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Date Delivered:	13 Apr 2018
Case Class:	Civil
Court:	High Court at Thika
Case Action:	Ruling
Judge:	Lucy Nyambura Gacheru
Citation:	Grace Njeri Thendu & another v Simon Kimani Karugiro & 2 others [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Kiambu
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

THIKA LAW COURTS

ELC CASE NO.112 OF 2017(OS)

GRACE NJERI THENDU.....1ST APPLICANT

AYUB MUCHERU KAMAU.....2ND APPLICANT

-VERSUS-

SIMON KIMANI KARUGIRO.....1ST RESPONDENT

DAVID MANJAI WANJIKU.....2ND RESPONDENT

ESTATE OF DANIED KAROKI KARUGIRO.....3RD RESPONDENT

RULING

The Applicants herein filed an ***Originating Summons*** dated ***8th February 2017***, and sought for the following orders against the Respondents:-

- 1) A declaration that the Applicants herein are entitled to all that parcel of land known as Githunguri/Kimathi/847 measuring 50 by 100 acres or thereabout, being the bonafide purchasers for value.***
- 2) An order that the 1st and 2nd Respondents do cease from further interfering with Githunguri/Kimathi/847.***
- 3) An order that the Land Registrar, Kiambu be compelled to cancel the title deed issued to the 2nd and 3rd Respondents and to register Githunguri/Kimathi/847 in the Applicant's name.***
- 4) Cost of this suit be provided for.***

Further on ***25th April 2017***, the Applicants filed a ***Notice of Motion*** even dated and sought for these orders:-

- 1) Spent.***
- 2) Spent.***
- 3) The Defendants/Respondents herein by themselves, their agents and/or anyone acting through their authority be restrained from entering, taking possession, selling, transferring, alienating or in any other way interfering with land title No.Githunguri/Komothai/847, measuring 50 by 100 acres pending the hearing and determination of this suit.***

4) The Honourable Court be pleased to cause transfer of the suit to the Principal Magistrate's Court at Githunguri for hearing and determination.

5) That the costs of this application be provided by the Defendant.

The application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Grace Njeri Thendu**, the 1st Applicant herein. These grounds are:-

1) That the Applicants jointly own all that property known as Githunguri/Kimathi/847, measuring 50 by 100 acres.

2) That the Applicants purchased the suit property from the 1st and 3rd Respondents at Kshs.950,000/=.

3) That at the time of execution of the sale agreement, the Plaintiffs paid Kshs.650,000/= and the balance of Kshs.300,000/= was to be paid after the 1st and 3rd Respondents (deceased) had obtained consent from the Land Control Board.

4) That after payment of the deposit, the Applicants were shown the parcel of land and consequently fenced the same.

5) That the 3rd Respondent passed on before they could obtain consent from Land Control Board and effect transfer.

6) That the 1st Respondent is now threatening to sell the suit property to the 2nd Respondent and has actually restrained the Applicants from accessing the property.

7) That the suit property herein is situated in Githunguri.

8) That the Principal Magistrate's Court at Githunguri is vested with both territorial and pecuniary jurisdiction to hear and determine the suit herein.

9) That the Respondents have no right to take possession, alienate and/or dispose off the suit property as the Applicants are the bonafide owners.

In her **Supporting Affidavit**, **Grace Njeri Thendu**, reiterated the contents of the grounds in support of the application and further averred that together with the 2nd Applicant, they are the *bonafide* owners of all that property known as **Githunguri/Kimathi/847**, having purchased the same from the 1st and 3rd Respondents on **2nd June 2016** for a sum of **Kshs.950,000/=**. She also averred that the balance of **Kshs.300,000/=** was to be paid upon obtaining the Land Control Board consent. It was her contention that after executing the Sale Agreement, the Surveyor was appointed and he marked the boundaries accordingly and the Applicants fenced the land off awaiting the **Land Control Board's Consent** and transfer of the same to their names. However, the 3rd Respondent passed on in **January 2017**, before the process of transfer was concluded and the 1st Respondent has issued them with threats to vacate the suit premises. Further, that the 1st Respondent has ganged up with the 2nd Respondent who is a potential buyer and that the action of the 1st Respondent is fraudulent. She also averred that the suit property is situated in Githunguri with the value of **Kshs.950,000/=** and therefore the Principal Magistrate's Court has jurisdiction to hear and determine the matter. That it is in the interest of justice and fairness that this suit be transferred to Githunguri Principal Magistrate's Court for hearing and determination and for the same property to be preserved by an order of this Court.

The application is contested. The 1st Respondent **Simon Kimani Karugiro** filed a **Replying Affidavit** on **29th June 2017**, and denied that the Applicants are *bonafide* owners of the sit property as they breached the contract which was for purchase of a portion of **Githunguri/Kimathi/ 847**. Further that the Applicants never took possession of the suit land and that **Githunguri/Kimathi/847**, is not in existence anymore as the same was distributed to the beneficiaries of the estate of their late mother as per the Certificate of Confirmation of Grant dated **28th June 2016, SKK-1**. He contended that the Applicants did not purchase the whole of the 3rd Respondent's portion of land but they purchased a plot to be excised out of **LR.No.Githunguri/Kimathi/847**. He further contended that the Applicants should pursue the 3rd Respondent for a refund of their purchase price and he urged the Court to dismiss the Applicants' instant **Notice of Motion**.

The 2nd Respondent, **David Manjai Wanjiku** also filed a **Replying Affidavit** on **10th May 2017**, and averred that the purchased plot measuring **50 x 100** to be excised from split of **Plot K** measuring **0.009 Hectares** from one **Daniel Karoki Karugiro**, which was a plot to be excised from **Githunguri/Kimathi/847** for a consideration of **Kshs.900,000/=**. The Sale Agreement to that effect is dated **14th September 2016, DMW-1**. He also alleged that he bought the property from **Daniel Karoki Karugiro** who was a beneficiary of the **Estate of Grace Njeri Karugiro** and the 1st Respondent was the administrator of the said Estate. He deposed that he was later issued with a title deed for the land parcel **No.Githunguri/Kimathi/2237**, which was jointly registered in his name and that of **Daniel Karoki Karugiro** as per the title deed marked **DMW-3** issued on **14th October 2016**. However as he was in the process of having the said land parcel **No.Githunguri/Kimathi/ 2237**, subdivided in order for him to have a separate title, the 3rd Respondent who was a co-owner passed away in **January 2017**, before the process was finalized. Therefore the Applicants have no claim over **Githunguri/Kimathi/2237**, as they were to get their portion which was to be excised from the entire **Githunguri/Kimathi/847**. He also urged the Court not to transfer this suit to **Githunguri Law Courts** and also asked the Court to dismiss the instant application with costs.

This **Notice of Motion** was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also considered the pleadings in general, the written submissions and the relevant provisions of law and it renders itself as follows:-

There is no doubt that land parcel **No.Githunguri/Kimathi/847** was initially registered in the name of **Grace Njeri Karugiro (deceased)** as is evident from the **Certificate of Confirmation of Grant**, marked **SKK-1**. There is also no doubt that **Simon Kimani Karugiro** was the administrator of the Estate of the said **Grace Njeri Karugiro**. It is also evident that the suit property was distributed to various beneficiaries as per the **Certificate of Confirmation of Grant**. One of the beneficiaries of the said estate was **Daniel Karoki Karugiro**, who has been sued as the 3rd Respondent herein.

The 2nd Respondent alleged that he purchased a portion of land measuring **50 x 100ft** from the said **Daniel Karoki Karugiro**, and after the distribution of the estate of **Grace Njeri Karugiro**, the share of the said **Daniel Karoki Karugiro** measuring **0.0900 Hectares** was registered in the joint names of **Daniel Karoki Karugiro** and the 2nd Respondent as is evident from **DMW-3**, title deed issued on **14th October 2016**. Therefore after the distribution of the said estate and subdivision of land parcel **No.Githunguri/Kimathi/847**, to various beneficiaries of the estate of **Grace Njeri Karugiro**, the said land parcel **No.Githunguri/**

Kimathi/847 ceased to exist.

The Applicants have alleged that they purchased a portion of land measuring **50 x 100** from **Daniel Karoki Karugiro**, which was to be excised from the larger **Githunguri/Kimathi/ 847**. However, that the

said **Daniel Karoki Karugiro** died before transferring the purchased portion to the Applicants and now the 1st Respondent has threatened to evict the Applicants and thus this suit.

The Applicants have sought for injunctive order which is an equitable relief granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554**, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised. It must be based on common sense and legal principles.”

Further, as the Court embarks on determining whether to grant the orders sought or not, it will take into account that at this juncture, it is not called upon to determine the disputed facts with finality. The Court is only called upon to determine whether the Applicants have met the criteria for grant of injunctive orders. See the case of **Edwin Kamau Muniu...Vs...Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The criteria that will guide the court is the one laid down in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358**. These criterias are:

- 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.**

Therefore this Court will now consider the available evidence, and then juxtapose the same with the above stated criteria to arrive at a finding of whether the Applicants' are deserving of the orders sought or not.

First the Applicants needed to establish that they have a *prima-facie* case with probability of success at the trial. *Prima-facie* was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & 2 Others 2003 KLR 125**, as:-

“so what is a prima facie case----- In civil cases it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter”

The Applicants have alleged that they own the suit property **Githunguri/ Kimathi/847**, having purchased the same from the 1st and 3rd Respondents. However from the **Sale Agreement** dated **21st June 2016**, the Applicants purchased a portion of land measuring **50 x 100** from the 1st and 3rd Respondents which was to be excised from **Githunguri/ Kimathi/847**. The Applicants therefore did not purchase the whole of **Githunguri/Kimathi/847**, and they can certainly not be the owners of the above stated parcel of land.

Further the Applicants purchased a portion of land measuring **50 x 100** from **Daniel Karoki Karugiro**

and 1st Respondent which was to be excised from **Githunguri/Kimathi/847**, before it was distributed to the beneficiaries of the estate of **Grace Njeri Karugiro**. It is evident that the said distribution was done on **28th June 2016** as per the **Certificate of Confirmation of Grant, SKK-1** and therefore land parcel **No.Githunguri/ Kimathi/847**, which the Applicants are claiming ceased to exist. If the Applicants have any claim, it is against the portion of land owned by 1st Respondent or 3rd Respondent after distribution of the estate of **Grace Njeri Karugiro**. The Applicants cannot seek to injunct what is not in existence. The Court finds that injunction cannot issue against an event that has already occurred or overtaken by events. See the case **of Jane Kemunto Mayaka...Vs...Municipal Council of Nakuru & Others, HCCC No.124 of 2005**, where the Court held that:-

“Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure the Applicant and are not issued where such an event has taken place.....”

Therefore the Court finds that the Applicants herein have not established that they have a *prima-facie* case with probability of success.

Having found that the Applicants have not established a *prima-facie* case with probability of success, this Court finds no reasons to consider the other principles laid down in **Giella...Vs...Cassman Brown (supra)** as the said principles are considered sequentially. See the case of **Kenya Commercial Finance Co. Limited...Vs... Afraha Education Society (2001) 1EA 87**, where the court held that”-

“The conditions in the case of Giella ...Vs... Cassman Brown for granting of temporary injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt, then the third condition can be addressed.”

The Applicants also sought for an order of transfer of this suit to **Githunguri Principal Magistrate’s Court**. The Court has considered the value of the suit property which is **Kshs.950,000/=**. The suit property is situated in Githunguri. The **Court of Appeal in Civil Appeal No.287 of 2016** determined that the **Magistrates Courts** have jurisdiction to hear and determine land matters according to their respective pecuniary jurisdiction. Further as provided by **Section 18(1)** of the **Civil Procedure Act**, the Court has power to transfer a matter pending before it to the Subordinate Court for trial and determination.

Accordingly, the **Court finds that the Principal Magistrate’s Court, Githunguri has pecuniary jurisdiction to hear and determine this suit**. Consequently, the **Court allows the application for transfer of this suit to Githunguri Principal Magistrate’s Court** but declines to grant any order for injunction.

Having carefully considered the **Notice of Motion** dated **25th April 2017**, the **Court finds it not merited in terms of prayer No.3** and the said **prayer is dismissed entirely**. However, the **Court allows prayer No.4** of the instant **Notice of Motion** and **directs that this suit be transferred to Principal Magistrate’s Court, Githunguri forthwith for hearing and determination. Costs of the application shall be in the cause**.

It is so ordered.

Dated, Signed and Delivered at Thika this 13th day of April 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Maina holding brief for Mr. Gikenye for 1st Applicant

2nd Applicant

No appearance for 1st Respondent

No appearance for 2nd Respondent

No appearance for 3rd Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

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

L. GACHERU

JUDGE

13/4/2018



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