



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.671 OF 2017

FRANCIS KARANJA KIBUGI.....1ST PLAINTIFF/APPLICANT

RICHARD KABERI WAWERU.....2ND PLAINTIFF/APPLICANT

PETER MUNGAI RANJA.....3RD PLAINTIFF/APPLICANT

A.I.P.C.A. CHURCH MANGU PARISH.....4TH PLAINTIFF/APPLICANT

-VERSUS-

FRANCIS KOGI WAWER.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiffs'/Applicants' *Notice of Motion* application dated **21st July 2017**, brought under various provisions of law, inter alia Order 40 Rule 1 & 2 of the Civil Procedure Rules. The Applicants have sought for the following orders:-

a) Spent.

b) Spent.

c) That this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendant from continued construction, developing, encroachment or further alienating a portion of 0.25 acres in land parcel Ngenda/ Mangu/1395, belonging to the 1st Plaintiff/Applicant pending the hearing and determination of this suit.

d) That the OCS Mwea Police station or in-charge therein or area Provincial Administration Police do ensure compliance and that peace prevails.

e) That the cost of this application be provided for.

The application is premised upon the following grounds:-

1) That the Plaintiffs/Applicants are the registered owners of land parcel Ngenda/Mangu/1395, owning in different shares.

2) That the Defendant/Respondent has been trespassing and carrying acts of wanton damage on the 1st Plaintiff's portion.

3) That the Defendant is not at all a registered owner to the land.

4) That the Defendant's actions of constructing, digging trenches on the land is not only malicious and in bad faith, but he is also arrogant and threatened the Plaintiffs with dire consequences if they try to interfere with his illegal agendas.

Further, the application is supported by the *affidavit* of **Francis Karanja Kibugi**, the 1st Plaintiff herein who reiterated that the Plaintiffs/Applicants are the owners of **LR.No.Ngenda/Mangu/1395**, wherein each of them owns **0.25 acres** as envisaged by the copy of the **title marked FKK-A**. He further averred that they each bought a portion of their parcel of land from the registered owner **Joseph Waweru Kogi** as confirmed by the **Sale Agreement** marked **FKK-B**. He contended that the said **Joseph Waweru Kogi** passed on before subdivision

and transfer of their respective portions was effected as confirmed by the area chief through **annexture FKK-C**. It was his contention that a **Succession Cause** was filed and after successful completion of the same, they were allocated land as beneficiaries to the estate of the deceased as can be confirmed from **annexture DKK-D(i)(ii)**. He further alleged that the Defendant has been cutting down his crops and digging trenches on his portion of land with every intentions of putting up permanent structures as is evidenced from **annexture FKK-E**. It was his further allegations that the Defendant's actions are fraudulent, uncalled for and illegal hence should be stopped immediately. He contended that he is incurring losses and it is imperative to issue the orders sought herein.

The application is contested and **Francis Kogi Waweru**, swore a **Replying Affidavit** on **3rd November 2017**, and averred that the land in question belonged to his **late father, Joseph Waweru Kogi**, and before he died he had subdivided it to his children in that **Magderena Nyokabi**, was to get **70 X 70** and the remaining portion was for **Richard Kaberi, John Kimiri** and **Francis Kogi**, the Defendant/Respondent herein. That their father subdivided the above parcel of land when he was of sound mind. He contended that his brother, **Richard Kaberi Waweru**, went behind his back and dishonestly filed a **Succession Cause No.123 of 2011**, and left the Respondent out since the Respondent was in **Remand Prison**. It was his contention that the other persons named by the area Chief in the introduction letter for purpose of filing **Succession Cause** were not beneficiaries of their deceased father and that their father had not sold any portion of land to anybody.

He further deponed that after coming from **Remand Prison**, and realizing that his brother had filed a **Succession Cause**, without involving him, he filed an application for **Revocation of Grant** which is still pending for hearing as is evident from **annexture FKW-C**. It was his further contention that the Applicants have come to court with tainted hands as the letter from the area chief which was used to file **Succession Cause No.123 of 2011** did not disclose all the beneficiaries of the deceased and the agreement which was executed by **1st Plaintiff/Applicant** is irregular as by then, their father was long dead and did not sign the said agreement. He urged the Court to dismiss the instant application.

The Court directed the parties to file **written submissions** in support of their respective positions. In compliance thereto, the Applicants filed their submissions on **1st February 2018**. However the Defendant/ Respondent failed to file his submissions to support his contention.

This Court has carefully read and considered the filed written submissions. The Court has also considered the pleadings in general, the annexures thereto and the relevant provisions of law and renders itself as follows:-

The Court granted interim orders herein and enjoined the Respondent. The determination herein is on whether to **confirm** the said **interim orders** in terms of **prayer No.3 or** to **vacate** them.

The orders sought herein are equitable in nature which are granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **David Kamau Gakuru..Vs...National Industrial Credit Bank Limited, Civil Appeal No.84 of 2001** where the Court held that:-

“It is trite that the granting of interim injunction is an exercise of judicial discretion and an Appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially”.

Further, as the Court embarks on determination of this application, it will take into account that at this juncture, it is not required to determine the disputed issues with a finality. See the case of **Edwin Kamau Muriu...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 based on the usual criteria---“

All that the court is required to do at this juncture is to determine whether the Applicant is deserving of the orders sought based on the usual criteria. The criteria to be considered is the one laid down in the case of **Giella ...Vs...Cassman Brown & Company 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.**

The Court will now juxtapose the available evidence with the above stated criteria to determine whether the Applicants are deserving of the orders sought.

Firstly, the Applicants are to establish that they have a *prima-facie* case with probability of success at the trial which **prima-facie** case was described in the case of **Mrao Ltd....Vs...First American Bank Ltd & 2 others (2003) eKLR 125**, to mean:-

“so what is a prima facie case----- In civil cases it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

It is evident that the suit property herein initially belonged to **Joseph Waweru Kogi** who died on **8th February 1987**, as per the letter of the area chief marked **FKK-B**. It is also not in doubt that the said deceased **Joseph Waweru Kogi**, was the father of among others **Richard Kaberi Waweru**, the 1st Plaintiff/Applicant and **Francis Kogi Waweru**, the Defendant/

Respondent herein. It is also not in doubt that **Richard Kaberi Waweru** took out **Letters of Administration** on **30th September 2011**, for the estate of the said **Joseph Waweru Kogi (deceased)**. It is also evident that before the **Letters of Administration** were issued to him, **Richard Kaberi Waweru** entered into a **Sale Agreement** with **Francis Karanja Kibugi**, the 1st Plaintiff herein. The said **Richard Kaberi Waweru** described himself as a beneficiary of the estate of **Joseph Waweru Kogi**.

Subsequently, the Grant was confirmed and the suit property herein **No.Ngenda/Mangu/1395**, was devolved to four persons named in the said Grant. A title deed in the joint names was issued on **24th November 2015**, describing the acreage for each proprietor. **Richard Kaberi Waweru** was entitled to **2.25 acres** whereas the other three proprietors were each entitled to **0.25 acres**.

As registered proprietors, the Applicants are deemed to be the **absolute** and **indefeasible** owners of the said property. However, the said proprietorship may be challenged if the same was acquired through **fraud, misrepresentation, unprocedurally** or through **corrupt scheme** as provided by **Section 26(1) (a)&(b)** of the **Land Registration Act**, which provides:-

“The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

The challenge of the said proprietorship has to be done through a constitutionally constituted forum such as a court of law. An individual cannot take the law unto his/her hands and revoke the said title. By doing that, the parties would be reverting to the law of the jungle which is not acceptable in any orderly and democratic Society. See the case of **Suleiman...Vs...Amboseli Resort Ltd, Nairobi HCCC No.1078 of 2003 (2004) 2KLR 589**, where the Court held that:-

“A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenants consents or agree to give up possession, the landlord has to obtain an order of competent court or statutory tribunal to obtain possession”.

Equally, the Respondent herein cannot obtain possession of the suit land wherein the Applicants have a Certificate of title issued after the confirmation of Grant, until such Grant is revoked by a competent court or tribunal or until there are lawful orders putting the Respondent into the suit property. For now, the Respondent has to respect the sanctity of that title until his application for revocation of Grant is heard and determined.

The Respondent has alleged that his brother filed a **Succession Cause No.123 of 2011** behind his back when he, the Respondent was held in **Remand Prison**. That his brother, **Richard Kaberi Waweru**, the 2nd Plaintiff/Applicant failed to disclose the full list of the beneficiaries and thus left out the Respondent herein in the inheritance of the deceased's estate. In response to that failure, the Respondent rightfully filed an application for **Revocation of Grant**. Therefore the Respondent should have waited for the outcome of the said application for Revocation of Grant instead of taking the law into his hands by invading the Applicants' portions of land wherein they hold a valid title deed. By doing that, the Respondent is in disregard of the rule of law and has reverted to the law of the jungle. Therefore the Court finds that the Applicants have established that they have a *prima-facie* case with probability of success at the trial.

Further, it is evident that their right to property has been infringed by the Respondent herein. The Respondent has a forum to ventilate his claim - in the application for revocation of the Letters of Administration in which he might carry the day in the said application. However, he has to respect the rule of law by holding his horses until the said application for Revocation of Grant is heard and determined.

On the second limb, though the damaged crops on the suit property can be quantified and paid in monetary terms through compensation or payment of damages, the Court finds that since the Applicants have a title which has not been cancelled yet, then by the Respondent's actions, their rights have been infringed and this infringement is capable of causing irreparable loss and damage which cannot be adequately compensated by an award of damages. See the case of **Olympic Sport House Ltd...Vs...School Equipment Centre Ltd HCC No.190 of 2012**, where the court held that:

“Damages are not and cannot be substitute for the loss which is occasioned by a clear breach of the Law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an Order of Injunction”.

On the third limb, the Court finds that it is not in doubt. However if the court is to determine on the balance of convenience, the same tilts in favour of the Plaintiffs/Applicants who are title holders.

Having now carefully considered the instant **Notice of Motion**, the **Court finds it merited and consequently allows the same entirely in terms of prayer No.(c) and (d) with costs being in the cause.**

However, the *Applicants should not alienate, subdivide and/or dispose off the suit property to 3rd parties until the suit is heard and determined.*

The parties are directed to comply with Order 11 of the Civil Procedure Rules within a period of 45 days from the date hereof and thereafter fix the matter for Pre-trial directions before the Deputy Registrar of this court and thereafter fix the matter for hearing of the main suit expeditiously so that the disputed issues can be resolved at once.

It is so ordered.

Dated, Signed and Delivered at Thika this 18th day of May 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Odhiambo holding brief for Mr.Kanyi for Plaintiffs/Applicants

No appearance for Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open Court in the presence of the above advocate and absence of the Defendant/Respondent.

L. GACHERU

JUDGE

18/5/2018