



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 234 OF 2017

**KAGOCHI GITAU KARIA (Suing as the Administrator of the Estate of
GITAU KARIA DECEASED).....PLAINTIFF/APPLICANT**

VERSUS

MARY WANJIRU CHEGE

RUTH NYAMBURA CHEGE

JACKSON Z. NDUNG’U KIARIE

NJENGA GITHAE (sued as the Administrator of the Estate of WAWERU

NJOROGE GATHUNGU DECEASED).....DEFENDANT/RESPONDENT

RULING

1. The matter that is coming before me for determination is the Notice of Motion dated 17th May 2015 brought under, *Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules*, where the Applicant seeks for interim injunctive orders against the Respondents from dealing with land parcel no. Nyandarua/Lesirko/136 pending the hearing and determination of the suit herein. That Applicant also seeks for prohibitive orders against the Defendants from dealing with the said parcel of land pending the hearing and determination of the suit.

2. The said application is based on the grounds on the face of it and supported by the annexed affidavit sworn by Kagochi Gitau Karia the Applicant on the 16th May 2016.

3. By consent, parties agreed to have the application disposed of by way of written submissions wherein they filed their submissions respectively. I have considered the said written submissions wherein the Applicant seeks orders to preserve the subject suit land pending the hearing and determination of the suit.

Applicant’s case

4. It was the Applicant’s submission that that he was the administrator of the Estate of Gitau Karia (deceased) by virtue of the letters of Administration granted in the Nakuru High Court Succession Cause No.35 of 2015.

5. That the Respondents on the other hand were also Administrators of the Estate of Waweru Njoroge Gathungu (deceased) by virtue of a consent recorded in the Nakuru High Court Succession Cause No. 400 of 1993.

6. The Applicant submitted that at all times the late Waweru Njoroge Gathungu was the proprietor of parcel of land No. Nyandarua/Lesirko/136 wherein he had sold 19 acres to late Gitau Karia as confirmed by the Rimita J in the proceedings held in the Nakuru High Court Succession Cause No. 400 of 1993. A copy of the proceedings and judgment which was attached to the Affidavit. That subsequently, Ndungu J had directed that the claim by late Gitau Karia be espoused through a suit filed in the Land and Environment Court. (the present proceedings)

7. The Applicant’s contention was that the statute of limitation had not caught up with him as the said provided that time starts running from the date the Administrator of an estate is granted letters of Administration when claiming or defending on behalf of an estate. In this case the

Applicant was granted the letters on the 2nd September 2015 whilst the Respondents were granted their letter on the 15th December 2011. This suit was therefore not time barred.

8. It was further the Applicant's contention that Nakuru High Court Civil suit No. 258 of 2004 was not determined on merit but was dismissed for want of prosecution, further that the Respondents could not claim that the present suit was Res judicator because parties in the previous suit, No. 258 of 2004, were different from the parties in the present suit. The dispute of No. Nyandarua/Lesirko/136 measuring 19 acres was yet to be determined on merit.

9. The Applicant submitted he was complying with the orders made in Nakuru High Court Succession Cause No. 400 of 1993 where Ndungu J had directed that the claim by late Gitau Karia be espoused through proceedings in the Land and Environment Court. That this case was directed to the beneficiaries and administrators who were bequeathed the suit and by the High Court in that case.

10. The Applicant finally had submitted that they had made out a prima facie case to warrant the orders so sought.

Respondents' case

11. The Application was opposed by the Respondents who framed their issues for determination and submitted on the first issue that this suit was time barred for reasons that the Applicant's claim was that he had received the suit land from his sister in the year 1987 which was 30 years ago, that he ought to have filed the suit within a period of 3 years, but chose to do so 30 years later, without leave of the court.

12. On whether the Applicant was the beneficiary of the suit parcel measuring 17.6 acres, it was the Respondent's submission that, the family division in the Nakuru High Court succession cause No. 400 of 1993 apportioned the suit land on the strength of the ruling of 13th November 2014 to the beneficiaries the Respondents herein included. That thereafter a stay pending Appeal for 4.4 acres was granted which Appeal is yet to be lodged by the 3rd Respondent.

13. That the sale of the suit land by one Cecilia Wangui to her bother was highly contested and disallowed by the court in the Nakuru High Court succession cause No. 400 of 1993. That the Applicant has never set foot on the land but his interest is through the proxy namely Njenga Githae who was even jailed for six months for contempt of the court.

14. The Respondent submitted that the Plaintiff herein had also filed another case being Nakuru High Court Civil Case No. 258 of 2004 which was dismissed for want of prosecution, the present case was therefore Res judicata. The Respondents prayed for the Application to be dismissed.

Determination.

15. I have considered the Application as well as the submissions and authorities cited for and against this application. The often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

16. My first task is to determine whether the Defendant/Applicant has demonstrated a prima facie case. A prima facie case was described as follows in the case of **Mrao v First American Bank (2003) KLR 125;**

a. "...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard that is higher than an arguable case."

17. From the submission by both parties, I note that the Applicant's claim is for transfer of 19 acres of land out of land parcel No. Nyandarua/Lesirko/136 to the estate of late Gitau Karia for reasons that the late Gitau Karia bought the said parcel of land from the late Waweru Njoroge Gathungu. The Applicant holds that he has filed the present Application and suit pursuant to the orders issued in a judgment delivered on the 19th January 2002 in the Nakuru High Court succession cause No. 400 of 1993.

18. I have pondered over this line of submission by the Applicant vis a viz the said orders which I shall replicate for ease of reference.

'I find that the objector was married to the deceased. The two had no children, the dispute is over the distribution of the deceased's remaining estate, which comprises of LR No. Nyandarua/Lesirko/136. The land measures about 24 acres but it is said that the deceased had sold part of it in 1987. But this is denied by the Petitioner. Anyway if the contention is true, the purchaser will be at liberty to follow the appointed legal representative in the ordinary way'

19. I find that the holding of the judge in the above phrase was not a finding that indeed the late Waweru Njoroge Gathungu had sold land to the late Gitau Karia. The implication was simply that the issue as to whether or not there had been any sale transaction between the two gentle was to be resolved in the usual manner-the filing of a suit. In the present Suit and/ or application, although the Applicant alleges that the Waweru Njoroge Gathungu sold 19 acres of the suit land to the late Gitau Karia, there is however no evidence in the form of a sale agreement to support the said allegation.

20. The foundation of the suit is related to a disposition of an interest in land which is governed by Section 3(3) of the Law of Contract that

stipulates as follows;

No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

21. In the case of ***Nguruma Ltd vs. Jan Bonde Nielson & 2 others, Civil Appeal No 77 of 2012***, the Court held that:

“The Party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion”

22. There having been no agreement, in writing between the two parties, I am satisfied the Applicant/Plaintiff is seeking to effectuate a contract that clearly did not comply with the provisions of Section 3(3) of the Law of Contract Act.

23. Whether or not the consent of the land control board was obtained and/or necessary would be a matter of evidence at the trial but since I have held the suit is unsustainable for non-compliance with Section 3(3) of the Law of Contract Act, the issue is of no consequence. The plaintiff's suit against the defendants is not maintainable and is sufficient to lead the court to hold that the Applicant has not established that there is a prima facie case.

24. I need not consider the other two conditions for the grant of temporary injunction as established in the ***Giella –vs- cassman Brown Ltd case (supra)*** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The court of appeal in the case of ***Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86*** cited by ***Gitumbi, J*** with approval in the case of ***Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR*** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

25. Consequently, I dismiss the application dated 17th May 2015 with costs to the Respondents.

26. Parties to comply with the provisions of order 11 of the Civil Procedure Code within the next 21 days for the hearing of the main suit herein.

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

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE