



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT THIKA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 180 OF 2017**  
**ROSE WANGARI NDUNGU**  
**ROSE WANJIKU NDUNGU(Suing on their**  
**own behalf and their own benefit and**  
**on behalf of and for the benefit of**  
**the Estate of the late Mr. Stanley**  
**Ndungu Njoroge (Deceased).....PLAINTIFFS**  
**VERSUS**  
**CATHERINE NJERI.....DEFENDANT**

**RULING**

The two files, *ELC No. 297 of 2014* and *ELC No. 1282 of 2014*, were consolidated by the Order of the Court issued on **14<sup>th</sup> July 2014**. Further this Court on **22<sup>nd</sup> July 2015**, directed that the two applications pending be canvassed together by way of *Written Submissions*. Basically, the two applications seek similar Orders and relate to the same parties. *ELC No. 297 of 2014*, was filed by **Rose Wangari Ndungu** and **Rose Wanjiku Ndungu** suing on their own behalf and on behalf of and for the benefit of the estate of the Late **Stanley Ndungu Njoroge** (deceased). The suit is against **Catherine Njeri** and applicants have sought for various orders among them being a declaration that the parcel of land known as **Dagoreti/Riruta/6213** situate in **Kawangware area**, Nairobi belongs to the Plaintiffs and that the Defendant be evicted from this parcel of Land and the Plaintiffs be granted vacant possession of the same. This *ELC No. 297 of 2014* was filed in Court on **13<sup>th</sup> March 2014**.

On the other hand, *ELC No. 1282 of 2014* was filed in Court on **2nd October 2014**, by **Catherine Njeri** (Suing on her behalf and on behalf of the estate of the late **Gabriel Kungu Kamunu** (deceased). This plaintiff is the Defendant in *ELC No 297 of 2014*. She sued the Defendants **Rose Wangari Ndungu** and **Rose Wanjiku Ndungu** ,who are Plaintiff's in *ELC No 297 of 2014*. Further, **Catherine Njeri** also sought for various prayers among them a declaration that the Plaintiff's deceased husband **Gabriel Kungu Kamunu** purchased land parcel No **Dagoretti/Riruta/6213** from **Stanely Ndungu Njoroge** (*deceased*) and subsequently a determination of the plaintiff's deceased husband share from the

Defendants' husband estate of **Stanley Ndungu Njoroge**. Further that an Order do issue for cancellation of the title deed issued in favour of the Defendants' name and the same be in the name of the Plaintiff thereof.

Simultaneous to this Plaint filed on **2<sup>nd</sup> October 2014**, the Plaintiff therein **Catherine Njeri** (Defendant in **ELC No. 297 of 2014**) filed a Notice of Motion dated **29<sup>th</sup> September 2014**, and sought for temporary injunction to restrain the Defendants (Plaintiffs in **ELC No 297 of 2014**), their employees, servant and or agent from entering, trespassing, occupying, destroying and or in any manner doing any other act of waste on the Plaintiff's/applicant's land being **L.R No. Dagoretti/Riruta/6213**, until the hearing and determination of the main suit. Subsequent to the filing of this instant Notice of Motion, the Court did issue Orders of maintenance of obtaining **status quo** in regard to the suit property being that **"there will be no eviction and/or sale of the property pending the hearing of the application"**.

Thereafter the Plaintiffs in **ELC No 297 of 2014**, filed their Notice of Motion dated **22<sup>nd</sup> June 2015**, and also sought for an order of **temporary Injunction** against the Defendant (**Catherine Njeri**) who is the Plaintiff in **ELC 1282 of 2014**, and sought to restrain her, her agents and/or servants or any other person acting for the Defendant or with the Defendant's authority from damaging, wasting, encroaching or trespassing into, constructing thereon, further alienating or disposing of or in any other way whatsoever interfering with the Plaintiffs' parcel of land known as **Dagoretti/Riruta/6213**, situate on Kawangware areas, Nairobi pending the hearing and determination of this suit.

These are the two applications that the Court directed that they be canvassed together by way of Written Submissions since the two files have now been consolidated.

In compliance with the Court's directions, the parties did file their Written Submissions. The Law Firm of **Wangai Nyuthe & Company Advocates** for Plaintiffs in **ELC No. 297 of 2014** and Defendants in **ELC No. 1282 of 2014**, filed their written submissions on **7<sup>th</sup> November 2016**, and submitted that the suit property is registered in the names of **Rose Wangari Ndungu** and **Rose Wanjiku Ndungu** as administrators of the estate of **Stanley Ndungu Njoroge** and therefore the status quo Order in existence should be discharged. They relied on various decided cases among them the case of **Dismas Odour Vs Housing Finance Company (K) Ltd & Another** where the Court held that:

**"----- as the jurisdiction to grant an injunction is an equitable one, a matter of equal weight with those conditions is that an injunction will not be granted if the applicants conduct in relation to the subject matter as shown not to meet the approval of a Court of equity"**

It was further submitted that the Court Order granted on **18<sup>th</sup> March 2015**, was obtained through deceit and non-disclosure of material facts to the Court that the applicant therein was a Defendant in a similar suit **ELC No. 297 of 2014**, between the same parties over the same subject matter. The Plaintiff's in **ELC 297 of 2014** further submitted that their Notice of Motion dated **22<sup>nd</sup> June 2015**, is merited and should be allowed entirely.

On behalf of **Catherine Njeri (Plaintiff in ELC 1282 of 2014** and Defendant in **ELC No. 297 of 2014)**, the Law Firm of **B.G Mwangi & Company Advocates**, filed their written submissions on **28<sup>th</sup> January 2017**, and urged the Court to allow her application dated **29<sup>th</sup> September 2014**. It was submitted that the suit land was purchased by **Gabriel Kungu Kamunu** from **Stanley Ndungu Njoroge** on **18<sup>th</sup> November 1980**, as evident from an attached sale agreement. It was her further submissions that the Defendants/Plaintiffs in **ELC 297 of 2014**) who are administrators of the estate of **Staneley Ndungu Njoroge** secretly and fraudulently filed a Succession Cause in respect of the estate of **Stanley Ndungu Njoroge** vide Succession Cause **No. 654 of 2012**. It was further submitted that through the said Succession Cause, the Defendants allegedly distributed the parcel of land which belonged to **Stanley Ndungu Njoroge** without any consideration to other beneficiaries of the estate and/or persons with overriding interest on the estate. The Plaintiff in **ELC 1282 of 2014** relied on various decided cases among them the case of **Giella Vs Cassman Brown & Company Ltd 1973 (KLR) 358** which laid down the threshold to be established in grant of an interlocutory injunction which are:-

***“First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”***

Applicant also relied on the case of *Mwangi & Another Vs Mwangi (1986) KLR 328*, where the Court held that the ***“rights of a person in possession or occupation of the land are equitable rights which are binding on the Land and the Land is subject to those rights”***. The applicants urged the Court to allow her application dated **29<sup>th</sup> September 2014**, in totality.

This Court has now carefully considered the instant applications, the annexures thereto, the facts of the case and the written submissions and the Court makes the following findings:-

Before embarking on any analysis of the facts, the Court will take note that there is in existence as Interim Order of maintenance of Status quo issued by the Court on **18<sup>th</sup> March 2015**. The Court will also take into account that **ELC No 297 of 2014** was filed earlier on **13<sup>th</sup> March 2014**, and that the Defendant therein filed her statement of Defence on **16<sup>th</sup> April 2014** and did not include any counter-claim. However, she later filed **ELC 1282 of 2014** and sought for injunctive Orders.

The Orders being sought in the two referred applications are orders of injunction. The principles for grant of an Interlocutory injunction were laid down in the case of *Giella Vs Cassman Brown & Company Ltd 197 E.A 358 (Supra)*.

At this stage, the Court is only required to determine whether the applicants are deserving of the Orders sought. The Court is not required to determine the merit of the case. 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---“***

Further in the case of *Mbuthia Vs Jimba Credit Corporation Ltd 1988 KLR 1*, the Court held that:-

***“In an application for Interlocutory Injunction, the Court is not required to make final findings of contested facts and Law and the court should only weigh the relative strength of the parties cases”***

In the Instant case, the contested facts are whether *Gabriel Kungu Kamunu* (Deceased), the late husband to *Catherine Njeri* did purchase the suit land from *Stanley Ndungu Njoroge* (deceased) the late husband to *Rose Wangari Ndungu* and *Rose Wanjiku Ndungu*. The said contested facts cannot be determined at this Interlocutory stage through affidavits evidence. The determination of the said contested issues will have to await the calling of evidence at the main trial. See the case of *Airland Tours and Travel Ltd Vs National Industrial Credit Bank Nairobi HCCC No. 1234 of 2002*, where the Court held that:-

***“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”***.

Bearing in mind the above position, the Court will first embark on determination of the Notice of Motion dated **29<sup>th</sup> September 2014**, filed by *Catherine Njeri* in **ELC 1282 of 2014**. The applicant herein needed to establish the threshold for grant of Interlocutory application. The question now for determination, is whether the said applicant, *Catherine Njeri* in **ELC 1282 of 2014** is deserving of the Orders sought in the instant Notice of Motion.

What is not in doubt is that **L.R No Dagoretti /Riruta/6213** is registered in names of *Rose Wangari*

**Ndungu** and **Rose Wanjiku Ndungu** vide a title deed issued on **5<sup>th</sup> September 2013**. The said Certificate of title was issued to the defendants after Confirmation of Grant of the estate of **Stanley Ndungu Njoroge**. The late **Stanley Ndungu Njoroge** was the initial registered owner of **L.R No Dagoretti/Riruta/6213**, having been issued with the said title on **14<sup>th</sup> May 2012**. The Defendants herein being the registered owners are deemed to be the **absolute** and **indefeasible** proprietors of the suit property by dint of Section 26(1) of the Land Registration Act which states that:-

***The certificate of title issued by the registrar upon registration, or to a purchaser 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.***

Being the **absolute** and **indefeasible** owners of the suit land, the Defendants have their rights protected by Section 25(1) of the said **Land Registration Act** and the said right shall not be liable to be defeated except by operation of law. The applicant has alleged that her late husband purchased a portion of **L.R No. Dagoretti/Riruta/264** from the late **Stanley Ndungu Njoroge**. Certainly a portion of **Dagoretti/Riruta/264** is not the same as **Dagoretti/Riruta/6213**, in which the Defendants are the registered owners. Though the Plaintiff/applicant has attached a copy of the sale agreement dated **18<sup>th</sup> September 1980**, the said agreement is over **L.R No. Dagoretti/Riruta/264**. Whether **L.R Dagoretti/Riruta/6213** is a subdivision of **L.R Dagoretti/Riruta/264** is a matter of evidence which this Court cannot determine at this juncture. The same will await the calling of evidence at the main trial.

However, it is evident that the defendants are the registered owners of the suit property having obtained the same through transmission vide **Succession Cause No. 654 of 2012**, and there is no evidence that the Plaintiff herein objected to the distribution of the said estate. The Defendants being the registered owners of the suit property then **prima facie** as provided by Section **26(1)** the Land Registration Act, they are the absolute and indefeasible owners and the Court cannot injunct them from their own parcel of Land.

Further, as this Court had earlier observed, the Defendants herein filed **ELC 297 of 2014** earlier than **ELC 1282 of 2014**. The Plaintiff herein (Catherine Njeri) who is the Defendant in **ELC 297 of 2014** filed a Defence in the said suit but did not file a Counterclaim. However, she later filed this suit and sought for an injunction. Was this suit **ELC 1282 of 2014** filed to hoodwink the Court into granting an injunctive order over a subject matter which was in issue in **ELC 297 of 2014** involving the same parties?. The Court finds that the Plaintiff in **ELC 1282 of 2014** was guilty of material non-disclosure and did not come to Court with clean hands. An injunction being an equitable relief, then the applicant ought to have come to Court with clean hands. See the case of **Jane Achieng Onyango Vs Giro Commercial Bank, Kisumu HCCC No. 339 of 1999**, where the Court held that :-

***“an injunction being an equitable remedy, the party seeking it must come to Court with clean hands.***

Further in the case of **David Kamau Gakuru Vs National Industrial Credit Bank Ltd, Civil Appeal No 84 of 2001**, the Court held that:

***“An Injunction being, an equitable remedy cannot be granted to a party who has demonstrated openly by his conduct that he is undeserving of the equitable relief”***

It is evident that the applicant in **ELC 1282 of 2014** filed the instant Notice of Motion dated **29<sup>th</sup> September 2014**, knowing very well that the Defendants had filed **ELC No 297 of 2014**. Instead of filing

a counterclaim in **ELC 297 of 2014** and the instant application in the existing suit, she chose to file a separate suit.

The Court has also considered the prayers sought by the Plaintiff in the **ELC No. 1282 of 2014**. The Court has noted that the Plaintiff/applicant has not sought for an order of permanent injunction. She cannot therefore seek for Injunction in the instant application as the order sought are in variance with the prayers sought in the main suit. See the case of **Dismas Odour Owour Vs Houseing Finance Company (K) Ltd and another, Nairobi HCCC No 630 of 2001** where the Court held that :-

***“the Plaintiff cannot be granted Interlocutory Orders which are at variance with the permanent Orders sought.”***

Having now analyzed and considered the Notice of Motion dated **29<sup>th</sup> September 2014**, filed by **Catherine Njeri**, suing on her behalf and on behalf of the estate of the late **Gabriel Kungu Kamunu**, and having considered the relevant provisions of Law and the written submissions, the Court finds the said application is **not** merited and the same is consequently dismissed entirely with cost to the Defendants. For avoidance of doubt, the Order issued by the Court on **18<sup>th</sup> March 2015** are consequently vacated and/or discharged as the same were obtained through non-disclosure of material facts to the Court and while **ELC No 297 of 2014** between the same parties and over the same subject matter was pending in Court.

Now turning to the Notice of Motion dated **22<sup>nd</sup> June 2015**, and having found that the Plaintiffs in ELC 297 of 2014 are registered owners of the suit property and **Prima-faciely** they are the absolute and indefeasible proprietors, then the court finds that they are entitled to enjoy the rights conferred to a proprietor of any suit property as provided by sections 24(a) and 25(1) of the Land Registration Act.

The Plaintiffs/applicants vide annexures attached to their application dated **22<sup>nd</sup> June 2015** have demonstrated that the Defendant (Catherine Njeri) is putting up a development on the suit property. The said development is being constructed before the contested issue has been settled. It is therefore important to preserve the suit property. The said preservation can only be done by issuance of temporary Order of injunction. For the above reasons, the Court finds it prudent to issue an order of temporary Injunction in the Notice of Motion dated **22<sup>nd</sup> June 2015** in the following terms:-

***“A temporary Injunction be and is hereby granted restraining the Defendant herein (Catherine Njeri) by herself, her agents, and/or servants or any other person acting for her or with her authority from damaging, wasting, Constructing or carrying further development/constructing thereon, alienating or disposing of the suit property known as LR No. Dagoretti Riruta/6213 situate in Kawangware area Nairobi pending the hearing and determination of this suit”.***

Costs of this application shall be in the cause.

It is so ordered

Dated, Signed and delivered this 23rd May 2017.

**L. GACHERU**

**JUDGE**

In the Presence of

**L. GACHERU (JUDGE)**

C.C: Rachael

Plaintiff/Applicant/Respondent: Absent

Defendant/Respondent/Applicant: Absent

**Court:** Ruling read in open court in the absence of the parties and their advocates though date taken in Court in the presence of the respective advocates.

**L. GACHERU JUDGE**

**23/5/2017**