



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 53 OF 2017

ELIJAH GITHINJI GACHOKI1ST PLAINTIFF

WAMBUI MURAGE KARIUKI.....2ND PLAINTIFF

CICILIA WAIRIMU MURAGE.....3RD PLAINTIFF

**(Suing as Legal Representative of
CYPRIAN MURAGE GACHOKI)**

VERSUS

STANLEY MUGO MURIUKI1ST DEFENDANT

(Sued as Legal Representative of

MURIUKI GACHOKI.....1ND DEFENDANT

RAPHAEL KINYUA MUGO.....2RD DEFENDANT

RULING

I have before me two applications for my determination.

The first application dated 10th April 2017 is by the plaintiffs and is premised under ***Order 40 Rules 1 and 2 of the Civil Procedure Rules***. It seeks the following orders:

1. Spent.

2. Spent.

3. That this Honourable Court be pleased to order temporary injunction against the defendants restraining them from selling, transferring, disposing, charging and/or in any other way interfering with the plaintiffs use, possession and enjoyment of land parcel No. MWERUA/GITAKU/154 pending the hearing and determination of the suit herein.

4. That the costs of the application be provided for.

The basis of the plaintiffs' case is that land parcel No. MWERUA/GITAKU/154 (the suit land) was registered in the names of their deceased brother **MURIUKI GACHOKI** (represented by the 1st

defendant herein) to hold in trust on behalf of the family. However, the 1st defendant secretly filed a Succession Cause and sold a portion thereof to the 2nd defendant. The plaintiffs have therefore filed this suit seeking, among other orders, the determination of trust.

The application is opposed and the 1st defendant (**STANLEY MUGO MURIUKI**) has filed grounds of opposition thereto alleging, inter alia, that it is frivolous, vexatious and an abuse of the Court process. Further, that this suit is res-judicata following the ruling dated 13th July 2016 in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 90 of 2013**.

The 2nd defendant **RAPHAEL KINYUA MUGO** filed a replying affidavit in which he deponed that in 1997, the 1st defendant requested him to help finance the Succession Cause of his (1st defendant's) father and so they agreed that the 1st defendant would sell him 2 acres out of the suit land for Ksh. 200,000. That he was therefore included in the application for confirmation of grant. That grant was later revoked and it was therefore upon the plaintiffs to extract the order and present it to the Land office so that his names can be removed from the register as he is not interested in this suit and neither is he in occupation of the suit land.

The second application is by the 2nd defendant and is dated 28th April 2017. It seeks the following orders:

- 1. That this Court do strike out the plaintiffs suit against the 2nd defendant for being an abuse of the Court process.***
- 2. Costs be provided for.***

That application is premised on the grounds that although the 2nd defendant had been included in the confirmation of grant and obtained 2 acres out of the suit land, that grant was revoked in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 90 of 2013** following an application filed by the 1st plaintiff. Following that revocation of grant, it was upto the plaintiffs to extract an order and present it to the Lands office so that the 2nd defendant's name is removed from the register but instead, he has been wrongly enjoined in the proceedings yet he was only a purchaser and is not interested in this case which is greatly prejudicial to him as he has to undergo costs defending a case that has nothing to do with him.

The plaintiffs have filed grounds of opposition to that application describing it as bad in law and an abuse of the process of the Court.

On 13th July 2017, it was agreed by counsel for the parties that the two applications be canvassed simultaneously by way of written submissions. Those submissions have now been filed by **MS WANGECHI** advocate for the plaintiffs, **MS THUNGU** advocate for the 2nd defendant and **MR. KAHIGA** advocate for the 1st defendant.

I have considered the two applications, the rival affidavits and annexures thereto as well as the submissions by counsel.

With regard to the plaintiffs Notice of Motion dated 10th April 2017, it seeks injunctive relief pending trial and therefore has to be considered in light of the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:

- 1. An applicant must show a prima facie case with a probability of success.***
- 2. Secondly, an interlocutory injunction will not normally be granted unless the applicant might suffer irreparable injury which would not otherwise be adequately compensated by an award of damages.***
- 3. Thirdly, if the Court is in doubt, it will determine such an application on the balance of convenience.***

A prima facie case has been defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)** as:

“..... a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

In the case of **NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No. 77 of 2012**, the Court of Appeal while considering whether a prima facie case had been established stated that:

“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities”

Finally, as was held in the case of **FILMS ROVER INTERNATIONAL LTD VS CANNON FILMS SALE LTD 1986 3 ALL E.A 772**, a Court considering such an application should take the route that appears to carry the lower risk of injustice should it turn out to have been wrong.

Before I go into the merits of the two applications however, it is important that I determine whether this suit is in fact res-judicata in view of the ruling in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 90 of 2013**. This is because in his grounds of opposition, the 1st defendant has stated that the application and the entire suit are in fact res-judicata in view of the ruling dated 13th July 2016 in the above Succession Cause. I have looked at the ruling of **LIMO J.** in that Succession Cause and the Judge made it clear that he was unable to make a decision on ***“whether a trust existed or not”***. Further on in the same ruling, the Judge made the following important observation:

“It is also important to note that the law of Succession Act Cap 160 Laws of Kenya deals with intestate and testamentary succession and administration of Estates of deceased persons. The architectural design of the Act is not meant to deal with disputes related to land and in this regard, I agree with the 2nd respondent that such disputes whether based on trust or contractual obligations should be left to the Environment and Land Court which by law is seized with the jurisdiction and Constitutionally mandated to deal with such disputes under Article 162 (2) of the Constitution”.

What the Judge was saying in that Succession Cause was that the issue of trust is the preserve of this Court and could not be handled in a Succession Cause. That was the correct position and the Court of Appeal took the same view in the case of **STEPHEN MUNENE GACHUIRI & MURIITHI KABUGU VS WAIRUI KARANI C.A CIVIL APPEAL No. 273 consolidated with No. 274 of 2007 (NYERI)** when it stated that a claim in trust being civil in nature cannot be determined in a Succession Cause. See also my decision in **VINCENT GATIMU GITAKU VS CHARITY WANGECHI NGARI KERUGOYA ELC CASE No. 353 of 2013**. It follows therefore that the doctrine of res-judicata which is provided for under **Section 7 of the Civil Procedure Act** cannot be invoked to defeat this claim based on trust as that issue was not determined and could not have been determined by **LIMO J.** in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 90 of 2013**. I must therefore reject the plea that this suit is res-judicata.

Going back to the plaintiffs’ application for temporary injunction pending trial, it is clear from paragraph 6 of the supporting affidavit of **ELIJAH GACHOKI GITHINJI** the 1st plaintiff herein that both he, the 2nd plaintiff and the 1st defendant all live on the suit land where their parents are buried. The plaintiffs claim to the suit land is based on trust which is of course a matter to be determined by evidence at the trial. The Green Card to the suit land shows that as at 13th June 1997, the defendants were registered as the proprietors thereof. It is however trite law that the registration of a party as the proprietor of land does

not absolve him of any obligation owed by him as a trustee. The 2nd defendant has of course stated that he has no interest in the suit land but that notwithstanding, since his name appears on the register as one of the proprietors, unless he relinquishes that right, this Court will have to make a determination on his proprietorship thereto. The Green Card also shows that as at April 1960, the suit land was registered in the names of **KARIUKI NJAGUA** the deceased father to the plaintiffs and **MURIUKI GACHOKI** the deceased father to the 1st defendant herein. Taking all that into account and particularly the fact that the plaintiffs are in occupation of the suit land and also the fact that the object of a temporary injunction is to preserve the land in dispute pending the hearing of the case, I am satisfied that a prima facie case has been established by the plaintiffs which is the first principle as set out in the **GIELLA** case (supra).

On the adequacy of damages as a remedy, I have noted from the ruling of **LIMO J.** in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 90 of 2013** and specifically at page 12 thereof that the Judge made a finding that by the time the 2nd defendant purchased 2 acres out of the suit land from the 1st defendant, no confirmation of grant had been issued and therefore the sale agreement entered between the two on 10th April 1997 was “**unlawful and irregular**”. That means that the said agreement was a clear transgression of the law and in such a case, it cannot be said that damages would be a sufficient remedy – **MOHAMED VS COMMISSIONER OF LANDS & OTHERS K.L.R (E & L)1**. This Court therefore has the power, indeed the responsibility, to prevent a further transgression of the law by issuing the temporary injunction sought by the plaintiffs as failure to do so may expose the suit land to more danger of being alienated before this suit is heard and determined. And if this Court was in any doubt (which it is not) the balance of convenience would be in favour of granting the application for temporary injunction pending the hearing of this suit.

I am therefore satisfied on the evidence before me that the plaintiffs are deserving of the orders sought in their Notice of Motion dated 10th April 2017.

I shall now consider the 2nd defendant’s application dated 28th April 2017 in which he seeks an order striking out the suit against him for being an abuse of the Court process. His argument is that he purchased 2 acres out of the suit land for Ksh. 200,000 from the 1st defendant in 1997, he did not know the history of the land and although he was included in the confirmed grant, this was later revoked with the effect that it was upto the plaintiffs to extract the order and present it to the Lands office to remove his name from the register. It is true that in the ruling dated 13th July 2016 in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 90 of 2013, LIMO J.** made a finding that the 2nd defendant’s name was inadvertently included in the confirmed grant. However, as per the Green Card and certificate of official search in respect of the suit land, the 2nd defendant is registered as proprietor of 2 acres of the same while the 1st defendant is registered as proprietor of 1.8 acres. As a registered proprietor of the suit land, the 2nd defendant is therefore a party whose presence is necessary to enable this Court to effectually and completely adjudicate over this dispute. I am not therefore persuaded that this suit against the 2nd defendant is an abuse of the Court process. Indeed to omit him from these proceedings would be an affront to **Articles 40 (1) and 50 (1) of the Constitution**. I notice from the record that the 2nd defendant has not filed any defence to the plaintiffs’ suit and infact an application for interlocutory judgment to be entered against him was made on 16th May 2017. That issue will be handled during the trial but all I can say at this stage is that the plaintiffs claim is not a liquidated demand for which interlocutory judgment can be entered and perhaps that explains why the request has not been acted upon by the Deputy Registrar of this Court. As stated above, the main ground upon which the 2nd defendant seeks the striking out of the suit against him is that it is an abuse of the Court process. A litigant is said to be abusing the process of the Court when he is only interested in accomplishing some improper purpose which is collateral to the proper object of the legal process and offends justice – **MUCHANGI INDUSTRIES LTD VS SAFARIS UNLIMITED (2009) e K.L.R.** I do not see how the suit against the 2nd defendant can be regarded as being an abuse of the process of this Court. Besides, the remedy of striking out a suit is to be employed only in the clearest of cases. Further, as was held in the case of **YAYA TOWERS LTD VS TRADE BANK LTD (2004) e K.L.R.** a plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success unless it can be demonstrated that the claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court. In my view, since the register in respect to the suit land reflects that the 2nd defendant, together with the 1st defendant, are the registered proprietors thereof, both of them are properly sued in this case. The suit against the 2nd defendant cannot

therefore be described as an abuse of the process of this Court and therefore liable for striking out as alleged. I therefore find no merit in the 2nd defendant's Notice of Motion dated 28th April 2017 which must be dismissed.

Ultimately therefore and having considered the two applications, I make the following orders:

- 1. An order of temporary injunction is issued against the defendants restraining them from selling, transferring, disposing, charging or in any other way interfering with the plaintiffs use, possession and enjoyment of the land parcel No. MWERUA/GITAKU/154 pending the hearing and determination of this suit.***
- 2. The 2nd defendant's application seeking the striking out of the suit against him is dismissed.***
- 3. The parties shall comply with the pre-trial directions so that this suit is heard and determined within the next twelve (12) months.***
- 4. Each party to meet their own costs.***

Having said so, it is clear from the record of 13th July 2017 that an attempt had been made by the parties to try and arrive at an amicable settlement of this dispute. That attempt did not achieve its objective. The plaintiffs and 1st defendant are related. The Court now has the benefit of having perused the ruling of **LIMO J.** in **KERUGOYA SUCCESSION CAUSE No. 90 of 2013** and I am of the view that this is a matter that the parties can negotiate and settle out of Court. I therefore encourage them not to abandon that path but to continue and pursue it even as they prepare for trial.

B.N. OLAO

JUDGE

29TH SEPTEMBER, 2017

Ruling delivered, dated and signed in open Court this 29th day of September 2017

Ms Kiragu for Ms Munene for Plaintiffs present

Ms Waweru for Mr. Kahiga for 1st Defendant present

Mr. Ngigi for Ms Thungu for 2nd Defendant present.

B.N. OLAO

JUDGE

29TH SEPTEMBER, 2017