



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.NO.109 OF 2017

JAMES KIMATA MUKUI in his individual Capacity

and in the capacity as a legal representative of the Estate of

PAUL MUKUI WAIRIRE(DECEASED).....PLAINTIFF/APPLICANT

-VERSUS-

JOSEPH GITONGA MUKUI.....1ST DEFENDANT/RESPONDENT

JOHN BOSCO WAWERU MWANGI...2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff's/Applicant's **Notice of Motion** application dated **14th February 2017**, brought under Order 40 Rules 1, 2, 3 & 4, Order 8 Rules 3(1) 3(2) 3(5) 5(1) and Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A,1B 3, 3A & 63 of the Civil Procedure Act and all enabling provisions of the law. The Plaintiff/Applicant has sought for orders against the Defendants/Respondents to the effect that the Court do issue injunctive orders restraining the Defendants/Respondents from dealing with **LR No.Ndarugu/Karatu/583**. That the said Defendants/Respondents be restrained either by themselves, their agents and/or servants from trespassing, cultivating or in any way from dealing with the suit property herein. Further that the Court do declare that the Plaintiff is the lawful beneficial owner of the suit property herein and that Gatundu Police Station do enforce the orders issued.

The application is premises on the grounds stated on the face of the application and on the annexed affidavit of the Plaintiff/Applicant herein. These grounds are:- The Plaintiff/Applicant is the administrator of the Estate of the late **Paul Mukui Wairire**, who was the registered owner of the suit property **LR.No.Ndarugu/Karatu/583**. Further that the Plaintiff/Applicant is the beneficial owner of the suit property as per the **Confirmation of Grant** issued on **22nd November 2016**, upon distribution of the Estate of **Paul Mukui Wairire**. That though the 1st Defendant/Respondent is a beneficiary of the Estate of **Paul Mukui Wairire**, he has no beneficial interest over the suit property as he has his own parcel of land from the Estate of the deceased as per the confirmation of grant. That without the knowledge of the Plaintiff/Applicant, the 1st Defendant/Respondent leased the suit property illegally to the 2nd Defendant/Respondent who has proceeded to destroy the crops and cut down the trees and coffee bushes on the suit property. That unless the 2nd Defendant/Respondent is restrained, he will continue to destroy the said crops and trees and the Plaintiff/Applicant will suffer irreparable loss. Further by continuing to damage and destroy the crops and trees on the suit property, the Defendants/Respondents will in essence

defeat the purpose of this application. Plaintiff/Applicant urged the Court to allow the instant application in the interest of justice.

The application is opposed. 1st Defendant/Respondent **Joseph Gitonga Mukui**, swore his **Replying Affidavit** and a **Supplementary Affidavit** and admitted that the Plaintiff/Applicant is the administrator of the Estate of the late **Paul Mukui Wairire**. He averred that both the Plaintiff and himself have been using the suit property **LR.No.Ndarugu/Karatu/583**, as beneficial owners. Further that the Plaintiff/Applicant secretly without involving the other beneficiaries obtained a certificate of confirmation of grant indicating that he is the sole owner of the suit property. He also alleged that they are in the process of seeking for revocation of the said certificate of confirmation of grant. The deponent admitted to have leased the suit property to the 2nd Defendant/Respondent and the said lease was entered before the grant was confirmed. He contended that he has been farming on the suit land since the year **1985**, and the Plaintiff/Applicant has never objected to that. In his supplementary affidavit, he attached a copy of the summons for revocation of the grant.

The 2nd Defendant/Respondent **John Bosco Waweru Mwangi**, also swore his **Replying Affidavit** in opposition to the **Notice of Motion**. He admitted that he did lease a portion of land from the 1st Defendant/Respondent on Land parcel **No.Ndarugu/Karatu/583**, the suit property. That he entered into a **Lease Agreement** with the 1st Defendant/Respondent and paid him **Kshs.230,000/=**. He started to clear the land so that he could plant pineapple seedlings, but he was stopped by the Plaintiff/Applicant.

That he has incurred expenses to the tune of **Kshs.342,400/=** so far and he stands to suffer further loss of about **Kshs.2,208,000/=** if he is not allowed to utilize the land as per the terms of the lease. He urged the Court to dismiss the instant application as it is misleading, misconceived and vexatious and should be dismissed with costs.

The **Notice of Motion** was **canvassed** by way of **written submissions** which this Court has carefully considered and read. The Court has also considered the pleadings herein and the annexures thereto.

There is no doubt that the core of the dispute herein is **LR.No.Ndarugu/Kararu/583**, which was initially registered in the name of **Paul Mukui Wairire**, the deceased father to the Plaintiff/Applicant and the 1st Defendant/Respondent. There is also no doubt that by virtue of a certificate of confirmation of grant dated **22nd November 2016**, this suit property was transmitted to **James Kimata Mukui**, the Plaintiff/Applicant herein to hold it as an absolute owner. It is also evident that the 1st Defendant/Respondent is a beneficiary of the estate of **Paul Mukui Wairire** and as per the confirmation of grant, he was given other parcels of land. However, the 1st Defendant has alleged that the Plaintiff/Applicant herein did obtain the stated certificates of grant secretly without involving the other beneficiaries of the estate of the late **Paul Mukui Wairire**. It was his contention that the other beneficiaries have applied for revocation of the said grant. Indeed the Court has seen the summons for such revocation. What is also not in doubt is that the 2nd Defendant/Respondent leased this parcel of land from the 1st Defendant/Respondent and he started to clear the said land by cutting trees and coffee bushes in preparation for planting of pineapple seedlings. Then the Plaintiff/Applicant brought this suit. It is evident that the Plaintiff/Applicant has sought for injunctive orders and the principles to be considered herein on whether to grant or not to grant the orders sought were set out in the case of **Giella..Vs..Brown Co. Ltd 1973 EA 358**, where the Court held that:

- a. **The Applicant must establish that he has a prima facie case with probability of success.**
- b. **That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c. **When the Court is in doubt, to decide the case on a balance of convenience.**

This Court will now consider the available evidence and determine whether the Plaintiff/Applicant has

established a prima-facie case with probability of success at the trial.

It is evident that the suit land is a subject of succession in **Succession Cause No.818 of 1993** in respect of the Estate of **Paul Mukui Wairire**. The Plaintiff/Applicant herein is an administrator of the said Estate and a beneficiary too. In the confirmed grant issued on **22nd November 2016**, the Plaintiff/Applicant was given the suit property absolutely as a sole proprietor.

However, the 1st Defendant/Respondent alleged that the grant was confirmed secretly. There is indeed a confirmed grant and the Plaintiff/Applicant is the absolute owner of the suit property. On whether he obtained the said grant secretly or not is not a matter to be determined at this stage. The said issue would only be determined at the main trial. On whether the Certificate of confirmation of grant would be revoked or not is also a matter to be determined in the Succession Cause.

However, the 1st Defendant/Respondent alleged that the Plaintiff and himself have been using the suit land jointly and they had even leased it out to one **George Karanja Kimata** as is evident from annexure **JGM-1**. It is evident from that agreement allegedly written on **12th August 2011**, that the suit property was being utilized by both the Plaintiff/Applicant and 1st Defendant/Respondent. The issue of how the Plaintiff/Applicant came to be registered as the absolute and sole proprietor at the confirmation of grant would only be best tackled at main hearing.

For now what is evident is that both the Plaintiff/Applicant and the 1st Defendant/Respondent have not been in possession or physically utilizing the land as they had leased it to one **George Karanja Kimata**. The Plaintiff/Applicant is not in possession of the suit land. The suit land is being utilized now by 2nd Defendant/Respondent who was leased the same by the 2nd Defendant/Respondent without the involvement of the Plaintiff/Applicant herein. The Court finds that there is still an issue to be answered on how the Plaintiff/Applicant got registered as the sole proprietor of the suit land whereas in the agreement of **12th August 2011**, it had been acknowledged that the said land was utilized by both the Plaintiff/Applicant and the 1st Defendant/Respondent. The Plaintiff/Applicant is not in possession at the moment and this Court finds and holds that he has not established that he has a prima-facie case with probability of success at the trial.

On the second limb of whether he will suffer irreparable loss which cannot be compensated by an award of damages, the Court finds that the Plaintiff/Applicant has not been utilizing the land and he does not live on it. The Plaintiff/Applicant and 1st Defendant/ Respondent has leased the land to one **George Karanja Kimata**. Failure to grant the orders sought would not constitute to any loss on the part of the Plaintiff/Applicant herein. No evidence that Plaintiff/Applicant will suffer any loss which cannot be compensated by an award of damages.

On the balance of convenience, the Court finds that both the Plaintiff/Applicant and the 1st Defendant/Respondent have not been utilizing the land. They had leased it to one **George Karanja Kimata**. However, the 1st Defendant/Respondent has now leased the same to the 2nd Defendant/Respondent without involvement of the Plaintiff/Applicant herein. There is a dispute as to the ownership of this property at the moment. The lease agreement between the 1st Defendant/Respondent and the 2nd Defendant/Respondent was entered on **5th October 2016**, before the grant was confirmed. However, the 1st Defendant/Respondent did not involve the Plaintiff/Applicant as he had done on **12th August 2011**. The Court finds that the 2nd Defendant/Respondent should not come in between a property which is in dispute involving the Estate of the father of both the Plaintiff/Applicant and 1st Defendant/Respondent. The Court finds that the balance of convenience would tilt in favour of maintaining the status quo that existed before the **5th October 2016**, when the 1st Defendant/Respondent entered into a lease agreement with the 2nd Defendant/Respondent. In any case, the amount paid for the lease is known and the 2nd Defendant/Respondent can quantify his expected loss and can be compensated in damages.

Consequently, the Court finds that for the interest of justice, the balance of convenience tilt in favour of maintaining the *status quo* that existed before **5th October 2016**. The suit land to be utilized by both the Plaintiff/Applicant and the 1st Defendant/Respondent as they used to do before and if the same is to be leased out, then it has to be leased with the consent, knowledge and authority of both the Plaintiff/Applicant and 1st Defendant/Respondent. The ***status quo order to remain until the hearing and determination of the suit herein***.

It is so ordered.

Dated, Signed and Delivered at Thika his **6th** day of **October 2017**.

L. GACHERU

JUDGE

In the presence of

Mr. Kimani for Plaintiff/Applicant

M/S Momanyi holding brief for Mr.Kamonjo for 1stDefendant/

Respondent

M/S Otieno holding brief for Mr. Mbogo for 2ndDefendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

6/10/2017