



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 149 OF 2013**

**EDWARD KIHARA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JAMES MUIGAI ..... DEFENDANT/RESPONDENT**

**MONICAH MURUGI MUIGAI.....1<sup>ST</sup> INTERESTED PARTY**

**GRACE ROSEBELL WANJIRU..... 2<sup>ND</sup> INTERESTED PARTY**

**ARTHUR GICHURU..... 3<sup>RD</sup> INTERESTED PARTY**

**REGINALD NGUGI .....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

On 24<sup>th</sup> July 2013 **Hon. Lady Justice Gitumbi** ordered file **ELC NO. 315 of 2013** consolidated with file **ELC NO. 149 of 2013** (the instant file ) and on 9<sup>th</sup> May 2014 she directed that the Notices of Motion dated 30/1/2013, 8/3/2013 and 20/1/2014 filed in the instant file and the Notice of Motion dated 1/3/2013 filed in **ELC NO. 315 of 2013** be heard together and she directed parties to exchange written submissions.

In the Notice of Motion dated 30/1/2013 the plaintiff **Edward Kihara Ngugi, in ELC NO. 149 of 2013** seeks an injunction against the Defendant **James Muigai Kinyanjui** restraining the Defendant from selling, Leasing and/or disposing off his share of land in **Dagoretti/Kinoo/2465** to any other person other than the plaintiff. The Applicant additionally seeks an order that the Land Registrar Kiambu County be prohibited from dealing or otherwise transferring the suit land till further orders of the court. The plaintiff/Applicant's application is predicated on an agreement dated 13<sup>th</sup> February 2007 where the Defendant agreed to sell to the plaintiff apart of his share of the suit land measuring 22.86 metres by 50.3 metres.

The plaintiff/Applicant avers that even though he has nearly paid the full purchase price the defendant has neglected, refused and/or failed to transfer the portion to the plaintiff and that the Defendant is in the process of selling the land to a third party.

The plaintiff's further application dated 8<sup>th</sup> March 2013 sought an order of injunction in terms of prayer 2 of the Notice of Motion dated 30<sup>th</sup> January 2013 that is to say that the defendant whether by himself, agents and/or servants be restrained from interfering with the plaintiff's peaceful occupation of his portion of land contained in **Dagoretti/Kinoo/2465**. Apparently this application was provoked by the fact that although by the earlier application the Defendant was restrained from selling the portion of land until the application was heard the Defendant had before the application dated 30<sup>th</sup> January 2013 was heard and determined demanded that the plaintiff do vacate the portion of the land the subject of the suit and was interfering with the plaintiff's occupation and possession.

In the Notice of Motion dated 1<sup>st</sup> March 2013 the plaintiff in **HC ELC NO. 315 of 2013 (James Muigai Kinyanjui –vs- Edward Kihara Ngugi** sought an order of injunction against the defendant restraining the defendant, his employees, agents, servants, relatives or anybody else from entering, trespassing thereon, farming, erecting any structure or structures thereon or in any other manner dealing with parcel of land known as **Dagoretti/Kinoo/2465** pending the hearing and determination of the suit.

In yet another Notice of Motion in **HC ELC NO. 149 of 2013** the plaintiff, **Edward Kihara** filed on 30<sup>th</sup> January 2014, the plaintiff seeks an order of injunction directed against the interested parties who are beneficiaries of the estate of **Samuel Kinyanjui Waiganjo** and who claim to be entitled to land parcel **Dagoretti/Kinoo/2465** to restrain them from evicting the plaintiff or taking possession or otherwise interfering with the plaintiff's buildings, structures or materials on land parcel NO. **Dagoretti/Kinoo/2465** until the matter is heard and determined. The interested parties were enjoined as parties by consent of the parties on 20<sup>th</sup> May 2013 and were granted leave to respond to the applications dated 30<sup>th</sup> January 2013 and 1<sup>st</sup> March 2013.

The plaintiff (**HC ELC 149 of 2013**) predicates his suit on an agreement for sale entered into with the Defendant on 13<sup>th</sup> February 2007 and an addendum to the agreement dated 10<sup>th</sup> February 2011 whereby the Defendant agreed to sell to the plaintiff a portion of the land he would be entitled to as a beneficiary out of land parcel NO. **Dagoretti/Kinoo/2465**. The Defendant for his part through replying affidavit sworn on 11<sup>th</sup> March 2013 denies that he is selling the parcel of land to any other buyer as alleged by the plaintiff. While the Defendant admits entering into an agreement for sale with the plaintiff he however states that the plaintiff breached the contract and would not be entitled to the orders sought. The Defendant further avers the succession cause has not been finalized to enable the estate to be distributed and thus the portion the plaintiff was purchasing is incapable of being identified on the basis that no land has been given to the Defendant pursuant to the succession cause from which he could excise the portion the plaintiff claims. The Defendant thus argues no land has been granted to him vide the succession cause which he could lawfully deal with as envisaged in the purported agreement with the plaintiff.

The story does not end there as the interested parties, **Monicah Murugi Muigai, Grace Rosebell Wanjiru, Arthur Gichuru and Reginald Ngugi** who all claim to be the beneficiaries of the estate of **Samuel Kinyanjui Waiganjo** (deceased) who was the registered owner of title number **Dagoretti/Kinoo/2465** applied and were enjoined as interested parties in **HC ELC NO. 149 of 2013** and filed a replying affidavit to the plaintiff's application dated 30<sup>th</sup> January 2013. The interested parties depone that the letters of administration pursuant to which their brother, **James Muigai Kinyanjui**, the defendant herein was appointed as administrator to their late father's estate in **HC Succession Cause NO. 1228 of 2006** made on 24<sup>th</sup> February 2009 were revoked by **Hon. Justice Musyoka** on 21<sup>st</sup> February 2013 on the terms set out on the order issued on 21<sup>st</sup> February 2013 and dated 22<sup>nd</sup> March 2013 annexed to the replying affidavit by **Monicah Murugi Mungai** and marked "MMM3" in particular the order revoking the grant provided under paragraphs 2,3&4 as follows:-

**2. That all acts of doings or transactions effected on the strength of this grant be and are hereby declared null and void.**

**3. That the certificate of confirmation of grant dated 9<sup>th</sup> July 2007 is also cancelled.**

**4. That the surviving children of the deceased are at liberty to move the court for appointment of new administrators.**

The interested parties contend that their brother **James Muigai Kinyanjui**, the Defendant herein lacked the capacity to deal with their deceased father's estate without the consent of the other beneficiaries and avers that the Defendant's dealings with the plaintiff were patently illegal and a nullity. The interested parties aver that the orders sought by the plaintiff are not capable of being granted as the plaintiff is neither a beneficiary and/or a dependant of their late father and granting of the same would amount to fettering the deceased estate to the detriment of the beneficiaries.

The parties filed written submissions in which they each reiterate the facts of the case. I have considered the pleadings and the parties submissions and the issue for determination is whether the plaintiffs in the respective suits have established prima facie cases to entitle the court to grant the orders of injunction sought. Both the plaintiff and the Defendant acknowledge that the Succession Cause **HC Succession Cause NO. 1228 of 2006** is yet to be finally determined. It is not contested that the letters of administration that had been granted to the Defendant have since been revoked and as the matter stands now the succession court is yet to determine who the beneficiaries and the persons entitled to land parcel **NO. Dagoretti/Kinoo/2465** are. Until the beneficiaries are identified and the distribution of the estate undertaken the Defendant cannot lawfully and properly claim to be entitled to any specific portion of the parcel of land. The Defendant's interest to any specific portion of **L.R. NO. Dagoretti/Kinoo/2465** has not yet crystallised for him to be in a position to dispose his interest. That will only happen upon the beneficiaries to the parcel of land being identified and distribution being effected.

If the plaintiff claims to have acquired an interest to the parcel of land my view is that such interest could only be determined by the succession court and perhaps the plaintiff ought to have sought to be enjoined as a party in the succession cause if he claims all the beneficiaries had consented to him purchasing a portion of the suit property otherwise he would have to await until the Defendant gets his entitlement pursuant to the succession cause and then make his claim. My view therefore is that the family succession court is seized of the matter relating to who is entitled to inherit title number **Dagoretti/Kinoo/2465** and this court cannot properly deal with the matter when the question of succession is still pending before the court. The family court can properly make preservative orders pending the determination of the matters before it and in my view it would be inappropriate for this court to deal with the issue of ownership and/or enforcement of a contract relating to a parcel of land the subject of a succession cause until the succession cause is concluded.

Having regard to all the circumstances of this case and considering the materials placed before the court by the parties I am not persuaded that the plaintiff in **HC ELC NO. 149 of 2013** and/or the plaintiff in **HC ELC NO. 315 of 2013** have established a prima facie case with any probability of success to entitle either of them to an order of injunction. The conditions that an applicant has to satisfy as enunciated in **GIELLA –VS- CASSMAN BROWN & CO. Ltd (1973) EA 358** have not been satisfied. Neither of the parties have demonstrated a prima facie case and/or that they stand to suffer any damages that cannot be compensated for in damages unless the injunction is granted.

The upshot is that I find the plaintiff's Notices of Motion in **HC ELC 149 of 2013** dated 30/1/2013 and 30/1/2014 and the Defendant/plaintiff's Notice of Motion in **HC.ELC 315 of 2013** dated 1/3/2013 are devoid of merit and I order the same dismissed with no orders as to costs. I further order and direct that this suit be stayed pending the hearing and determination of **HC. Succession cause NO. 1228 of 2006** pending before the Family Division of the High Court.

Orders accordingly.

Ruling dated, signed and delivered this.....**4th**.....day of...**February**.....2015.

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

.....For the Plaintiff

..... For the Defendant

..... For the interested Parties.