss the instants application.

The Plaintiff/Applicant filed a **Supplementary Affidavit** on **28th July 2017**, and reiterated the contents of her earlier affidavit and further averred that together with her sibling **Marion Wambui Gitau *alias* Marion Wambui Koinange**, have always been in actual and exclusive physical occupation of the suit property for the **last 41 years**. That the Defendants being aware of the Applicant's ownership fraudulently failed to disclose the said interest in **Succession Cause No.6 of 1976**. She also alleged that she has been advised by her advocate on record that having been in possession of the suit land, her rights are binding on the said property and her possessory rights are overriding. Further that the Respondents have now forcibly encroached on the suit parcel of land and have started cultivating the same with threats and menaces. She also alleged that the illegal activities of the Defendants/Respondents have subjected her to a lot of anxiety, irreparable loss, damages and harm and thus this application.

The Respondents too filed a Response to the **Supplementary Affidavit** on **6th October 2017**, and averred that the said Supplementary Affidavit is a mixture of submissions of law and purported facts and the same being in the nature of legal principles and opinions should be expunged from the court records.

He further stated that until the death of **Mungai Gichia**, the property was still registered in his name. Further that the property devolved to the five sons of the deceased as confirmed in **Kiambu, SPM SUCC Cause No.6 of 1976**, and there has been no Appeal or any other court process to alter the orders of the said court and the property has since been transferred and registered in the names of the five sons of the deceased who are the Defendants herein. The deponent also denied that his father **Mungai Gichia** ever gave possession of the suit land to the Late **Charles Karuga Koinange**, who purports to have bought the said property. Further that the property was never transferred to the said **Charles Karuga Koinange** nor any of his agents and/or put in possession as alleged by the Applicant. Therefore he reiterated that the Applicant and or the said **Marion Wambui Gitau** are trespassers and have never been in possession of the suit property. Further that he has been informed by the rest of the Defendants/Respondents who are his brothers, that none of them have agreed to transfer the property to the Plaintiff/Applicant as alleged. Therefore the Plaintiff has no colour of right to the suit property and any transfer and/or handing over of the suit property to her would be unlawful. The Court was urged to dismiss the instant application with costs.

This application was canvassed by way of written submissions wherein the **Law Firm of Gatheru Gathema & Co. Advocates** for the Plaintiff/Applicant filed their submissions on **23rd August 2017**, and urged the Court to allow the instant application. It was submitted that the Applicant has met the threshold set up in the case of **Giella...Vs...Cassman Brown & Co. Ltd (1973) 358**, which stated as follows:-

“The conditions for the grant of interlocutory injunction are now, I think well settled in East Africa, First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”

The Applicant further relied on the case of **Suleiman...Vs...Amboseli Resort Ltd (2004) eKLR 589**, where the Court held that:-

“.....the court in responding to prayers for interlocutory injunctive relief should always opt for the lower rather than the higher risk of injustice.... there would be a much larger risk of injustice if the court found in favour of the Defendant than if it determined the application in favour of the Applicant.”

Further the Applicant relied on the case of *John Simiyu Ndalila...Vs... Francis Soita (2014) eKLR*, where the Court cited with approval the holding in the case of *Mwangi & Another...Vs...Mwangi (1986) KLR 328*, where it was held that:-

“...the rights of a person in possession or occupation of land are equitable rights which are binding on the land”.

The Court was urged to allow the Plaintiff’s application with costs.

The Defendants/Respondents through the *Law Firm of Masese & Co. Advocates*, filed their written submissions on **6th October 2017**, and submitted that the Applicant has not met the threshold for grant of injunctive orders and the instant application should be dismissed with costs. The Respondents relied on various decided cases and various provisions of law. They relied on the *Section of Law of Contract Act* which provides that:-

“No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought; or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized”.

Further the Respondents relied on *Section 38(1) of the Land Act 2012* which provides:-

38. (1) No suit shall be brought upon a contract for the disposition of an interest in land unless

—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

The Respondents also relied on the case of *Gatimu Kunguru....Vs...Muya Gathangi (1976) KLR 253*, where the Court held that:-

“To fall within Section 6(1) a dealing in land requires a free and voluntary act of parties involving disposition of land”.

It was therefore submitted that the alleged sale if any did not meet the legal requirements and the same is null and void and any occupation of the suit premises in line with the said illegal sale is rendered unlawful and wrongful. That the said occupier is therefore a trespasser and should be prosecuted for trespass. It was their further submissions that there would be a greater degree of injustice to the Defendants/Respondents if the prayers sought are granted. For this, they relied on the case of *Amir Suleiman...Vs...Amboseli Resort Ltd (2004) eKLR*, (cited by the Applicant), where the Court observed as follows:-

“A further albeit rather special and more intrinsic test which is now in the nature of general principle. The Court.... should always opt for a lower rather than the higher risk of injustice”.

This Court has now carefully considered the instant *Notice of Motion*, the annexures thereto, the written submissions, the cited authorities and the relevant provisions of law and renders itself as follows:-

There is no doubt that the suit herein against the 1st Defendant was withdrawn vide a *Notice of*

Withdrawal dated **15th June 2017**. The claim herein is against the 2nd to 6th Defendants. It is also evident that the Plaintiff/Applicant filed this suit on **2nd June 2017**, and sought for various orders against the Defendants. Among the orders sought is an order that **‘a declaration do issue that the Plaintiff is the lawful and rightful owner of the parcel of land known as LR.No.Kiambaa/Kanunga/376 (the suit property)’**.

It is also evident that vide **HCCC No.1183 of 1983, John Kabebe Mungai**, the 3rd Defendant had sued one **Charles Karuga Koinange** for an Order of vacant possession of the suit land wherein he had alleged that the Defendant (**Charles Karuga Koinange**) was in illegal occupation **since 1974**. The said Defendant (**Charles Karuga Koinange**) has alleged that he had purchased the suit property in **1974**, from the father of the Plaintiff, one **Mungai Gichia**. It is evident that the said suit was dismissed with costs. The Court therein had observed that **“since the other brothers had consented to the Defendant being on the suit land, the Plaintiff ought to have waited until the suit land is subdivided and each of them given his portion so that he could only institute a suit in respect of the portion registered in his name”**.

That being the observations of the trial court, then it is evident that the said **Charles Karuga Koinange** (deceased) was in possession of the suit land **since 1974**. It is also evident that the said **Charles Karuga Koinange** died on **20th February 2005**, and Letters of Administration were issued to the Plaintiff/Applicant together with other co-administrators on **27th February 2014**.

It is not clear whether the said grant has been confirmed and the estate of the deceased distributed. Further there was no list of assets of the said deceased listed in this application and whether the suit property is listed among the list of the assets left by the said deceased and subject to distribution to his beneficiaries.

However, the Applicant has alleged that the suit property was gifted to her and her sibling **Marion Wambui Gitau alias Marion Wambui Koinange**, as gift *inter vivos* and they have been in possession with the knowledge of the Defendants. However, the Defendants have recently encroached on the suit property and thus this suit.

It is evident that the Respondents have vehemently denied that the suit land was ever sold to the said **Charles Karuga Koinange** (deceased) and that he was ever in possession (though in **HCCC No.1183 of 1983**, the Defendants had alleged that the said **Charles Karuga Koinange** was in wrongful occupation of the suit property). It is also evident that the Respondents have denied that the Plaintiff/Applicant is entitled to the prayers sought.

The above are the undisputed facts. The Applicant has sought for injunctive orders and the issues for determination is whether the applicant is entitled to the orders sought.

What is apparent is that the Applicant has sought for injunctive orders which are equitable relief granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554**, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised. It must be based on common sense and legal principles.”

Further, the Court also takes into account that at this juncture, it is not called upon to delve into the substantive issues which are disputed and make finally concluded finding. See the case of **Agip (K) Ltd...Vs..Mahesh chandra Himatlal Vora & Others, Civil Appeal No.213 of 1999**, where the Court held that:-

“In an application for injunction, the Court should not delve in substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

All that the Court is called upon is to decide whether the Applicant has met the threshold for grant of injunctive orders based on the laid down criteria. See the case of **Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The threshold for grant of such injunctive order is the one laid down in the case of **Giella...Vs...Cassman Brown & Co. Ltd (supra)**. These principles have been repeated in other judicial pronouncements. See the case of **Francis Jumba Enziano & Others ..Vs...Bishop Philip OKeyo & 2 Others, Nairobi HCCC No.1128 of 2001**, where the Court held that:-

“The settled principles of grant of an injunction are; first that the Applicant must show a prima-facie case with probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the Applicant can show an irreparable injury which cannot be adequately compensated by damages. Thirdly, if the court is in doubt, it should decide the application on a balance of convenience”.

Therefore the Applicant herein had a duty to establish the above stated threshold.

Firstly, the Applicant needed to establish that she has a *prima-facie* case with probability of success. In the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & 2 Others 2003 KLR 125**, the Court held that:-

“A prima-facie case means more than an arguable case. It means that the evidence must show infringement of a right and probability of success of the Applicant’s case at the trial”.

Again in the case of **Habib Bank Attorney General Zurich...Vs... Eugene Marion Yakub, Civil Appeal No.43 of 1982 (Nairobi)**, probability of success was described as follows:-

“Probability of success means the Court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at that stage since proof is only required at the hearing stage”.

Therefore the question for determination is whether the available evidence as laid down by the Applicant has established infringement of the Applicant’s right and probability of success at the trial.

It is evident that the Applicant herein is a co-administrator of the Estate of the late **Charles Karuga Koinange**. It is evident that the said **Charles Karuga Koinange** was in possession of the **LR.No.Kiambaa/ Kanunga/376 since 1974** as was alleged in **HCCC No.1183 of 1983** by the 3rd Defendant who was the Plaintiff in the said suit. The above stated suit was dismissed because the Plaintiff therein did not have *locus standi*. The said dismissal was done in the **year 2005**. With the said dismissal, it meant that the said **Charles Karuga Koinange** remained in possession. It is also evident that the said **Charles Karuga Koinange** died on **20th February 2005** as per the Letters of Administration attached to the application. The Applicant has alleged that during his lifetime, the said **Charles Karuga Koinange** had granted the suit property to the Applicant and one **Marion Wambui Gitau** as gift *inter vivo* and they have been using the suit land for a long time. However, the Respondents have disputed the Plaintiff’s claim and alleged that the purported sale was **null and void** as there was no written sale agreement nor consent from the Land Control Board. However the Court has noted that the issues raised by the Respondents are issues which can only be decided after calling of evidence at the main trial. These are disputed facts which cannot be delved into and decided with finality at this stage based on affidavits evidence. The issues raised by the Respondents would only be determined at the full hearing.

However, it is evident that the late **Charles Karuga Koinange** was in possession of the suit land before he met his death. On whether the beneficiaries of the said **Charles Karuga Koinange** are entitled to inherit the suit property which was allegedly not properly purchased is an issue to be decided at the full hearing.

At this juncture, the Court finds that the beneficiaries of the late **Charles Karuga Koinange** have been in possession and use of the suit property. It has been alleged that the Defendants have encroached on the suit property and threatened to evict the Plaintiff/

Applicant and her sibling **Marion Wambui Gitau *alias* Marion Wambui Koinange**. That is infringement of the Applicant's right to possession before the disputed facts have been resolved. Therefore the Court finds and holds that the Applicants have established that she has a *prima-facie* case with probability of success.

On the second limb of the Applicant should establish that she will suffer irreparable loss which cannot be compensated by an award of damages, the Court finds that the land herein is quantifiable and its value can be ascertained and Applicant compensated in damages. However, it is worth to note that the suit herein was allegedly gifted to the Applicant and her sibling. The suit land has sentimental value and it is unique given that it is supposed to be an inheritance from their father. Therefore the Court finds that this land having a sentimental value to the Applicant cannot be compensated by an award of damages. See the case of ***Notco (mbsa) Ltd & Another...Vs....Halima Bakali Ramadhani, Civil Appeal No.158 of 1992***, where the Court of Appeal held that:-

“Where the plaintiff has been residing in the suit premises and that has been her home and the seat of the family for more than four decades, that place which she fondly calls her home has a value of which cannot be measured purely in economic terms as money cannot buy for the respondent a home with the same sentimental value and attachment as the suit property”.

Taking into account the above findings of the Court and the available evidence, this Court finds that the suit property has some sentimental value to the Applicant and her siblings **Marion Wambui Gitau** and the Court therefore cannot hold and find that an award of damage would be adequate compensation in the event the Plaintiff/Applicant is the successful litigant at the end of the trial.

On the third limb of if the Court is in doubt to decide on a balance of convenience, the Court finds that it is not in doubt at all. However, if the Court is to decide on a balance of convenience, the same would tilt in favour of the Applicant who is in possession and thus preservation of the *status quo*. It is evident that the purpose of temporary injunction is to preserve the *status quo*. The Court finds that it is prudent herein to preserve the *status quo* and the *status quo* to be preserved is the one existing before the act complained of occurred and that means the Plaintiff/Applicant and her sibling **Marion Wambui Gitau *alias* Marion Wambui Koinange** to remain in possession. 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”.

Further, the Court finds that the lower risk of injustice would be observed if the Court finds in favour of the Applicant herein. See the case of ***Films Rover International Ltd...Vs...Cannon films Sale Ltd (1963) 3 ALL ER 772***, where the Court held that:-

“It will take the account that appears to carry the lower risk of injustice should it turn out to have been wrong”.

However, on **prayer No.3**, the Court finds that though the certificate of title is in the name of the Respondents, there are no compelling reasons to warrant this Court to direct that the Defendants to deposit the title deed for the suit property in Court. However the injunctive orders issued herein should be entered on the title to safeguard it until the suit is heard and determined.

On **prayer No.4**, there is no evidence that the Respondents herein would not comply with orders of the Court. Therefore there is no need of involving the police in execution of court orders of a civil nature at this juncture.

Having now carefully considered the instant **Notice of Motion** dated **18th April 2017**, the Court finds it merited and it is allowed entirely in terms of **prayer No.2** pending the hearing and determination of the suit with costs to the Applicant.

Further the injunctive order issued herein to be entered and registered on the original title to safeguard the same pending the hearing and determination of the suit.

The parties are directed to comply with Order 11 of the Civil Procedure Rules within the next 45 days from the date of this Ruling and thereafter to take a date for Pre-trial directions before the Deputy Registrar of this Court so that the suit is fixed for main hearing expeditiously. abiub

It is so ordered.

Dated, Signed and Delivered at Thika this **16th** day of **February 2018**.

L. GACHERU

JUDGE

16/2/2018

In the presence of

Mr. Mac Ronald for Plaintiff/Applicant

Mr. Businge holding brief for Mr. Masese for Defendants/Respondents

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

16/2/2018