



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

**THIKA LAW COURTS**  
**ELC CASE NO.575 OF 2017**

**(FORMERLY MILIMANI ELC CASE NO.1347 OF 2016)**

**PRICAL ENTERPRISES LIMITED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**MARTHA WANGARI MWAURA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MWAURA KAMAU HARUN.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

Coming up for determination is the *Notice of Motion* application dated **31<sup>st</sup> October 2016**, brought by the Plaintiff/Applicant under various provisions of law and it seeks for the following orders against the Defendants/Respondents:-

**1) Spent.**

**2) That an order of injunction do issue forthwith restraining the Defendants/Respondents either by themselves or their agents and/or servants from interfering with all that land parcel known as LR.No.Chania/Kanyoni/2407, pending the hearing and determination of this suit.**

**3) That an order of injunction do issue restraining the Defendants/Respondents from interfering with the Plaintiff's/Applicant's quiet enjoyment and possession of LR.No.Chania/Kanyoni/2407, pending the hearing and determination of this suit.**

**4) That the Land Registrar, Gatundu Lands Registry, be ordered to put a caveat and stop any further dealings with the said land parcel pending the hearing and determination of this suit.**

**5) That the County Commissioner, Kiambu County and the OCS Kamwangi Police Station be ordered to ensure that due performance and compliance with Orders 2,3 and 4 above.**

**6) That such other and/or further orders be made as this Honourable Court may deem fit and just.**

The application is supported by the grounds stated on the face of the application and these grounds are:-

**a) The Plaintiff/Applicant entered into a Sale Agreement with the 1<sup>st</sup> Defendant/Respondent over the entire land parcel known as LR.No.Chania/Kanyoni/2407, on 26<sup>th</sup> January 2015, upon doing due diligence as per law required.**

**b) That at the time of the said sale, the said suit property was registered in the names of the 1<sup>st</sup> Defendant/Respondent and who had an original title deed to the property.**

**c) The Plaintiff/Applicant paid the whole purchase price and the suit property was transferred in its favour upon attaining the requisite consent from the Kamwangi Land Control Board and subsequent lodging the transfer documents at the Thika Land Registry then.**

**d) The suit land was successfully transferred in favour of the Plaintiff/Applicant and a title deed duly issued in its favour on the**

6<sup>th</sup> March 2015.

e) *The Plaintiff/Applicant has heavily invested in the suit property.*

f) *That the Plaintiff/Applicant also obtained a copy of the Green card to the suit property and confirmed that the entry to its title deed had been cancelled following an order vide a Ruling in High Court Succession Cause No.180 of 2011- Nairobi.*

g) *That the Plaintiff/Applicant is now apprehensive that it might incur irreparable loss and damage as the 2<sup>nd</sup> Defendant/ Respondent is now threatening to evict it from the suit property.*

h) *It is the interests of justice, equity and fairness that the orders sought be granted as prayed.*

The application is also supported by the *Affidavit* of **Steven Nyota Nyambura**, a *Director* of the Plaintiff/Applicant. He averred that the 1<sup>st</sup> Defendant/Respondent offered **LR.No.Chania/Kanyoni/2407**, for sale sometimes in the year 2015 and the Company got interested in the said property. He further averred that they conducted a search in **January 2015**, and confirmed that the suit property was registered in the name of 1<sup>st</sup> Defendant/Respondent and they were satisfied that she was the legal owner. He further averred that they entered into an **Agreement for Sale** and purchase of the said land on **26<sup>th</sup> January 2015** as per **annexture SNN-2**. It was his contention that after paying the deposit of **Kshs.650,000/=** they went to **Gathaite Location** to confirm status of the suit property and thereafter sought the **Land Control Board Consent** at **Kamwangi Land Control Board** and they were issued with the requisite **Consent** to transfer as is evident from **annexture SNN-4**. That the requisite transfer forms were executed and lodged for registration at **Thika Lands Office** on **26<sup>th</sup> February 2015** as per **annexture SNN-7**. He alleged that the transfer was successfully lodged and there was no rejection of the documents.

Subsequently, title deed to the suit property was issued in favour of the Plaintiff on **6<sup>th</sup> March 2015** as per **annexture SNN-9**. He alleged that they paid the full purchase price and thus obtained title deed in the name of the Plaintiff and thus the Plaintiff became the rightful and legal owner of the suit property. He further alleged that the Plaintiff was not aware of any family disputes as they had confirmed that a **Succession Cause** had been filed at **Gatundu Resident Magistrate's Court** being **Succession Cause No.26 of 2007** and the Grant was confirmed and the suit property was bequeathed to the 1<sup>st</sup> Defendant/Respondent.

However, vide an **Order** of the Court in **High Court Succession Cause No.180 of 2011 (Nairobi)**, their title deed was **cancelled** as per **SNN-15**. He contended that the Defendants/Respondents never served them with any **Notice** whatsoever regarding the ongoing Succession Cause at the High Court in Nairobi. It was his contention that the 2<sup>nd</sup> Defendant/Respondent intended to evict them from the suit property wherein they have invested heavily. It was his contention that the Plaintiff/Applicant is a *bonafide* purchaser for value and the Defendant should not deny them their entitlement to the suit property.

Further, that the interest of justice and fairness would only be served if the orders sought are granted.

The application is contested by 2<sup>nd</sup> Defendant/Respondent, **Mwaura Kamau Harun**. The 1<sup>st</sup> Defendant/Respondent **Martha Wangari Mwaura** did not file her **Replying Affidavit** despite having filed a **Notice of Appointment of Advocate** on **19<sup>th</sup> July 2017**. The said **Notice of Appointment** had been filed by **R. M. Njiraini & Co. Advocates**, but no **Replying Affidavit** was filed.

On his part, the 2<sup>nd</sup> Defendant/Respondent averred that the suit property herein **Chania/Kanyoni/2407**, and another **Chania/Kanyoni/ 2413** was a matter before the **High Court Succession Cause No.180 of 2011** as per **annexture MKH-1**. The court delivered a **Ruling** on **30<sup>th</sup> November 2014** and cancelled the existing titles and ordered reversion of the two parcels of land back to the name of the deceased, **Mwaura Wangonya** as is evident from **annexture MKH-2**. However, in complete discard of the High Court Ruling, the 1st Defendant proceeded to offer the suit land for sale to the Plaintiff/Applicant without disclosing the status of the land and the Succession Cause at the High Court. Therefore the process of sale of this land to the Plaintiff/Applicant by the 1st Defendant was shrouded in fraud as at the time of sale, the land was no longer for the 1st Defendant but had been reverted back to the deceased. Further that the Applicant cannot claim to have any valid hold on and possession of the suit property herein. He alleged that the suit property is indeed the property of the deceased **Mwaura Wangonya**, and Plaintiff/Applicant has no proprietary rights over the same.

He further contended that he was not a party to the sale agreement in issue and he has therefore not breached any terms of the agreement and should not be bound by the orders sought herein. It was his further contention that the Plaintiff/Applicant should not be allowed to enjoy and possess which does not legally belong to them.

This application was canvassed by way of **written submissions** which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. Further the Court has considered the cited authorities and the relevant provisions of law and renders itself as follows;-

There is no doubt that the suit property herein **Chania/Kanyoni/2407** is now registered in the name of **Mwaura Wangonya (deceased)**, who is allegedly the husband to the 1st Defendant/Respondent and father to the

2nd Defendant/Respondent. There is also no doubt that after the death of the said **Mwaura Wangonya**, the 1st Defendant/Respondent **Martha Wangari Mwaura** filed a Succession Cause at the **Magistrate's Court, Gatundu** being **Succession Cause nO.26 of 2007**, wherein the two parcels of land belonging to the deceased, **Mwaura Wangonya** were transferred to 1st Defendant solely without involving the 2nd Defendant herein. The suit property herein **Chania/Kanyoni/2407**, was one of the property transferred to the 1st Defendant/Respondent. It is also evident that vide a **Succession Cause No.180 of 2011**, filed in **Nairobi High Court**, the 2nd Defendant herein **Mwaura Kamau Harun** filed an application for revocation of the Grant issued to the 1st Defendant vide **Succession Cause No.26 of 2007**. He also sought for revocation of the transfer of the deceased two properties to the 1st Defendant.

Further, it is evident that vide a **Ruling** delivered in **Succession Cause No.180 of 2007** on **30<sup>th</sup> November 2014**, the court revoked the Grant that was confirmed and which grant had transferred the suit property herein, **Chania/Kanyoni/2407**, to the 1<sup>st</sup> Defendant. The Court further directed that the two properties do revert to the name of the deceased **Mwaura Wangonya** and the 1<sup>st</sup> and 3<sup>rd</sup> Defendants were directed to obtain **Letters of Administration** jointly and seek an amicable mode of distribution of the said estate of the deceased or through canvassing and ventilation of the issues for determination of the court.

From the above Ruling of the court, which has not been appealed against or vacated as no such evidence was availed, it is evident that the suit property is in the name of the deceased and it can only be disposed off after the Succession Cause is finalized. For now the suit property is subject of the **Succession Cause No.180 of 2011**. Dealing with the said party contrary to the provision of the Succession Act means that there is meddling of the property of the deceased and that is contrary to **Section 45(1)** of the **Succession Act** which provides:-

**“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.**

However, it is evident that even after the **Ruling** of the court that was delivered on **30<sup>th</sup> November 2014**, the 1<sup>st</sup> Defendant went ahead and sold the suit property to the Plaintiff/Applicant. The suit having reverted back to the deceased and given that the 1<sup>st</sup> Defendant/Respondent was not the sole administrator of the estate of the deceased **Mwaura Wangonya**, then she had no capacity to sell the suit property to the Plaintiff/Applicant herein.

Having purchased the suit property from a person who had no capacity to sell the said land, the Plaintiff/Applicant did not acquire good title and it cannot claim that it is a *bonafide* purchaser for value.

The Applicant has now come to court seeking for injunctive orders against the Defendants/Respondents herein. The orders sought herein are equitable reliefs granted at the discretion of the court. However, the said discretion must be exercised judicially. Further the court at this interlocutory stage is not supposed to decide the issues in dispute with a finality. All that the court is supposed to do is to determine whether the Applicant is deserving of the orders of injunction based on the usual criteria set out in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973 E.A 358**. These criterias are:-

- a) **The Applicant must establish that he has a *prima facie* case with probability of success.**
- b) **That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c) **When the Court is in doubt, to decide the case on a balance of convenience.**

Has the Applicant satisfied the above criteria?

It is evident that the Plaintiff/Applicant purchased the suit property herein when the 1<sup>st</sup> Defendant did not have capacity to sell the said property to the Plaintiff or any other parties. The property had been reverted back to the name of the deceased **Mwaura Wangonya**, and in selling the same, the 1<sup>st</sup> Defendant was infact meddling in the property of the deceased. Infact the court vide a **Ruling** delivered on **17<sup>th</sup> March 2016**, held that the 1<sup>st</sup> Defendant should be cited for contempt of court. The 1<sup>st</sup> Defendant did not have capacity to sell the suit land to any third party let alone the Applicant herein. Therefore the 1<sup>st</sup> Defendant did not pass a good title to the Applicant herein. Even if the suit land was initially registered in the name of the Plaintiff/Applicant, that entry was cancelled and revoked through a Court Order. Even if the Applicants are holding a Certificate of title, that Certificate of title was revoked and the entry in the register was rectified. The Applicants title has no legal effect and cannot give them proprietorship. This parcel of land is subject of Succession Cause and the Applicant can only lay their claim in the Succession Cause that would be filed by both the 1<sup>st</sup> and 2<sup>nd</sup> Defendant herein especially during the distribution of the said estate.

For now the Court finds that the Plaintiff/Applicant has not established that it has a *prima-facie* case with probability of success at the trial.

On whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, the Court finds that the purchase price that the Plaintiff/Applicant paid to 1<sup>st</sup> Defendant is a known amount. The allegedly heavy investments on the suit property can be quantified and can be payable in monetary terms. However the suit property herein is a property of the deceased and the estate of the deceased stands to suffer if Plaintiff is allowed to remain on the suit property. Again that would mean breaching of the **Court Orders** that were issued on **30<sup>th</sup> November 2014** and **17<sup>th</sup> March 2016**. That would cause embarrassment to the Judiciary and the Rule of Law. The

Court finds that there is no evidence that the Applicant herein would suffer irreparable loss which cannot be compensated by an award of damages.

Further on the third limb, the Court finds that it is not in doubt at all. However if the court is to decide on the balance of convenience, it finds that the balance of convenience tilt in favour of maintaining the orders issued by the court in **Succession Cause No.180 of 2011** on **30<sup>th</sup> November 2011**. The Defendants herein should file Succession Cause over the estate of the deceased, **Mwaura Wangonya**, and have the property therein distributed as per the provisions of Succession Act.

The Applicant has an option of filing a Civil Suit against the 1<sup>st</sup> Defendant seeking for refund of purchase price, damages, costs and interest thereon, or stake a claim in the Succession Cause. However the 2<sup>nd</sup> Defendant's only recourse is in the Succession Cause and the Court should allow the parties to take that path.

Having now carefully considered the available evidence, the Court finds that the Plaintiff/Applicant's **Notice of Motion** dated **31<sup>st</sup> October 2016** is **not merited**. Consequently, the said **Notice of Motion application is dismissed entirely with costs to the 2<sup>nd</sup> Defendant/Respondent herein**.

Further, for the purpose of preserving the suit property until the intended Succession Cause is filed, the **Court directs the Land Registrar, Gatundu Land Registry to put a caveat on the suit property and stop any further dealings of the suit property by the 1<sup>st</sup> Defendant solely except only on orders or dealings emanating from any Succession Cause wherein both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are involved and the said dealing be done in the presence of the 2<sup>nd</sup> Defendant herein**.

It is so ordered.

**Dated, Signed and Delivered at Thika this 27<sup>th</sup> day of April 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

M/s Wangeshi holding brief for M/S Nganga for Plaintiff/Applicant

No appearance for 1<sup>st</sup> Defendant/Respondent

Present in person for 2<sup>nd</sup> Defendant/Respondent

Lucy - Court clerk.

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

**L. GACHERU**

**JUDGE**

**27/4/2018**