



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 322 OF 2017**

**WAMAI GITHERE**

**PLAINTIFF/APPLICANT**

**VS**

**CHRISTOPHER KIARIENJOROGE 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DANIEL MAINA NJOROGE 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MWANGI NJOROGE 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JESSE CHEGE NJOROGE 4<sup>TH</sup> DEFENDANT/RESPONDENT**

**MWANGI GITAU 5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application is brought by way of Notice of Motion dated 30/3/17. It is filed under sections 1A,1B,3A & 3 of CPA, Order 40 rules 1&2, Order 51 rule 1 of the CPR, Art 27,40,43,47 & 159 of the Constitution, Section 3,13,18,19 and 120 of the ELC Act No. 19 of 2011 and all other enabling provisions of the law.

2. The application stems from a long and protracted legal battle that has been raging through the Courts since 1984 to date, a period of 33 years. The cases are NBI HCCC NO 597 of 1994 where judgement was entered in 1987 and a further attempt to revive it in 2012 where a Ruling was delivered, dismissing the application; THIKA CMCC NO 281 of 2008: a criminal case that started at the RMCC NO 104 of 1980 in Thika and traversed the Court systems all the way to Court of Appeal (Criminal Appeal Nos. 573 & 574 of 1981) which appeal was finally heard and granted by the late Justice Z.R. Chesoni (as he then was). All the parties except one in this legal contest are blood relatives. The Plaintiff is the uncle of the 1<sup>st</sup>-4<sup>th</sup> Defendants.

3. The Applicant/Plaintiff is seeking the following orders;

a. Spent

b. Spent

c. That pending the hearing and determination of this suit, the Defendants/Respondents, their servants and/or agents or otherwise be restrained by way of permanent injunctions from disposing of, selling, charging, transferring and/or interfering with the Land Parcel No. Loc.3/Mukuria/649 and Land Parcel No. Loc.3/Mukuria/650 or any part of it.

d. A declaration that the Plaintiff/Applicant has an ownership rights of Land Parcel No.Loc 3/Mukuria/649 and Land parcel No. Loc. 3/Mukuria/650.

e. A declaration that the Defendant/Respondents occupation of the whole of Land Parcel No.Loc.3/Mukuria/649 and Land Parcel No. Loc.3/Mukuria/650 is illegal and/or unlawful.

f. Cost of this suit.

4. The application is based on the grounds stated in the Notice of Motion and supported by the affidavit of Wamai Githere the applicant herein.

5. The summary of the disposition of the Applicant is that his father one Githere Kangee owned two parcels of land to wit: LR. No. Loc.3/Mukuria/81 and Loc.3/Mukuria/82 measuring 7.2 & 6.6 acres respectively. Upon his death the two titles were inherited by his mother who transferred Loc.3/Mukuria/82 to the Plaintiff's name. It is not clear whether LR. No. Loc.3/Mukuria/81 was registered in the joint names of the Plaintiff and his brother or in either save that upon the death of his brother, parcel No. LR. Loc.3/Mukuria/81 was registered in the name of Karuru Gathii who was the Plaintiff's Uncle. Upon the death of Karuru Gathii the Parcel LR No. Loc.3/Mukuria/81 fell in the hands of Wanjiku Njoroge and Wangari Gitau the mothers of 1<sup>st</sup> -4<sup>th</sup> Defendants and 5<sup>th</sup> Defendant respectively. He depones that parcel LR. No. Loc.3/Mukuria/81 was sub-divided into LR No. Loc. 3/Mukuria/650 and 649 and registered in the names of Wanjiku Njoroge & Wangari Gitau respectively. That the registration was fraudulent, illegal & done without his knowledge.

6. Being aggrieved by the action of the Defendant's mothers aforesaid, the Plaintiff filed a suit HCC No. 597 of 1984 wherein judgement was entered in his favour that the LR No. Loc.3/Mukuria/81 was to be shared equally between the Plaintiff and Wanjiku Njoroge (the mother of 1<sup>st</sup> - 4<sup>th</sup> Defendants). Wangari Gitau was excluded from the ownership of this land. He avers that notwithstanding the above judgement the said Wanjiru Njoroge and Wangari Gitau continued to be registered owners of the suit properties. He annexed certificate of search dated 7/3/08 to buttress his averment.

7. He further avers that he has sought help from Kituo Cha Sheria. District Land Registrar Murang'a and even the Chief Registrar of the Judiciary in vain in his attempts to resolve the dispute.

8. That in 2011 he carried out a further search on the suit properties whereupon he discovered that the said suit properties had been transferred to the Defendants in 2010, again without his knowledge.

9. That the 1<sup>st</sup> -4<sup>th</sup> Defendants sued for a share of the LR No. Loc.3/Mukuria/82 in CMCC 281 of 2008 at Thika and in 2013 the Court ordered the said parcel Loc.3/Mukuria/82 be divided into 2 equal parts between the Plaintiff and the Wanjiku Njoroge, the mother of 1<sup>st</sup> – 4<sup>th</sup> Defendants. That he is now seeking his half share in the suit properties LR No. Loc.3/Mukuria/649 & 650 which have been wholly registered in the Defendants to his exclusion. He seeks the Courts orders to enforce the decision of HCCC No. 597 OF 1984. In the meantime, that an inhibition, be placed on the suit properties to prevent any dealings before the suit is heard and determined.

10. Opposing the application, the Defendants deponed that the application is incompetent on account of being an abuse of the process of the Court; that the suit is Resjudicata having been heard and determined by a Court of competent jurisdiction.

11. It is their position that the genesis of the suit is LR No. Loc.3/Mukuria/81 which was originally owned by Karuru Gathii who died in 1978. That it is Loc.3/Mukuria/82 which was owned by Mzee Githere Kangee the Plaintiffs father and not Loc.3/Mukuria/81.

12. He deponed that in 1972, the said Karuru Gathii subdivided LR No. Loc.3/Mukuria/81 into parcel No. Loc.3/Mukuria/591 & 592. LR NO. Loc.3/Mukuria/591 measuring 2.0 acres was registered in the name of the said Karuru Gathii while Loc.3/Mukuria/592 was subdivided further to Loc.3/Mukuria/649 (2.1

acres) and Loc.3/Mukuria/650 (3.1 acres) and registered in the names of Wangari Gitau & Wanjiku Njoroge respectively. That the transfer to the said land was done by Karuru Gathii himself who signed all the documents including at the Land Control Board.

13. That displeased by the manner in which the above parcels were handled the Plaintiff initiated Criminal Case RMCC No. 104/1980 at Thika which went all the way to the Court of Appeal vide Criminal Appeals 573 & 574 of 1981 against the Defendants mothers whereupon they were acquitted on appeal.

14. That thereafter the Defendants were registered as owners of the suit properties in a process they claim to be lawful and legitimate.

15. In response to the decision in HCCC No. 597 of 1984, the Defendants have denied that the Plaintiff was entitled to half of the suit properties. They incorrectly or otherwise state that the Ruling dated 20/7/2012 determined that the decision in HCCC NO 597 of 1984 cannot be enforced given the suit properties are in the names of the third parties being the Defendants herein. In agreement, the Defendants appear to be stating that the suit is Resjudicata the same having been decided in HCCC No. 597 of 1984 which decision settled the matter.

16. The parties have each filed written submissions which I have considered in arriving at the Ruling. In their submissions the Applicants have listed 7 issues for the Court to determine, many of which are not included in their application. I shall proceed to only determine issues relating to the prayers in the application dated the 30/3/2017 which are stated in Para 1 of this ruling.

17. Replying on Order 40 Rule 1 & 2 of the CPR the Plaintiff submitted that he is entitled to a permanent injunction in the circumstances. Quoting the celebrated case of **Giella Vs Cassman Brown and Co. Ltd (1973) EA 358**, he proceeds to quote the principles of granting interlocutory injunction and states that he has established a prima facie case entitling him to interlocutory injunction.

18. As to whether the Plaintiff is entitled to the Interlocutory injunction, the Defendants submitted that the Plaintiffs have not satisfied the requirements of a Prima facie case and the same should be dismissed.

19. The issues that commend themselves to this court are only two which I shall proceed to entertain.

20. The gist of this application as captured in the Applicants prayer No. 3 is stated as;

“That pending the hearing and determination of this suit, the Defendants/Respondents, their servants and/or agents or otherwise be restrained by way of permanent injunctions from disposing of, selling, charging, transferring and/or interfering with the Land Parcel No. Loc.3/Mukuria/649 and Land Parcel No. Loc.3/Mukuria/650 or any part of it.” (emphasis mine).

This prayer is similar to the prayers in the plaint which sought an injunction in the suit.

The second issue is whether or not the Plaintiff is entitled to the declaratory orders in respect to ownership of the suit properties.

21. A permanent or mandatory injunction is one that determines a matter in finality, unlike a temporary injunction which offers a temporary reprieve. The Plaintiff has prayed for a permanent injunction but in his submissions however he proceeded to argue on a non-existent application on interlocutory injunction which he did not plead in his application.

22. **In Shepherd Homes Limited Vs Sandahm Homes Limited V. Sandahm [1971] 1 CH. 34**, Megarry, J. stated:

“it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will,

of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.

23. The same principle was restated by Mustil, LJ in **Locabail International Finance Ltd. v. Agro-export [1986] 1 ALL E.R. 901** as thus:

“The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.

24. In **Bharat Petroleum Corp Ltd v. Haro Chand Sachdeva, Air 2003**, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship.

25. In the case of **Nandan Pictures Ltd. v Art Pictures Ltd & others, Air 1956, Cal 428**, Chakravarti, CJ. of the High Court of Calcutta set out, in the following passage, the rather limited scope in which a mandatory injunction is available at the interlocutory stage:

“At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issues in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.”

26. From the above cases it is trite law that Courts do grant mandatory applications in very rare of circumstances where the justice of the case require that a mandatory injunction be granted. As to whether the Plaintiff is entitled to a permanent injunction, the answer is no. The Plaintiff has not shown reasons why a permanent injunction should be granted. Save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing. The instant case is not one of those cases that entitles the Plaintiff a mandatory injunction. What the applicant is asking the Court is to determine rights in land in finality at an interlocutory stage. A permanent injunction will have the effect of changing the status of the subject matter and the rights of the parties without affording a hearing. There are arguments and counter arguments in the suit that are best dealt with on trial.

27. In the interest of justice and fortified by the inherent powers bestowed upon this Court by Section 63(e) of the Civil Procedure Act, Section 1A, 1B of the Civil Procedure Rules, and for purposes of preserving the suit properties, I make an order restraining the Defendants, their servants and or their agents or any person claiming under them from disposing, selling or in any manner alienating the suit properties until the final disposal of the case.

28. Prayers 4 & 5 are in respect to declaration of ownership rights as well as declaring that the occupation of the respondents is unlawful/illegal. I decline to entertain the prayers as they are in respect to rights on ownership which cannot be determined on an interlocutory application such as this one. These are matters that be ventilated through viva voce evidence noting that this is a land matter.

29. I have seen the allegations in the Defence and Replying Affidavit in respect to Resjudicata and I do not wish to make any findings on the same without a proper application on record and the parties having been given the opportunity to so canvass the same. This is notwithstanding an attempt by both parties to invite the Court to so determine it in their written submissions.

30. In the end the application dated the 30.3.2017 partially succeeds as follows; -

a) In the interest of justice and fortified by the inherent powers bestowed upon this Court by Section 63(e) of the Civil Procedure Act, Section 1A, 1B of the Civil Procedure Rules, and for purposes of preserving the suit properties, I make an order restraining the Defendants, their servants and or their agents or any person claiming under them from disposing, selling or in any manner alienating the suit properties until the final disposal of the case.

b) Costs shall follow the event.

**DATED, DELIVERED AND SIGNED THIS 23<sup>RD</sup> DAY OF NOVEMBER 2017**

**J.G. KEMEI**

**JUDGE.**