



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERUGOYA**

**E.L.C. CASE NO. 128 OF 2017**

**MARY WANJIKU KABIRANGA (*Suing on her own behalf and  
as the administrator of the estate of the late*)**

**MERCY WAITHIRA GITHAЕ .....PLAINTIFF**

**VERSUS**

**ISAAC MURIITHI MURAGURI.....1<sup>ST</sup> DEFENDANT**

**WANJOHI MURAGURI.....2<sup>ND</sup> DEFENDANT**

**MUGO MURAGURI.....3<sup>RD</sup> DEFENDANT**

**WARUI MURAGURI.....4<sup>TH</sup> DEFENDANT**

**GLADYS WANGIGI MURAGURI.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 23<sup>rd</sup> August 2017 and filed on 30<sup>th</sup> August 2017, the Plaintiff sought various orders against the Defendants. The material ones for the purpose of this ruling are prayers Nos. 3 and 4 which seek an injunction to restrain the Defendants from interfering with the burial of the late Mercy Waithira Githae on *Title No. Mwerua/Kanyokora/399* (hereinafter known as the “suit property”) pending the hearing and determination of the suit and for the OCS Baricho Police Station to provide security and enforce compliance with such order.

2. The Plaintiff’s case was basically founded on two grounds. The first was that the suit property was allocated to her father’s clan during the land demarcation exercise but his late father directed that his share should be registered in the name of his eldest son Muraguri Kinguru in trust for the family. It would appear that Muraguri’s father had two wives, Nancy Wachuka and Waithira Githae according to the Plaintiff and the burial permit produced by the Defendants. By virtue of such a marriage relationship, the Plaintiff claims that her late mother was entitled to be buried on the suit property.

3. The second ground was that during her lifetime, the Plaintiff’s mother obtained a decree that she was entitled to one (1) acre of land out of the suit property. The decree arose from an award of the Land Disputes Tribunal which was adopted by the court in Kerugoya LDT case No. 41 of 1998. A copy of the decree was exhibited in the supporting affidavit.

4. The Defendants opposed the said application vigorously. They filed 3 replying affidavits in which they

claimed that the deceased, Mercy Waithira, was a complete stranger to them. They stated that they did not know how they were related to her and that they had never seen her on the suit property. They claimed that they were not aware of Kerugoya LDT case No. 41 of 1998. They further stated that the suit property was registered in the name of Muraguri Kinguru who was the father of the 1<sup>st</sup> to 4<sup>th</sup> Defendants and husband of the 5<sup>th</sup> Defendant and that there were encumbrances against the title.

5. The main question in this application is whether or not the Plaintiff has satisfied the requirements for the grant of an order of interim injunction as set out in the case of ***Giella Vs Cassman Brown & Co. [1973] EA 358.***

6. I have considered the application, supporting affidavit, the affidavits in opposition thereto as well as the oral submissions of the parties and the court is satisfied that the Plaintiff has made out a *prima facie* case with a probability of success. I am alive to the fact that the trial court will have an opportunity to hear and consider the evidence at the trial hereof and therefore I shall not make any comments or findings of fact which may prejudice the fair trial of the action.

7. It would appear, *prima facie*, that the late Mercy Waithira Githae had a decree entitling her to one acre out of the suit property *Mwerua/Kanyokora/399*. There is documentary evidence on record to that effect. It would also appear from affidavits on record that the late Muraguri Kinguru appealed against the said decision but died before it could be determined. In fact, it is apparent that both the Appellant and Respondent are now deceased and their personal representatives are yet to take steps to have the appeal concluded. That means that the decree in Kerugoya LDT case No. 41 of 1998 has not been overturned or nullified to date. On that account, the Plaintiff has made out a *prima facie* case with a probability of success as contemplated in law.

8. The aspect of the relationship amongst the parties is not so clear though. Whereas the Defendants claimed that the Plaintiff's mother was a complete stranger to them and that they did not know how they were related, a copy of the death certificate annexed to the 1<sup>st</sup> Defendant's replying affidavit clearly showed that the late Paul Githae Kahindu had 2 wives one of whom was Waithira Githae. The 1<sup>st</sup> Defendant admitted in court that Paul Githae was his step-grandfather when questioned by the court. This clearly indicated that the Defendants were not very truthful in their evidence.

9. The other aspect which undermines the credibility of the Defendant's case is their complete denial of knowledge of Kerugoya LDT case No. 41 of 1998 and Baricho Succession case No. 390 of 2016. They made such denial during oral submissions on 7<sup>th</sup> September 2017. However, in paragraphs 12 and 18 of their statement of defence, they actually admit knowledge of the existence of these two cases. In paragraph 12, it is pleaded that their father had appealed the decision in LDT case No. 41 of 1998 but died before the appeal could be determined.

10. The court has also considered whether or not the Plaintiff might otherwise suffer irreparable damage which cannot be compensated by an award of monetary damages. Whereas the accumulating mortuary bill may be settled by an award of damages, the emotional stress she may suffer may not be quantifiable in monetary terms. The court is therefore satisfied that the Plaintiff has met the 2<sup>nd</sup> requirement for the grant of an order of injunction.

11. The third principle relates to balance of convenience. Although I need not determine this aspect in view of my findings on the first two principles, the court is satisfied that the balance of convenience tilts in favour of the Plaintiff. It is better to allow the Plaintiff to conclude the burial and move on with life instead of keeping the deceased's body in the morgue for an indefinite period of time. Should the Defendant's ultimately succeed after trial the suit, they may still obtain an order for removal of the body from the suit property.

12. Although it was alleged that the late Muraguri Kinguru had before his death distributed the suit property amongst his children, no evidence was offered to establish this claim. The copy of the title exhibited still showed that the suit property was intact save for the registration of a caution by the

deceased and a court order in Kerugoya LDT case No. 41 of 1998. The balance of convenience still favours the Plaintiff.

13. The upshot of the foregoing is that the Plaintiff's notice of motion dated 23<sup>rd</sup> August 2017 succeeds and the same is allowed in terms of prayer Nos. 3 and 4. Costs of the application shall be in the cause.

14. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **21<sup>st</sup>** day of **SEPTEMBER, 2017**

In the presence of Ms Anne Thungu for the Plaintiff and the 1<sup>st</sup> to 4<sup>th</sup> Defendants but in the absence of the 5<sup>th</sup> Defendant.

Court clerk Njue.

**Y.M. ANGIMA**

**JUDGE**

**21.09.17**