



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 118 OF 2017

JOHNES MWANGI GATHII

(Suing as the Legal representative and Administrator of the

Estate of MARGARET NJERI NJUGUNA (deceased).... .PLAINTIFF

VERSUS

PETER NJOROGE MWANGI.....1ST DEFENDANT

MARY WANJIRU NJOROGE.....2ND DEFENDANT

COUNTY LAND REGISTRAR, UASIN GISHU COUNTY...3RD DEFENDANT

RULING

Johnes Mwangi Gathii (hereinafter referred to as plaintiff) has come to court as the legal representative and administrator of the estate of Margaret Njeri Njuguna (deceased) against **Peter Njoroge Mwangi, Mary Wanjiru Njoroge** and **the County Land Registrar, Uasin Gishu** by way of Notice of Motion dated 17.3.2017 praying for an order that the 1st and 2nd defendant be restrained by way of an injunction jointly and severally by themselves, their agents, servants, employees or assigns from transferring, charging, wasting, alienating, selling, disposing off all that parcels of land known as No. Eldoret Municipality Connection No. 15/452, Eldoret Municipality (King'ong'o) 3730, Eldoret Municipality 21(King'ong'o)/4315 and unregistered plot in Mwanzo estate where the deceased was residing known as Eldoret Municipality connection No. 11/50 (Mwanzo) pending the hearing and determination of this suit and that the court be pleased to appoint an agent to collect rent from all the properties namely Eldoret Municipality Connection No. 15/452, Eldoret Municipality (King'ong'o) 3730, Eldoret Municipality 21 (King'ong'o)/4315 and unregistered plot in Mwanzo estate where the deceased was residing known as Eldoret Municipality Connection No. 11/50 and the proceeds be deposited in a joint account less the administration expenses not exceeding 10% of the rent or in court pending the hearing and determination of this application. Costs be borne by the defendants.

The application is based on grounds that the late Margaret Njeri Njuguna (deceased) died intestate on 27.8.2013 and Succession Cause No. Eldoret P & A No. 373 of 2014 has been instituted. A preservation order to the estate was given but the 1st and 2nd defendants are registered as owners of the deceased's property. That subsequent to the death of the deceased, the 1st and 2nd defendants have fraudulently transferred the subject to themselves and started collecting rent and are in the process of transferring one of the parcels to other unknown persons. The 1st defendant/respondent has purported to sell land parcel No. Eldoret Municipality Block 21 (King'ong'o) 3730 and a school is being built thereon and the same may be transferred and kept out of reach of the court.

The plaintiff claims that the 2nd defendant has caused land parcel No. Eldoret Municipality Block 21 (King'ong'o)/4315 to be registered in her name after the demise of the deceased and that the 1st and 2nd defendants are father and daughter respectively. The plaintiff stands to suffer irreparably if the 1st defendant transfers the suit parcels of land or charges, wastes, alienate, sells, disposes at all that parcels of land known as Eldoret Municipality Block 15 (Huruma)/452, Eldoret Municipality Block 21 (King'ong'o)/3730, Eldoret Municipality Block 21 (King'ong'o)/4315 and unregistered plot in Mwanzo estate where the deceased was residing known as Eldoret Municipality Connection No. 11/50. That the plaintiff believes that he has a prima facie case with high probability of success. That it is fair, just and expedient that the same be allowed.

The application is supported by the affidavit of Johnes Mwangi Gathii whose gist is that the deceased died intestate without a husband or children but left behind her mother and brothers. That subsequent to her death, the 1st defendant fraudulently transferred her properties. The properties belonged to the deceased upto her demise. Moreover, that land number Eldoret/Municipality Block 21 (King'ong'o) transferred to his daughter.

Peter Njoroge Mwangi filed a replying affidavit stating that they were in partnership with the deceased and purchased properties together. However, no evidence of partnership was produced. Moreover, that the deceased decided to sell her properties after clashes and that she sold

some property to fund a trip to Israel. He produced the extract of the white card for parcels numbers 3730 and 452. The respondent has also annexed the application for the consent of the Land Control Board and the consent issued on 26.5.2011. The instrument of transfer of land appear to have been executed before her death thus, on 12.7.2011, in respect of Eldoret/Municipality Block 15 (Huruma)/452, but the same was received for registration on 27.8.2013 that is almost one and half years after execution on 15.6.2011 in respect of Eldoret Municipality Block 21 (King'ong'o)/3730. The date of presentation is not clear. It is not clear when the transfers were registered by the County Land Registrar.

The power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

- 1. whether the applicant has demonstrated a prima facie case with a probability of success.**
- 2. Whether the applicant is likely to suffer irreparable harm if injunction is not granted.**
- 3. Where the balance of convenience tilts if the court is in doubt.**

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. **Prima Facie** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a **Prima Facie** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. On whether the plaintiff has a prima facie case with a probability of success, I do find that the plaintiff has demonstrated that he has locus standi as the administrator of the Estate of the deceased. The properties were transferred to the 1st, 2nd defendants after death of the deceased and that the documents relied upon such as the application for consent do not bear the signatures of the applicant and that the transferred are not duly signed by the Land Registrar.

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that **irreparable injury** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. On whether the plaintiff will suffer irreparable harm that cannot adequately compensated with damages, I do find that if the properties are transferred to third parties, the process of receiving will be very technical and that the estate will suffer irreparably.

The court should issue an injunction where the **balance of convenience** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of **balance of convenience** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the **balance of inconvenience** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it. Though the court is not in doubt, the balance of convenience tilts towards granting the orders sought.

Ultimately, I do order that the 1st and 2nd defendant be restrained by way of an injunction jointly and severally by themselves, their agents, servants, employees or assigns from transferring, charging, wasting, alienating, selling, disposing off all that parcels of land known as No. Eldoret Municipality Connection No. 15/452, Eldoret Municipality (King'ong'o) 3730, Eldoret Municipality 21(King'ong'o)/4315 and unregistered plot in Mwanzo estate where the deceased was residing known as Eldoret Municipality connection No. 11/50 (Mwanzo) pending the hearing and determination of this suit, save that the plaintiff and the 1st and 2nd defendants are hereby ordered to open a joint interest earning account in a reputable bank in which rent will be deposited.

Dated and delivered at Eldoret this 9th day of March, 2018.

A. OMBWAYO

JUDGE