



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 370 OF 2017

JANE WANGUI MACHARIA.....1st PLAINTIFF/APPLICANT

ALICE WAMBUI MUIGA.....2nd PLAINTIFF/APPLICANT

MARY WANGUI MACHARIA.....3rd PLAINTIFF/APPLICANT

VERSUS

RUTH MOHAGI MACHARIA.....1st DEFENDANT/RESPONDENT

CATHERINE WANGECHI MUGO.....2nd DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 10th May 2017 brought under Section 1A,1B, and 3B of the Civil Procedure Act, Order 39 rule 5(3), Order 40 rules 1 and 2, Order 50, Rule 1 of the Civil Procedure Rules, sections 78(2) and 93 of the Land Registration Act and all enabling Provisions of the Laws where the Applicant seeks:

i. Spent

ii. Spent

iii. That pending the hearing and determination of this suit the Defendants both jointly and severally either by themselves, agents, employees and servants, be restrained from interfering, charging, subdividing, alienating and /or in any way interfering with the Plaintiffs' quiet use, occupation, title to and quiet possession of all that parcel of land known as Nyandarua/Gilgil West/899.

iv. Spent

v. That pending the hearing and determination of this suit the Honorable court be pleased to issue mandatory orders freezing Equity Bank Nakuru Branch Account No. 1460172705917 belonging to and or held on behalf of the 1st Defendant /Respondent herein

vi. The cost of and incidental to this application.

2. The said application is premised on the grounds on the face of it as well as on the sworn affidavit of Mary Wangui Macharia, the 3rd Applicant on the authority of the rest of the Applicants herein marked as annexure MW1.

3. That the court had granted ex-parte interim orders on the 11th May 2017 and thereafter directed for service of the application for interparte hearing on the 27th June 2017 on which day the Applicants were not ready to proceed as they had just been served with the Respondent's replying affidavit.
4. That the matter was subsequently adjourned to the 30th October 2017 with directions that party's dispose of the matter by way of written submission and that parties highlight on the same.
5. On the 30th October the applicants were still not ready to proceed as they had not filed their submissions. They sought an adjournment and were granted the same but were condemned to pay the day's costs and Court adjournment fee of ksh 2,500/=the matter as then listed for highlighting on the 15th January 2018.
6. That Respondents submissions were filed on the 30th October 2017 while the applicants filed their submissions on the 27th November 2017.
7. I have considered the parties' submissions and the gist of the Applicants' claim is that they are the daughters of the 1st Respondent herein who is the registered proprietor of land parcel No. Nyandarua/Gilgil West/899 having inherited the same from the late Onesmus Macharia Njuguna to hold in trust for her benefit and all her children including the Applicants herein.
8. That the 1st Respondent herein is of advanced age and a habitual drunkard by which she had been rendered senile and is therefore not capable of entering into any valid agreement/Contact.
9. That despite her condition, on the 4th May 2017, she entered into an agreement with the 2nd respondent to sell her 1 acre of the suit land at a consideration of Ksh 1,310,000 / of which the 2nd Respondent paid the 1st Respondent Ksh 310,000/= in cash and deposited Ksh 1,000,000/= into the 1st Respondent's bank account at Equity Bank Nakuru Branch Account No. [...].
10. That following the payment of Ksh 310,000/ in cash the 1st respondent squandered the same and was likely to squander the money in the account if the injunction was not issued.
11. The applicant's submission was that the 1st respondent who was their mother did not seek consent from her children to sell the suit land and neither was she in the right frame of mind to enter into contract with the 2nd respondent. Their fear was therefore that that since the 1st Respondent had no formal source of income that in the event that the court found merit in their case, the 1st Respondent and/or the applicant's would not be in a position to refund monies paid by the 2nd Respondent to their mother the 1st Respondent herein.
12. That the 2nd Respondent has already threatened to evict them from the suit parcel of land and might carry out her threats if not stopped by the court which in turn would subject them to suffer irreparable loss.
13. The Applicants submitted that they had established all the principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought as was held in the **Giella vs Cassman Brown [1973] EA 358**.
14. That they had established prima facie case with the likelihood of success to enable the court grant them orders that they had sought to the effect that the suit land was held by the 1st Respondent in trust for the Applicants herein, that it was family land wherein the 1st Respondent and her children and grandchildren resided.
15. The applicants relied on the case of In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, to buttress their submission to the effect that they

had established a prima facie case.

16. On the issue of irreparable harm /loss the Applicants relied on the case of **Jan Bolden Nielsosen vs Herman Phillipus Steya also known as Hermannus Phillipus Steya & 2 Others (2012) eKLR** to submit that the suit land is what they had known as their home and even one of their sisters was buried thereon, that the 1st Respondent's grandchild also resides on the said suit land and that if the 1st Respondent is allowed to sell a portion of the suit land, nothing would stop her from selling the rest of it. That indeed if the Application was not granted the Applicants would be evicted from the suit and rendering them destitute.

17. There was no prejudice that the 2nd Respondent would suffer and if any, the same was minimal when compared to the loss the Applicants would suffer.

18. The Applicants also submitted that on the balance of convenience, the same tilted on the status quo being preserved until the hearing and the final determination of the suit.

19. The application was opposed by the 2nd Respondent on the grounds that she had bought 1 acre of a portion of uninhabited land from the 1st Respondent to be excised from the suit land herein.

20. That the 1st Respondent had inherited the suit land from her father Onesmus Macharia Njuguna(deceased)

21. That since the 1st Respondent was the proprietor of the suit land, and did not hold it in trust for anybody, she could not therefore be compelled to get consent from her children to deal with it howsoever she desired.

22. That the interim orders issued ex-parte to the Applicants were obtained through misrepresentation and withholding of material facts to the effect that the Applicants did not reside on the suit land, that the 1st Respondent did not hold the same in trust for the Applicants and further that the said 1st Respondent did not suffer illness of the mind.

23. That the said application was filed so as to arm twist the 1st Respondent into distributing her property to the Applicants.

24. That the 2nd Respondent was a bonafide purchaser for value without notice of the suit property and the Applicants have no right whatsoever against her and her ownership and possession of the suit property is beyond reproach.

25. That the Applicants have not made out a case to the grant of the orders sought because they have not established a prima facie case with the probability of success as they had not proved that the suit land was held by the 1st Respondent in trust for the applicants and therefore did not have any right over the suit land.

26. That although the Applicants alleged that the 1st Respondent was mentally incapacitated to enter into any contract yet they had not produced any iota of evidence to support their allegation and no determination by any competent authority had been made on the 1st Respondent's mental status.

27. That the purported deed annexed by the Applicants supporting the fact that the 1st Respondent expressed her intention to bequeath the suit Land to the Applicants cannot stand as it is invalid for having contravened the provisions of the Oaths and Statutory Declaration Act in that it lacked the witnesses and attestation.

28. The Respondents further submitted that the Applicants having failed to establish a prima facie case could not therefore suffer any irreparable loss which could not be adequately compensated by an award

for damages. That they were not privy to the agreement between the Respondents and would not be called to perform any act and as such they did not risk to suffer any injury.

29. That the 1st Respondent had already sold part of the suit land wherein the 2nd Respondent had paid the purchase price in full and the 1st Respondent has already utilized part of the proceeds from the sale, that if the orders sought are granted then the 2nd Respondent will have to be at a loss losing both her money and land and as such the balance of convenience tilted in the Respondent's favor.

30. Upon considering the application, the affidavits and the annexures attached therein as well as the written submission by Counsel for the parties, the issue for determination by this court is whether the Applicant has established a prima facie case to enable this court grant it the interlocutory injunction sought.

31. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

The conditions for the grant of an 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. (E.A. Industries v. Trufoods, [1972] E.A. 420)."

32. Had the Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It 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."

33. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicants, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the Applicants are deserving of the Orders sought. The Court is not required to determine the merit of the case.

34. I note that the issue raised herein that touch on the subject suit are whether the same was held in trust for the Applicants by their mother and/or whether she then had the locus to sell the same to the 2nd Respondent or not

35. I also note the 1st Respondent's mental status has been brought out in this application and what the court was asked is to find her incapable of entering into a legal contract by virtue of her mental status.

36. The court has also been informed that by not granting the orders sought the same will amount to an eviction of the Applicants who are on the suit land which in my view would be premature at this stage.

37. The said submissions have been denied vehemently by the Respondents herein.

38. Since at this stage the court is not required to make final findings of contested facts but to weigh the relative strength of the parties' cases as observed by Lord Diplock in **American Cyanamid Co. v Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL** at 510 where he stated as follows:

"It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of

evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

39. The balance in deciding whether to grant the injunction or not lies on the balance of probabilities. The court being in doubt as to whether the Applicants have shown a prima facie case with a probability of success and secondly whether by not granting the interlocutory injunction sought the Applicants might otherwise suffer irreparable injury, I shall determine the matter by considering in whose favor the balance of convenience tilts.

40. Given the above circumstance, I find that the balance of convenience tilts in favour of the Applicants and do find the order that best commends itself in the circumstances of this case is an order of status quo which I hereby proceed to pronounce that the status quo be maintained pending the hearing and determination of the suit.

41. Parties are herein directed to comply with order 11 within the next 30 days upon delivery of this ruling. Secondly, having regard to the subject suit value from the purchase price on the parties' agreement herein annexed as MWMIII, I further direct that this matter be and is hereby transferred to the Chief Magistrate's court for further directions, hearing and/or determination thereafter. Parties to take dates in the Registry.

42. Costs of the application shall be in the cause

Dated and delivered at Nyahururu this 1st day of March 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE