



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 112 OF 2017**

**MUHU HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**JAMES MUHU KANGARI.....DEFENDANT**

**RULING**

1. This is a ruling in respect of plaintiff's Notice of Motion dated 10<sup>th</sup> March 2017, an application brought inter alia under Order 40 rules 1, 2 and 4 of the Civil Procedure Rules and pursuant to which the following orders are sought:

**a) Spent.**

**b) Spent.**

**c) That pending the hearing and determination of this suit an interim injunction be granted against the defendant restraining the defendant by himself and/or acting through his servants, and or agents from trespassing, or otherwise howsoever from remaining on or continuing in occupation of and/or putting up structures upon, leasing out and/or carrying out any mining, extracting and crushing of stones and ballast and/or alienating and or otherwise dealing or interfering with parcels of land known as L.R No.s. 420/2 and 420/2/1 Naivasha.**

**d) That the Officer Commanding Police Division, Naivasha be and in hereby directed to ensure compliance of any orders issued herein.**

**e) That such other orders as this honourable court may find necessary to preserve the suit properties.**

**f) That costs of this application be provided for.**

2. The application is supported by an affidavit sworn by Serah Mweru Muhu who states that she is a director of the plaintiff company. She further states that she is the widow of James Muhu Kangari (deceased) and the executrix of the said deceased's will dated 22<sup>nd</sup> July 1986. Pursuant to the said will, the heirs to the deceased's estate executed a Declaration of Trust dated 31<sup>st</sup> January 1995 renouncing their rights to the properties not specifically bequeathed so that the properties could be transferred to the plaintiff company to hold in trust and manage them. Among the properties being managed by the plaintiff pursuant to the aforesaid arrangement are LR No. 420/2 and LR No. 420/2/1, the suit properties herein.

3. The deponent further deposed that sometime in February 2017, the defendant who is a grandson to the deponent and a son to Joseph Kangari Muhu (deceased), one of the heirs to the estate, wrongfully trespassed onto the suit properties, cleared a section thereof with a view to setting up structures and machineries to carry out unauthorized activities thereon. The deponent annexed a copy of the will, a copy of Grant of Probate of Written Will issued on 31<sup>st</sup> October 1989 in Nairobi HC Succession Cause No. 1027/1989 and copy of Declaration of Trust made on 31<sup>st</sup> January 1995 among others. The plaintiff therefore urged the court to grant the orders sought.

4. The defendant opposed the application through his replying affidavit filed on 11<sup>th</sup> April 2017. He deposed that the suit properties are the subject of Nairobi HC Succession Cause No. 1027/1989 consolidated with Cause No. 226/2013 and that the application ought to have been filed in the said Succession Causes. He added that the issues arising in the application and the entire suit are family disputes which ought to be determined in the Family Division of the High Court. Further, he stated that he is an heir to the estate of James Muhu Kangari (deceased) and is therefore entitled to a share of the deceased's estate and to be made a director of the plaintiff company, which matters are pending in the Succession Court. He thus urged the court to dismiss the application.

5. In a further affidavit filed on 19<sup>th</sup> June 2017, Serah Mweru Muhu deposed that whereas the defendant is a beneficiary of the estate of Joseph Kangari Muhu (deceased) who in turn was an heir to the estate of James Muhu Kangari (deceased), the defendant has no right to

utilize the suit properties.

6. The plaint was amended on 14<sup>th</sup> November 2017 to introduce the 2<sup>nd</sup> defendant.

7. The application was heard by way of written submissions. The plaintiff filed submissions on 9<sup>th</sup> February 2018, the 1<sup>st</sup> defendant filed submissions on 14<sup>th</sup> February 2018 and the 2<sup>nd</sup> defendant filed submissions on 19<sup>th</sup> March 2018. I have considered the application, all the affidavits filed as well as the submissions.

8. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not to issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers to the above two tests then the court would determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

9. In the amended plaint filed, the plaintiff primarily seeks an injunction to restrain the defendant from dealing with the suit properties. There is no dispute that the suit properties are part of the estate of James Muhu Kangari (deceased) which is the subject of Nairobi HC Succession Cause No. 1027/1989. The proceedings in the said case appear to be still live and the court made a ruling in that case as recently as 12<sup>th</sup> May 2017 which is reported as **In Re Estate of James Muhu Kangari (Deceased) [2017] e KLR**. The court stated as follows:

*5. The second application is dated 12<sup>th</sup> February 2015. It is brought at the instance of the executrix and Muhu Holdings. The application seeks that the respondent, Sarah Wangari Kang'ari, be restrained from interfering with the executrix's occupation and enjoyment of Dagoretti/Ruthimitu/177, that she be ordered to move her matrimonial home to Dagoretti/Ruthimitu/302 and that the police be directed to give effect to the said orders. The applicant avers that Dagoretti/Ruthimitu/302 is what was gifted to the estate of the respondent's husband in the will of the deceased. She complains that the respondent is abusive to her, and the two of them cannot live together in Dagoretti/Ruthimitu/177.*

10. Ultimately, the court made the following order among others:

*b. That the application dated 12<sup>th</sup> February 2015 is allowed in the terms proposed, the respondent, Sarah Wangari Kang'ari, is given three (3) months from the date of this ruling to move out of Dagoretti/Ruthimitu/177 to Dagoretti/Ruthimitu/302, in default of which the executrix shall be at liberty to forcibly remove her;*

11. Looking at the orders that were sought and the final decision of the succession court, it is abundantly clear that the succession court can and is dealing with issues of interference with properties that comprise the estate of James Muhu Kangari (deceased). If I were to make orders such as those sought in the present application, there is real risk of making orders that conflict with those that may be made by the Succession Court which is the court properly dealing with all issues to do with the estate. That would be an affront to the provisions of **Section 6** of the **Civil Procedure Act**.

12. In view of the foregoing, I am not persuaded that the plaintiff has established a *prima facie* case. That being so, Notice of Motion dated 10<sup>th</sup> March 2017 is dismissed with costs to the defendants.

**Dated, signed and delivered in open court at Nakuru this 27<sup>th</sup> day of September 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiff/applicant

No appearance for the defendants/respondents

Court Assistant: Gichaba