REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCA NO. 62 OF 2015

1. STEPHEN MWANGI KARUKU

2. WANJIRU KARUKU

3. JAMES NJENGA KARUKU.....APPELLANTS

VERSUS

JULIUS KIRAGU GATHUTHA.....RESPONDENT

RULING

Thedispute herein has a long history. The appellants and the respondents are relatives. They belong to two of the three (3) related families who were occupying a parcel of land known as L.R No. Kiambaa/Kanunga/460(hereinafter "Plot No. 460"). Sometimes in 1992, the three families reachedan agreement that Plot No. 460 be partitioned into three (3) equal portions so that each family can have a portion thereof with a separate title. Following this agreement, Plot No. 460 was subdivided into 3 equal portions measuring 0.73ha. each, namely, Kiambaa/Kanunga/1038, 1039 and 1040 (hereinafter "Plot Numbers 1038, 1039 and 1040"). Following this subdivision, Plot No. 1038 was transferred and registered in the name of the appellants, Plot No. 1039 in the name of James Karia Githutha who is not a party to the dispute herein and Plot No. 1040 in the name of the respondent. The dispute between the parties herein arose after the said subdivision of Plot No. 460 and the issuance of separate titles to each of the three families. The dispute arose as a result of the fact that although the three families had lived together, they were now expected to move to their respective portions of the former Plot No. 460 in respect of which they now had titles. The three families had initially occupied and developed the portion of Plot No. 460 which now forms part of Plot No. 1038. Whereas one of the families had no difficulty moving out and occupying Plot No. 1039, the appellants and the respondent had a dispute over the location on the ground of their respective parcels of land. As I have mentioned above, the appellants were allocated Plot No. 1038 of the original parcel of land while the respondent was allocated Plot No. 1040. The respondent insisted that the appellants were occupying his parcel of land namely, Plot No. 1040 and should move out while the appellants insisted on the other hand that they were rightfully occupying their parcel of land, namely Plot No. 1038. The respondent later on realized from the Registry Index Map for the area that the parcel of land which he had occupied and developed thinking all along that the same was Plot No.1040 which was registered in his name was actually registered as Plot No. 1038 in the name of the appellants. After this discovery, the respondent approached the appellants and attempted to reach an agreement to swap the two parcels of land.

They negotiations did not bear fruit. The appellants thereafter moved to Karuri Land Disputes Tribunal seeking an order that the respondent was a trespasser on Plot No. 1038 and should vacate the same. The tribunal found for the appellants in a ruling delivered on 3rd June 2010 and ordered the respondent to vacate Plot No. 1038 and move to Plot No. 1040 which is registered in his name. The respondent was

aggrieved with the decision of the tribunal and lodged an appeal against the same to the Central Province Land Disputes Appeals Committee (hereinafter referred to as "the Appeals Committee"). The Appeals Committee considered the matter and allowed the appeal in a ruling which was delivered on 13th July 2011. The Appeals Committee made a finding that the three families had agreed on which portions of Plot No. 460 were to be occupied by each family after the said parcel of land was partitioned and that a dispute arose when errors were detected in the title deeds which were issued to the appellants and the respondent. The Appeals Committee directed that the appellants and the respondent should surrender their title deeds to the land office for correction. The tribunal made a further order that each of the three families should continue to occupy the plots which are under their occupation.

The appellants were aggrieved with the decision of the Appeals Committee and preferred a second appeal to this court on 7th December 2011. The appellants have challenged the decision of the Appeals Committee on two main grounds namely, that the Appeals Committee made an award in excess of its jurisdiction and that the award was against the weight of evidence that was before the Appeals Committee.

What is now before this court is the appellants' Notice of Motion application dated 6th November 2015 seeking an order that pending the hearing and determination of this appeal, the respondent be restrained from constructing, wasting, alienating and/ or in any other manner interfering with the appellants' parcel of land known as Kiambaa/Kanunga/1038(hereinafter referred to as "the suit property"). The application is supported by the 1stappellants' affidavit sworn on 6th November 2015. The appellants have stated that they are the registered proprietors of the suit property. A copy of the appellants' title deed has been exhibited. The appellants have stated that the suit property is a subdivision of L.R No. Kiambaa/Kanunga/460("Plot No. 469") which was initially registered in the name of the appellants' late father Joseph KarukuMwangi who was a brother to the respondent. The appellants have contended that Plot No. 460 was subsequently registered in the names of their late father and his two brothers, the respondent herein and James Karia Githutha at the instance of the appellants' late father. The appellants have stated that the respondent brought a surveyor and subdivided Plot No. 460 into three portions namely, Pot No. 1038 ("the suit property") which was registered in the name of the appellants, Plot No. 1039 which was registered in the name of James Karia Githutha and Plot No. 1040 which was registered in the name of the respondent. The appellants have contended that the respondent thereafter commenced illegal construction works on the suit property which were being carried out at night and on weekends to evade law enforcers. The appellants have contended that the respondent is intent on constructing a building on the appellants' land with a view of leasing the same to third parties thereby complicating this appeal. The appellants have stated that they are desirous of prosecuting this appeal and that they would suffer substantial loss and the appeal will be rendered nugatory if the orders sought are not granted.

The application was opposed by the respondent through a replying affidavit sworn on 23rd November 2015. The respondent stated that he had occupied the suit property for over 38 years and had extensively developed the same through his son. The respondent contended that the appellants' application was brought in bad faith several years after the institution of the appeal herein. The respondent stated that the applicants were guilty of material nondisclosure. The respondent contended that the appellants had failed to disclose to the court the fact that they had lived on, developed and buried the remains of their relatives on Plot No. 1040.

The application was canvassed by way of written submissions. The appellants in their submissions dated 15th December 2015 contended that it was not disputed that they were the registered proprietors of the suit property and that the respondent was undertaking construction works on the suit property. The appellants submitted that construction works which were being undertaken by the respondent would interfere with the use of the suit property by the appellants. The appellants submitted that land is a unique commodity and they would suffer irreparable loss which cannot be compensated by damages if the activities being undertaken by the respondent on the suit property are not stopped. The appellants submitted that the balance of convenience weighed in their favour and that they had satisfied the conditions for granting the orders sought.

The appellants submitted further that they have an arguable appeal since the issue as to the jurisdiction of the Appeals Committee to order rectification of the register of land is arguable. The appellants argued that they had been forcefully evicted from the suit property by the respondent and that the respondent should not be allowed to benefit from his mischief. The appellants relied on the case of Jared Sagini Keengwe vs. Walter Onchwari & 2 others NaiCA (Appl) No. 27 of 2014 in support of this submission.

The respondent filed his submissions in reply dated 4th January 2016 on 25th January 2016. The respondent reiterated that he had lived on the suit property for over 20 years. He submitted that he entered the suit property in 1996 and had remained in possession openly and peacefully for uninterrupted period of over 12 years. The respondent argued that the appellants' claim for trespass and recovery of land was time barred under sections 7 and 17 of the Limitations of Actions Act ("the Act") and that the appellants' claim over the suit property had been extinguished by operation of law.

The respondent submitted further that he had extensively developed the suit property on which his son had built permanent houses. The respondent contended that the appellants had not come to court with clean hands. He submitted that an error arose during the registration of the subdivisions of Plot No. 460 after the partition thereof in that the titles issued in respect of the suit property and Plot No.1040 did not reflect the location of the parties on the ground. The respondent submitted that the appellants had lived and developed Plot No. 1040 where they had also buried their relatives. He submitted that the dispute between the parties is whether or not the titles for the suit property and Plot No. 1040 should be rectified.

The appellants filed a reply to the respondent's submissions on 29th January 2016. In their supplementary submissions, the appellants denied that their claim against the respondent was time barred under the Limitation of Actions Act(the Act). They argued that their title was issued in 2008 and that action against the respondent was commenced in the year 2010 within the limitation period. The appellants argued that the respondent having submitted himself to the jurisdiction of the then Lands Disputes Tribunal, was estopped from claiming that the suit was time barred.

I have considered the appellants' application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the respondent in opposition to the application. Finally, I have considered the submission by the advocates for the parties and the cases cited in support thereof. Under Order 42 rule 6(6) of the Civil Procedure Rules, this court has power to grant a temporary injunction pending the hearing and determination of an appeal to this court. The power is discretionary. I am of the view that the normal principles which the court applies in applications for a temporary injunction which were enunciated in the case of Giella vs. Cassman Brown Company Limited [1973] E.A 358would apply with minor modification in applications of this nature. For this court to grant the orders sought, the appellants must establish that they have an arguable appeal and that unless the orders sought are granted they would suffer irreparable harm which cannot be compensated in damages. If the court is in doubt, the application would be determined on a balance of convenience. I am satisfied that the appellants have an arguable appeal. The appellants' contention that the Appeals Committee had no jurisdiction to order rectification of the title for the suit property is arguable. The appellant's complaint is that the respondent is putting up buildings on the suit property which he intends to lease out to third parties. The respondent has contended that it has been in occupation of the suit property for over 20 years and has developed the same extensively. These averments were not controverted by the appellants. The appellants are not in occupation of the suit property although the same is registered in their names. It is common ground that they were evicted from the suit property several years ago and they are currently occupying Plot No. 1040 which is registered in the name of the respondent. Since the suit property is not registered in the name of the respondent, the respondent cannot sell or transfer the same to a third party. There is no evidence that the construction works being carried out on the suit property by the respondent is subjecting the suit property to waste or injury. I am not satisfied on the material before me that the appellants would suffer irreparable harm if the injunction sought is not granted. I am also not persuaded by the appellants' contention that the appeal herein may be rendered nugatory if the orders sought are not granted. I am of the view that even if the application was considered on a balance of convenience, the same would tilt in favour of maintaining the prevailing status quo pending the hearing of the appeal.

The upshot of the foregoing is that the Notice of Motion dated 6th November 2015 has no merit. The

same is accordingly dismissed. The costs of the application shall be in the cause. Since the subject matter of the appeal is situated at Kiambaa within Kiambu County, this appeal is transferred to Thika Environment and Land Court for hearing and final determination.

Delivered and Signed at **Nairobi** this 24th **day** of February, **2017.**

S. OKONG'O

JUDGE

In the presence of:-

Ms. Mwaniki h/b for Kariuki for the Appellants

Mr. Gatitu for the Respondent

Kajuju Court Assistant