



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO.777 OF 2016

MICHAEL KIMANI

(Suing on his own behalf and

**as the executor of the estate of Mweya Karonga
.....PLAINTIFF**

VERSUS

GEORGE KIMANI GITAU

(Sued on his own behalf and in his capacity

**as the administrator of the estate of Gitau Karonga.....
DEFENDANT**

RULING

What is before me is the Plaintiff's application which was brought by way of Notice of Motion dated 10th July 2016 in which the plaintiff has sought a temporary injunction to restrain the defendant by himself and through his agents from interfering in any manner with the plaintiff's possession and occupation of a portion of all that parcel of land known as L.R No. Dagoretti/Kangemi/7 and the subsequent and resultant subdivisions thereof currently occupied and in possession of the plaintiff pending the hearing and determination of this suit and an order that the court does give a clarification of the judgment of Angawa J. which was delivered on 24th May 2007 in Nairobi Civil Suit No. 2940 of 1992, Gitau Karonga vs. Mweya Karonga. The application was brought on the grounds set out on the face thereof and on the affidavit and further affidavit sworn by the plaintiff. The application was opposed by the defendant through a replying affidavit sworn on 23rd November 2016.

The plaintiff's application was argued before me on 9th February 2017 when the parties essentially relied on their affidavits filed herein in support of and in opposition to the application. I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the defendant's affidavit filed in opposition to the application. Finally, I have considered the parties' respective submissions. The principles upon which this court exercises its discretion in applications for temporary injunction are well settled. In the case of Giellavs. Cassman Brown and Company Ltd. (1973) E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and must also demonstrate that he stands to suffer irreparable injury which would not be adequately compensated by an award of damages if the injunction is not granted. If court is in doubt as to the above, the application would be determined on a balance of convenience. An injunction is an equitable remedy. In addition to the foregoing principles, the general principles of equity also come to

bear on an applicant for a temporary injunction. In the case of, Mraovs. First American Bank of Kenya Ltd. & 2 Others [2003] KLR 123, a prima facie case was defined as follows:-

“a prima facie case in civil application includes but is not confined to “a genuine and arguable case”. It is 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.”

The plaintiff's complaint in this suit is as follows. The defendant is a beneficiary and an administrator of the estate of Gitau Karonga, deceased(hereinafter referred to as “Gitau”) while the plaintiff is the administrator of the estate of Mweya Karonga, deceased(hereinafter referred to as “Mweya”). Gitau and Mweya were brothers. A part from the two, their parents had other children both male and female. Gitau, Mweya and their siblings inherited ancestral land from their father which was registered in the name of Mweya alone on 4th January 1958 as L.R No. Dagoretti/Kangemi/7 (hereinafter referred to as “the suit property”). A dispute arose between Gitau and Mweya over the sharing of the suit property among all the heirs of their father. This led to the filing of a suit by Gitau against Mweya in the High Court namely, Nairobi HCCC No. 2940 of 1992(hereinafter referred to as “the High Court Case”). In the High Court Case, Gitau sought among others, a declaration that Mweya held the suit property in trust for himself, Gitau and their siblings, an order compelling Mweya to sub-divide the suit property and transfer portions thereof to himself and Gitau and that Mweya does execute all the documents necessary to effect the said subdivision and transfer. Mweya filed a counter-claim against Gitau in which he sought among others, a declaration that the subdivision which had been carried out on the suit property and the registration of L.R No. Dagoretti/Kengemi/754 and L.R No. Dagoretti/Kengemi/757 which resulted from that subdivision in the name of Gitau were null and void, the cancellation of the said subdivision and an injunction restraining Gitau from disposing of, alienating and/or in any other way dealing with the said parcels L.R No. Dagoretti/Kengemi/754 and L.R No. Dagoretti/Kengemi/757(hereinafter referred to as “Plot No. 754” and “Plot No.757”).

The High Court Case was heard by Angawa J. In a judgment that was delivered on 24th May 2007, Angawa J. entered judgment infavour of Gitau and dismissed Mweya's counter-claim. The decree issued from that judgment on 7th July 2011 was on the following terms;

- “1. THAT the Defendant's counter-claim be and is hereby dismissed.*
- 2. THAT the Defendant, his servants or agents be and are hereby restrained and prevented from selling, disposing of or alienating the suit premises.*
- 3. THAT the Defendant be and is hereby restrained from interfering with the Plaintiff's occupation and use of the portion he has been occupying.*
- 4. THAT it is hereby declared that the Defendant holds L.R No. Dagoretti/Kengemi/7 in trust and/or as trustee for himself, the plaintiff and others.*
- 5. THAT the Defendant shall subdivide and transfer the suit premises into the names of the plaintiff and himself.*
- 6. THAT the Defendant shall execute all the documents necessary to effect the said subdivision and transfer”.*

The plaintiff has contended that while the High Court Case was pending and before the said judgment of Angawa J. and subsequent decree, Gitau had illegally and fraudulently subdivided the suit property into four portions namely L.R No. Dagoretti/Kengemi/754, 755,756 and 757 and caused L.R No. Dagoretti/Kengemi/754 and 757 to be registered in his name. The plaintiff has contended that the purported subdivision was carried out while there was an order in force in the High Court Case for the maintenance of status quo in relation to the suit property pending the hearing of that case. The plaintiff has contended that the issue of the fraudulent subdivision of the suit property was never interrogated

properly in the High Court Case. The Plaintiff has contended that pursuant to the judgment and decree of Angawa J. aforesaid, the suit property was to remain intact and Mweya was supposed to subdivide the same and transfer portions thereof to himself, Gitau and their siblings who were also entitled to benefit therefrom.

The plaintiff has contended that as at the time of his death on 29th July 2010, Mweya had not subdivided the suit property in accordance with the said decree of the court and no application had been made to the Deputy Registrar to facilitate the subdivision of the said property. The plaintiff has contended that he is a son of a sister to Gitau and Mweya who was not married and as such was entitled to benefit from the suit property and had been given a portion thereof which he had occupied for over 46 years. The plaintiff has contended that using the titles which he acquired following the said alleged fraudulent subdivision of the suit property by Gitau, the defendant has engaged in acts of interference with the rights of the beneficiaries of Mweya's estate over the suit property. The plaintiff has contended that the defendant had proceeded without consulting him as the executor of the estate of Mweya to carry out further subdivision of the portions of the suit property which he purportedly acquired through the alleged fraudulent subdivision. The further subdivisions gave rise to L.R No. Dagoretti/Kengemi/1343, 1344 and 1345(hereinafter referred to as "Plot No.1343,1344 and 1345"). The plaintiff has contended that Plot No.1343, 1344 and 1345 risks being sold to unsuspecting third parties. The plaintiff has contended that these plots encroach on his portion of the suit property which he has occupied for 46 years as aforesaid. The plaintiff has contended that Angawa J. had in her judgment nullified the fraudulent subdivision which had been carried out by Gitau when the High Court case was pending. The plaintiff has contended that the subsequent subdivisions by the defendant were equally illegal. The plaintiff has contended that following the subsequent illegal subdivisions aforesaid, the defendant has threatened to evict him from the suit property which threat he came to actualize on 7th July 2016 albeit unsuccessfully. The plaintiff has contended that unless restrained by the court, he risks being evicted by the defendant from the suit property.

In his response to the application, the defendant has admitted the relationship between Gitau and Mweya. The defendant has also admitted that there was a dispute between Gitau and Mweya which ended up in Court. The judgment and decree of Angawa J. on the dispute has also been admitted. The defendant has contended however that as at the date of the said judgment, the suit property had already been subdivided and absolute titles issued in favour of Gitau in respect of L.R No. Dagoretti/Kengemi/754 and 757. The defendant has contended that although Mweya had counter-claimed for the nullification and cancellation of the said subdivision, Angawa J. in her judgment upheld the same and dismissed Mweya's counter-claim. The defendant has contended that no appeal was preferred against the judgment of Angawa J. despite a notice of appeal having been filed. The defendant has contended that as beneficiary of Gitau, he was entitled to L.R No. Dagoretti/Kengemi/754 and 757 that came about as a result of the subdivision which was ordered by the court. The defendant has contended that as the absolute owner of L.R No. Dagoretti/Kengemi/754 and 757, he subdivided the same which subdivision gave rise to among others, L.R No. Dagoretti/Kengemi/1345. The defendant has admitted that the plaintiff resides on L.R No. Dagoretti/Kengemi/1345. The defendant has contended that the plaintiff has refused to vacate the said parcel of land despite several requests made to him to do so. The defendant has contended that he has a right to cut down trees on L.R No. Dagoretti/Kengemi/1345 being the owner of the said property. The defendant has contended that the dispute between Gitau and Mweya over the suit property was conclusively determined by Angawa J. and the only recourse that was available to whoever was dissatisfied with the same was to appeal and not to bring a fresh suit. The defendant has contended that the plaintiff is a trespasser on L.R No. Dagoretti/Kengemi/1345.

From the totality of the evidence before me, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendant. The plaintiff has shown that Mweya held the suit property not only in trust for himself and Gitau but also for other beneficiaries of his father, Karonga Gathenge. The plaintiff has shown further that following the judgment which was delivered by Angawa J. the suit property was supposed to be sub-divided by Mweya and portions thereof transferred to Mweya and Gitau. There is no dispute that the subdivision which was ordered by Angawa J. in her judgment has not taken place. The validity of the further subdivisions which the Defendant carried out over L.R No. Dagoretti/Kengemi/754 and 757 after the date of the said judgment is questionable and requires further

