



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.696 OF 2017

RUTH WANJA GICHUKI.....1ST PLAINTIFF/APPLICANT

(Suing as the Legal Representative of the Estate of Leah Wariara Gathu (Deceased))

HENRY GATHU NJERI.....2ND PLAINTIFF/APPLICANT

-VERSUS-

DANIEL KARANJA KAIYEHE.....1ST DEFENDANT/RESPONDENT

ERASTUS WANYOIKE.....2ND DEFENDANT/RESPONDENT

GEORGE NJUKU GATONYE.....3RD DEFENDANT/RESPONDENT

FRANCIS MWANGI MWENDA.....4TH DEFENDANT/RESPONDENT

KENYA POWER & LIGHTING CO.LTD.....5TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiffs'/Applicants' *Notice of Motion* application dated **3rd August 2017**, premised under various provisions of law and specifically Order 40 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicants have sought for the following orders:-

- 1. That this Honourable Court be pleased to grant a temporary but urgent injunction against the Defendants from continuing to trespass and or use development they have erected upon land parcel No.Muguga/Muguga/235, to vend water to the public.***
- 2. That the Court be pleased to issue an injunction order against the Respondents from unlawful and illegal use of LR.No.Muguga/Muguga/235, without any or shade of right.***
- 3. That the court do find it met and just to estopp the Defendant/Respondents from any further illegal conduct on LR.No.Muguga/Muguga/235 wherein they jointly and severally have sunk a water borehole, constructed a water point for vending water to the public, erected electricity poles for supply of power to facilitate pumping of water and are anticipating commencing sale of water to the public without consent from the administrator/executrix of the Will of Wariara Gathu(Deceased) and the holder of the beneficial interest of the parcel of land being Henry Gathu Njeri.***
- 4. That the officer commanding, Kikuyu Police Station do enforce compliance of the orders above.***
- 5. That the cost of this application be paid by the Defendants.***

This application is premised on the following grounds:-

- a. That the 1st Applicant is the executrix/administrator of the estate of Leah Wariara Gathu and is in the process of overseeing transmission of the various subdivisions of the land to the beneficial interest holders.***

b. That the 2nd Plaintiff/Applicant holds beneficial interest in the area on parcel No.Muguga/Muguga/235 that the Defendants/ Respondents have trespassed.

c. That inspite the diligent effort by the Plaintiffs/Applicants to restrain the Defendants/Respondents from continued trespass of LR.No.Muguga/Muguga/235, the Defendants/Respondents have persisted in their illegal conduct.

d. That the Plaintiffs/Applicants efforts constitute;

i. Complaints made to police and the area chief before filing of this suit.

e. That unless the Defendants/Respondents are restrained, they shall commence vending of water to the public and the matter may be reduced to a public interest contest with competing interests that may include or have political nuances.

f. That unless estopped, the Defendants/Respondents will persist in illegal conduct that amounts to meddling with the estate of Leah Wariara Gathu.

Further the application is supported by the affidavit of **Ruth Wanja Gichuki** and **Henry Gathu Njeri** who reiterated most of the contents of the grounds in support of the application. They further averred that the Defendants/Respondents have trespassed on **LR.No.Muguga/Muguga/235**, that constitutes a part of the estate of **Leah Wariara Gathu** who was a mother and grandmother to the deponents herein. That despite all efforts to restrain the Defendants/Respondents they have persisted in their illegal conduct and thus this application to restore civil order on **LR.No.Muguga/Muguga/235**.

This application is vehemently opposed by the Defendants/ Respondents. The 1st, 2nd and 3rd Defendants who are represented by **Nyoro Njogu & Co. Advocates** filed a **Replying Affidavit** which was sworn by **Geoffrey Njuku Gatonye**, the 3rd Defendant herein. He averred that the 1st, 2nd and 3rd Defendant have not trespassed on the suit property as alleged by the Plaintiffs/Applicants. He also averred that on or around the year 1995, a portion of land measuring 100ft X 100ft was donated to **Nyarugumu Water Project Self Help Group** by **Leah Wariara Gathu** out of **LR.No.Muguga/Muguga/235**, during her lifetime. It was his further averment that this **Nyarugumu Water Project Self Help Group** comprised of very many members. That once **Leah Wariara Gathu** gave this portion of land to **Nyarugumu Water Project**, they took possession and set up a water project thereon. Further that the said **Welfare Group** built a water tank thereon in 1999 and have been using the said portion for a long time for purposes of their water project. He alleged that the group has not moved or utilized any other portion of land other than the water point which was shown to the group and demarcated by **Leah Wariara Gathu** (deceased). He contended that the Applicants have not shown how they stand to suffer any loss if the orders herein are not granted. He urged the Court to dismiss the instant application.

The 5th Defendant/Respondent too filed a **Replying Affidavit** through **Jude Ochieng**, the **Chief Legal Officer – Litigation & Prosecutor** who averred that the 5th Defendant as a National Distribution Company and who owns most of the electricity transmission provides electricity transmission and generation upon demand and maintains the said distribution and transmission to its customers. He averred that on **16th June 2017**, **Nyarugumu Water Project** entered into a Wayleave Agreement with the 5th Defendant/Respondent to lay and erect electric supply line on **LR.No.Muguga/Muguga/235**, and from time to time to enter into the said parcel of land for the purpose of maintaining the said electricity supply line. Further that the pole allegedly erected was already part of the network supplying the area and therefore the 5th Defendant has not trespassed on the suit property. It was only contracted to supply power to the **Nyarugumu Water Project**. Therefore the Plaintiffs/Applicants are not entitled to the relief sought in whatsoever manner. Further that the deceased **Leah Wariara Gathu** had given the suit property to Kikuyu Town Council in her lifetime and the said Kikuyu Town Council in not a party to this suit. Therefore the 5th Respondent contended that the application herein is misconceived and the Court was urged to dismiss it with costs.

Further, the 5th Defendant raised a Notice of Preliminary Objection and averred that the suit herein is hopelessly **misconceived, frivolous**, totally **devoid of merit** and is **mala fides** for reason that the Plaintiffs/Applicants have failed to comply with mandatory provisions of Sections 6(1), 61(3), 107, 108 and 110(1) of **'The Energy Act 2006'** together with Rules 2 and 4 of the Energy (Complaints and Disputes Resolution) Regulations 2012.

The said **Notice of Preliminary Objection** was objected to by the Plaintiffs/Applicants who averred that the Energy Act does not deal with trespass nor does not include trespass as one of the condition precedent for supply of power to persons who have no **bonafide** interest on a parcel of land. The Plaintiffs/Applicants prayed for the dismissal of the **Preliminary Objection** herein.

Further the Applicants through **Ruth Wanja Gichuki**, filed a further affidavit and further averred that the suit land **LR.No.Muguga/Muguga/235**, which constitutes approximately **1.92 Hectares** and registered in the name of **Leah Wariara Gathu**, has been subdivided and distributed to the

beneficiaries of the estate of **Leah Wariara Gathu** in accordance to her **Will** which has already undergone the whole process of succession and Probate of the Will and the Defendants herein never raised any objection to the Succession Cause.

The Court directed that both the application and the **Notice of Preliminary Objection** be canvassed together by way of written submissions. The parties herein through their respective advocates filed their written submissions.

This Court has now considered the rival submissions, and the pleadings in general. The Court has too considered the annexures to the pleadings, the relevant provision of law and the cited authorities and this Court renders itself as follow;-

It is evident that the Applicants herein have sought for injunctive orders against the Defendants/Respondents which orders are equitable reliefs granted at the discretion of the court. As usual the said discretion must be exercised judicially and rationally. Further the Court notes that this application is anchored under Order 40 Rule 1 which grants the Court discretion to issue injunctive orders when the property is in danger of being **wasted, alienated, removed or disposed off**. Therefore for an Order of Injunction to be issued under Order 40, there must be evidence of imminent danger on the disputed property.

Further, the application is anchored under Section 3A of the Civil Procedure Act which donates the power to court to issue any orders that are necessary in ensuring that end of justice is met and to prevent abuse of the court process.

As the Court embarks on the determination of this application, it will bear in mind the above provisions of law.

It is also very clear that at this interlocutory stage, the Court is not called to determine the disputed issues conclusively or in a definitive manner on the account of affidavits evidence. All that the court is mandated to do is to determine whether the Applicants are deserving of injunctive orders being sought basing that on the usual 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 Court will further rely on the principles laid down in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358**. These principles 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.

Therefore, this Court will consider the available evidence and juxtapose the same with the laid down procedures at arrive to a determination on whether the Applicants are deserving of the orders sought.

The Applicants needed to establish that they have a prima-facie case with probability of success at the trial. What is a prima-facie case? The definition of ‘prima-facie case’ was given in the case of **Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, to mean:-

“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 a explanation or rebuttal from the latter”

Have the Applicants herein established that they have a prima-facie case with probability of success at the trial and that their rights have been infringed?

There is no doubt that there is a water project that is running on the suit property. The Applicants have alleged that the Defendants/

Respondents have sunk boreholes on the suit property without their consent and have been vending water to the public at the detriment of the Applicants. There is also no doubt that the suit property **LR.No.Muguga/Muguga/235**, was initially owned by one **Leah Wariara Gathu (now deceased)** who was a mother and grandmother to the Applicants herein. The Applicants have alleged that this suit property has been subdivided and distributed to the beneficiaries of the estate of the said **Leah Wariara Gathu** through a Succession Cause as per her last Will.

However, the 1st – 3rd Defendants/Respondents have averred that the said **Leah Wariara Gathu** had donated a portion of land measuring 100ft x 100ft to **Nyarugumu Water Project** and they produced a letter dated **16th September 2003** to that effect. It was their contention that the portion of land where the water project stands is distinct from the portions of land that was distributed to the beneficiaries of **Leah Wariara Gathu**. Further that this is not a new development but the same has been in existence even during the lifetime of the late **Leah Wariara Gathu**. The 5th Defendant/Respondent admitted that it was contracted to supply electricity to **Nyarugumu Water Project**, which stands on the suit property. Therefore the 5th Defendant/Respondent denied that it has trespassed on the Applicants’ suit property.

The issue of whether **Leah Wariara Gathu** donated 100ft x 100ft for construction of **Nyarugumu Water Project** is contested by the Plaintiffs/Applicants. That is therefore a contested issue which cannot be resolved at this interlocutory stage. It will have to await the calling of evidence at the main trial.

The Court has seen the photographs attached to the **Replying Affidavit** by the 1st – 3rd Defendants/Respondents. The water tank therein is not a new development. Only the supply of electricity is a new development. Therefore, the Applicants cannot claim that the Defendants have recently encroached on the suit property. For the Court to arrive on whether there is encroachment on the suit property by the Defendants or whether there is recent trespass on the suit property, the Court needs to have benefit of tangible evidence and cannot rely on affidavits evidence to determination the same.

Therefore after a careful consideration of the available evidence, the Court finds that the issues raised by the Applicants can only be adequately determined after the calling of evidence in the main trial. For the above reasons, the Court finds that the Applicants have not established that they have a *prima-facie* case with probability of success at the trial and that any of their rights have been infringed to warrant grant of injunctive orders.

Having found that the Applicants have not established a *prima-facie* case with probability of success, the Court finds no reasons to deal with the other grounds stated in *Giella...Vs...Cassman Brown (supra)* as the determination of these grounds is sequential. See the case of *Kenya Commercial Finance & Co. Ltd...Vs Afraha Education Society (2001) 1EA 86*, where the Court held that:-

“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella..vs..Cassman Brown & Co. Ltd 1973 EA pg 360 Letter E. The conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

Further in the case of *Nguruman Ltd...Vs...Jan Bonde Nielson (2014) eKLR*, the Court of Appeal also held that:-

“If prima-facie case is not established, then irreparable injury and balance of convenience need no consideration”.

Having now carefully considered the available evidence, and the instant *Notice of Motion* application dated 3rd August 2017, the Court finds it not merited and consequently the Court dismisses the said application entirely with costs to the Respondents herein.

On the *Notice of Preliminary Objection*, the Court finds that the same does not meet the description of a *Preliminary Objection* is as held in the case of *Mukisa Biscuits & Co. Ltd.....Vs...West End Distributors Ltd (1969) EA 696* to mean-

“...So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

The objection raised by the 5th Defendant/Respondent would require ascertainment of facts. It is therefore not a pure point of law which stems from the pleadings as was held in the case of *Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, where the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

For the above reason, the Court finds the *Notice of Preliminary Objection* raised by the 5th Defendant not merited. The same is dismissed entirely with costs being in the cause.

It is so ordered.

Dated, Signed and Delivered at Thika this 22nd day of June 2018.

L. GACHERU

JUDGE

In the presence of

M/S Ndolo holding brief for M/S Mungai for Plaintiffs/Applicants

Mr. Nyoro Njogu for 1st – 3rd Defendants/Respondents

No appearance for 4th Defendant/Respondent

Mr. Makau for 5th Defendant/Respondent

Lucy - Court clerk.

Court – Ruling read in open court. The matter herein to be transferred to Kikuyu SPM Court.

L. GACHERU

JUDGE

22/6/2018