



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC NO. 1220 OF 2014**

**MILKAH WANJIKU NDUNG’U.....PLAINTIFF**

**VERSUS**

**SAMUEL WACHIRA NDUNG’U.....1<sup>ST</sup> DEFENDANT**

**DAVID NG’ANG’A NDUNG’U.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff filed an application dated **16<sup>th</sup> September 2014**, seeking an order that the court be pleased to issue temporary conservatory orders restraining the Defendants, any other relatives of the Defendants, their agents, employees, servants, clan members and/or proxies that may be acting under the authority and/or instructions of the Defendants, their relatives or their clan members from burying the remains of the Defendants’ mother – Margaret Wanjiru Ndung’u – on the parcel of land known as **LOC 16/MBUGITI/2264**. The Plaintiff also prays that an order do issue directing the Assistant County Commissioner, Kariara Division and the Area Chief Mbugiti Location to ensure that this order is fully complied with and obeyed so as to maintain law and order.

The application is premised on grounds outlined on the face of the application and supported by an affidavit sworn by the Plaintiff on 16<sup>th</sup> September 2014, the Plaintiff deposes that she is the widow of the late Stanley Ndung’u Ng’ang’a (deceased 10<sup>th</sup> September 2012), the registered owner of **LOC 16/MBUGITI/2264** (the suit property) which property she has been living on since 2004, when she got married to the deceased. The Plaintiff admits that her husband was married to the Defendants’ mother, Margaret Wanjiru Ndung’u, but that her late husband divorced her in 1988 and that by 2004 when she got married she never saw nor met the Defendants’ mother. However, the Plaintiff deposed that in 2013, the Defendants’ mother made a complaint to the area chief, Mr. S.M. Ngugi, asking to be given a portion of the deceased’s plot. It is deposed that following the complaint, the chief summoned members of the deceased’s family on 24<sup>th</sup> August 2013 and read to them two letters authored by the deceased to the effect that he is the registered owner of the suit property and did not wish to have anything to do with the Defendants’ mother. Further that upon his death, the Defendants’ mother should not set foot on his land.

The Plaintiff deposes that she learnt that the Defendants’ mother filed letters of administration over the deceased’s estate without her knowledge to which she filed an objection. Subsequently, the Defendants’ mother passed on and the Defendants together with other relatives have expressed their intention to bury her on the suit property. The Plaintiff urges this court to grant the orders deposing that unless restrained

by the court, the Defendants will render the wishes of the deceased and the succession cause superfluous.

The 1<sup>st</sup> Defendant swore a Replying Affidavit on 26<sup>th</sup> September 2014, wherein he deposed that his deceased father married his first wife **Jacinta Njeri Ndung'u**, and divorced her in 1970s when after she re-married. Subsequently, their father married their mother after the divorce of his first wife. Thereafter their deceased married Sarafina Wanjiru Ndung'u and begot one child, a minor. However that deceased and his third wife separated in 2002. In 2004, their deceased father married the Plaintiff who came with three children from her previous marriage and begot one child with the deceased.

It is deposed that on the suit property which measures about 10 acres, comprises of 3 houses. The first is a semi-permanent house which their grandfather used to live in until his demise when their father allocated it to their mother. The second is a commercial plot with five rental rooms let out as shops one of which was allocated to the Plaintiff as her residence. The 1<sup>st</sup> Defendant referred to the Introductory Letter addressed by the area Chief to enable their deceased mother to initiate succession proceedings and deposed that the same captured the three wives of the deceased. The deponent also stated that despite the Plaintiff claiming to have objected the Succession Cause Proceedings, she had failed to avail a copy of the said objection. The deponent contended that the Plaintiff had no basis to refuse the burial of their deceased's mother's remains on the suit property as she was not a registered owner.

The Plaintiff swore a Further Affidavit on **13<sup>th</sup> October 2014** wherein she deposed that the matter herein concerns the use, utilization and/or preservation of the suit property hence the institution of a suit in this court and not the Family Division. The Plaintiff deposed that the Defendants' response relates wholly to matters of succession therefore falling within the scope of the Family Division. It was her disposition that her deceased husband separated from the Defendants' mother in 1988 and alleged that the deceased claimed that the Defendants were not his sons. The Plaintiff reiterated the contents of her Supporting Affidavit that her deceased husband wanted nothing to do with the Defendants' mother.

The application was further canvassed by way of written submissions. Kimanthi & Associates Advocates for the Plaintiff filed submissions dated 29/10/2014 wherein counsel urged the court to grant the temporary orders of injunction pending the hearing and determination of this suit as well as the Succession Cause HCSC No. 2140 of 2014. Counsel submitted that the Plaintiff had established that she is the wife of the deceased proprietor. Further that she stood to suffer irreparable loss in the event that the orders sought were not granted. Additionally, that the Defendants not being the sons of the deceased were not beneficiaries thereto and therefore could not lay claim whatsoever on the property.

Kamiro Advocate for the Defendants filed submissions dated 6<sup>th</sup> November 2014 wherein counsel submitted that the Plaintiff was yet to acquire legal capacity to institute the suit since the suit property is still registered in the name of the deceased. Counsel referred to the letters availed produced by the Plaintiff purported to have been written by the deceased and submitted that the same did not have evidential value since they are written in Kikuyu language and not accompanied by a copy translated to the language of the Court. Further, that the Plaintiff's allegation of the deceased and the Defendants' mothers' divorce is unsubstantiated as there is no formal court order for dissolution of marriage. Counsel urged the court to dismiss the Plaintiff's application.

Having now considered the pleadings and the written submissions, the Court finds that the Plaintiff seeks an injunction order restraining the Defendants from burying the remains of their mother on the suit property. It is her deposition that despite Defendants' mother at one time was married to her deceased husband; the latter divorced her in 1988. Further that the Defendants and their now deceased mother have never lived on the property since then. These averments are denied by the Defendants who claim to live on a house constructed by their grandfather and was given to them by the father upon their grandfather's demise. It is their averment that the Plaintiff has not established that the marriage between their parents was in fact dissolved.

At the interlocutory stage of a suit, the Court is tasked to determine whether the Plaintiff has met the threshold established in the case of **Giella v Cassman Brown & Co. Ltd (1973) E.A 358** that first, an applicant must show a ***prima facie case with the probability of success***. ***Secondly, an interlocutory***

***injunction will not normally be granted unless applicant will suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, where the court is in doubt, it will decide the application on a balance of convenience.***

The Plaintiff claims that her deceased husband in his lifetime was very categorical that he did not wish to have anything to do with the Defendants' mother and that she should never set foot on his property. In support of her averment, the Plaintiff annexed two letters authored by her deceased together with minutes said to be taken by the area chief when the family members were summoned and read the contents of the deceased's letters. On perusal of the said annexures, I do note that the letters said to be authored by the deceased are in Kikuyu language. These letters are not accompanied by the translated versions to the language of the Court. Similarly, the minutes said to be taken by the area chief is also written in Kikuyu language. This court is not able to make out the contents of the written documents and it would be grossly unjust to rely on the Plaintiff's interpretation thereof. Section 86(1) of the Civil Procedure Act provides for the languages of the courts that **the language of the High Court and of the Court of Appeal shall be English, and the language of subordinate courts shall be English or Swahili.**

Additionally, the said minutes despite signed and bears a stamp of Mbugiti Location, is written on a hotel 'Blue Pearl Hotel & Accommodation' letterhead, not the official Government letterhead suggesting that the meeting, if at all, took place outside the office of the chief. The Plaintiff's averment that the Defendants do not reside on the suit property was also challenged by the Defendants who deposed that they live in one of the houses constructed on the property.

On the foregoing, I am of the considered view that the Plaintiff has not established a prima facie case with chances of success to warrant this court to grant an injunction order. Suffice to say, whether one is a wife or child or dependent for purpose of succession is a matter that may very well be adjudicated over by the Family Division of the High Court. Both parties confirmed to this court that there is a Succession Cause pending before the High Court, and therefore the parties do have an avenue of litigating. The Plaintiff was of the view that the dispute is in regard to the use of land hence this suit. That may be so, however, I have considered the case in totality and opine that it hinges more on succession than use of land.

Having failed to satisfy the first requirement of granting an injunction, the court is not obliged to consider the remaining grounds. Consequently, the Court finds that the instant application is not merited. The application is hereby dismissed. For the avoidance of doubt, the interim order granted by this court on 16th September 2014 are hereby discharged. Parties to bear their own costs.

It is so ordered

Dated, Signed and Delivered this **20th** day of **March 2015**

**L. GACHERU**

**JUDGE**

In the Presence of:-

M/s Kithinji holding brief Mr Musyoka for the Plaintiff/Applicant

None attendance for the Defendants/Respondents though served.

Hilda: Court Clerk

**L. GACHERU**

**JUDGE**

**Court:**

Ruling read in open Court in the presence of the above counsel.

**L. GACHERU**

**JUDGE**