



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 49 OF 2019

PHILIPINE WAMBOGO KIBUCHI

THOMAS MURAGE KIBUCHI

SIETHELINA WANJIRU KIBUCHI

RACHEL WANJIRU KIBUCHI

BIBIANA MICHERE KIBUCHI

ARCH ANGEL MWAI KIBUCHI.....PLAINTIFFS

VERSUS

**MARY WANJIRU KARIRA (Sued in her personal
capacity and as the Administrator of the Estate of**

KAROLINA KARIRA KIBUCHI Alias KARIRA KIBUCHI

LYDIA WACHORA KARIRA

ANGEKINA WANJIKU KARIRA

CHARLES GICHIRA KARIRA

ANASTASIA WAMBUI KARIRA

AURALIA NJOKI KARIRA

PENINA WANGITHI KARIRA

FRANCIS WARUI KARIRA

JOHN MURIUKI KARIRA

JOSEPH MBITI KARIRA

VERONICA MUTHONI KARIRA.....DEFENDANTS

RULING

The application before me is the Notice of Motion dated 21st November 2019 brought under **Order 40 Rules 1 & 2, Order 50 Rule 1 CPR**.
The **applicant is seeking the following orders:**

(1) Spent.

(2) That the Honourable Court be pleased to issue a temporary injunction against the defendants restraining by themselves, their agents and/or servants from selling, sub-dividing, transferring, alienating, evicting and/or otherwise interfering with the plaintiffs right in any way on land parcel No. MWERUA/KIANDA/48 or any part thereof pending the hearing and determination of this application.

(3) That an inhibition order be issued against land parcel No. MWERUA/KIANDA/48 pending the hearing and determination of this application.

(4) That the Honourable Court be pleased to issue a temporary injunction against the defendants restraining by themselves, their agents and/or servants from selling, sub-dividing, transferring, alienating and/or otherwise interfering with the plaintiffs right in any way on land parcel No. MWERUA/KIANDA/48 pending the hearing and determination of this suit.

(5) That the Land Registrar, Kirinyaga do ensure compliance with the Court orders issued herein.

(6) That the costs of this application be provided for.

The application is supported by the affidavit of Philipine Wambogo Kibuchi and grounds shown on the face of the said application. The supporting affidavit is further supported by numerous annexures. The application is opposed with a replying affidavit sworn by Mary Wanjiru Karira.

APPLICANTS CASE

The applicants' contention is that the 1st defendant is a sister-in-law to the plaintiff and the rest of the defendants are her children. The applicants/plaintiffs also contend that the 1st defendant is a wife to their deceased brother one Karolino Karira Kibuchi alias Karira Kibuchi (deceased) who died in the year 2016 and that the 1st defendant is the administrator of the Estate of Karolino Kibuchi alias Karira Kibuchi (deceased). The applicants further stated that the suit land herein parcel No. MWERUA/KIANDA/48 was registered in the name of Karolino Karira Kibuchi alias Karira Kibuchi (deceased) to hold in trust for himself, other family and the plaintiffs. The plaintiffs/applicants also stated that their late father Jeremano Karira Kibuchi died on 23rd December 1960 before the lands were demarcated in their area. They stated that demarcation took place in the year 1961 and their elder brother Karolino Karira Kibuchi alias Karira Kibuchi (deceased) was registered as the proprietor of L.R. MWERUA/KIANDA/48 to hold the same in trust for himself and their family. The applicants further contend that at the time of land demarcation in the year 1961, lands were not being registered in the names of women, therefore the land could not be registered in the names of their mother who was still alive, thus the clan chose their eldest brother Karolino Karira Kibuchi alias Karira Kibuchi (deceased) who had reached the age of majority to be registered as the proprietor of the suit land on behalf of the family of Jeremano Kibuchi Karira. They contend that the plaintiffs, their mother Sabina Wangithi Kibuchi (deceased) and their other siblings were all brought up in the suit land wherein they were cultivating and utilizing the land for their day to day livelihood. The applicants also stated that they had constructed a permanent house where their deceased mother was residing and also where the plaintiffs were not residing on the suit land would stay when they came visiting. They also contend that their mother Sabina Wangithi Kibuchi who died in 2011 and their brother Vivianus Muteti Kibuchi who died in the year 1974 were buried on the suit land. The applicants stated that their sister Siethelina Wanjira was the one who was staying with their elderly mother in the permanent house they had built on the suit land up and until her demise in the year 2011. They further contend that their other brother Thomas Murage Kibuchi had also constructed his matrimonial home on the suit land where he was residing with his family. They contend that prior to the death of their brother Karolino Karira Kibuchi alias Karira Kibuchi, they had a meeting at their area Chief's office where he intimated that he was ready and willing to sub-divide the land and share it amongst his siblings. However, he died in the year 2016 before he could fulfil his wishes and desires to sub-divide and share it amongst his siblings.

The applicant stated that upon the demise of their brother in 2016, trouble started and his wife the 1st defendant in cahoots with her children who are the co-defendants started chasing them away and restraining them from accessing their house. They stated that she started to plough right outside their house and planted banana stems right at the door step of their house.

They stated that sometimes in the year 2017 and 2018, their sister Siethelina Wanjira Kibuchi had to flee from the suit land for fear of her life after it became completely impossible to stay in the suit land and went to live with her daughter at her matrimonial home. The applicants stated that their brother Thomas Murage Kibuchi also had to vacate from the suit land and rented a small house in their village wherein he currently resides. They stated that the 1st defendant demolished all cowsheds and non-permanent structures that belonged to the plaintiffs and she even cut down all food crops such as bananas and threw them on the road and also cut down all trees that had been planted on the suit land. They further stated that the defendants secretly filed Wanguru Principal Magistrate's Court Succession Cause No. 8 of 2018 without knowledge of the plaintiffs and shared out the suit land amongst themselves without disclosing that the suit land was a trust land and that the plaintiffs had an interest on it. They also stated that the suit land herein lies in Ndia Constituency Kirinyaga West District within the jurisdiction of Baricho Law Courts but the defendants chose to file the succession proceedings in Wanguru Law Courts in Mwea Constituency in order to make sure that none of the plaintiffs is aware of the proceedings. The plaintiffs stated that a grant was issued and the land shared out amongst the defendants and that the defendants have threatened to sub-divide the land amongst themselves and sell the same to third parties to the detriment of the plaintiffs.

RESPONDENTS CASE

The 1st respondent on behalf of the other respondents stated that during the land demarcation in 1959, she was already married to Karotino and had been blessed with three (3) children. She stated that by the year 1961, when her husband was given land, some of the siblings of her husband Karotino Karira were minors. She stated that her brother-in-law were Anthony Mbiti, Brian Muteti, Arch Angel Mwai and Thomas Murage while her sisters-in-law are Philipin, Siethelina, Bibiana, Rakel, Cecilia and Catelina Njoki. She stated that among her brothers-in-law and sisters-in-law Karolina, Anthony Mbiti, Brian Muteti, Cecilia and Catelina Njoki are deceased. The 1st defendant further stated that her late husband and his brother Anthony Mbiti are the ones who educated their siblings who thereafter got good education and good jobs and were able to buy themselves other properties where they moved to. The 1st defendant stated that Mwai bought land in Kathaka, Thomas Murage bought land in Mbeere and Kinya Kuru Muteti was given land by the clan in Chumbiri while Anthony Mbiti bought land in

Gathugu. She stated that all her sisters-in-law are married. The 1st defendant stated that in 2014, the applicants sued her husband before the Sub-chief stating that they wanted Siethelina to be given land with a title deed and her husband stated that what his siblings would inherit from him was only education. She stated that the only graves on the land are for Karolina, Sabina and Muteti. She stated that the reason why they filed a succession cause at Wanguru Court was because her husband had other properties in Mwea hence they were free to file succession cause either in Baricho or Wanguru. She stated that the applicants have not established a prima facie case.

ANALYSIS AND DETERMINATION

I have considered the application dated 21st November 2019, the affidavit evidence and the annexures thereto. I have also considered the submissions by the parties through their counsels on record. This application is brought under **Order 40 Rule 1 and 2 and Order 51 Rule 1 CPR**. The dispute between the parties relates to a parcel of land described as MWERUA/KIANDAI/48 which has been sub-divided and transferred to the respondents through transmission in Succession Cause No. 8 of 2018 at Wanguru Law Courts. The applicants are laying claim to the suit properties under Kikuyu Customary trust. They have given a historical perspective and why they think the registered proprietors are holding the same in trust for themselves and other members of the family.

Section 26 of the Land Registration Act No. 3 of 2012 enjoins the Courts to take certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor as prima facie evidence upon which is one of the ground of an injunction. The other ground for the grant of an injunction is that an applicant must demonstrate that he shall suffer substantial loss unless the orders are granted and lastly, where the Court is in doubt, it may decide the case on a balance of convenience. From the certificate of official search attached to the supporting affidavit, it is clear that the suit property has been sub-divided and transferred to the defendants through a succession cause. The first ground for the grant of an injunction therefore falls by the wayside. The second ground whether the applicant will suffer irreparable loss in which damages will not be an adequate remedy, the 1st applicant in the supporting affidavit deponed that unless the injunction order is granted, the respondents who filed succession proceedings secretly in Wanguru are likely to sub-divide the suit land amongst themselves and thereafter dispose to third parties to their detriment. I find the applicants' fears are not idle and far-fetched. If the respondents who are registered owners of the suit property dispose the same to unsuspecting purchasers for value, the applicants will definitely suffer irreparable loss to a clan land where they have sentimental value which cannot be found in any other land. I find that on that ground, this is a case where the balance of convenience tilts in allowing the application which I hereby do. I also take note that another test for the grant of an injunction has emerged from the approach taken by Ojwang J. (as he then was) in the case of **AMIR SULEIMAN VS AMBOSELI RESORT LIMITED (2004) e K.L.R** where he cited with approval the English case of **FILMS ROVER INTERNATIONAL (1986) 3 All ER 772** where it was held thus:

‘A fundamental principle is that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong’.

A further test for the grant of an injunction can also be discerned from the principle of Lis pendens where it is necessary to preserve the subject matter of the suit pending the hearing and determination of the suit. The principle was brought out in the case of **MAWJI VS US INTERNATIONAL UNIVERISTY & ANOTHER (1976) K.L.R 185** where **Madan J. stated as follows;**

“The doctrine of Lis pendens under Section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the Court. The doctrine of Lis pendens is necessary for final adjudication of the matter before the Court and in the general interests of public policy and good effective administration of justice. It therefore overrides Section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other”. (Emphasis mine)

I therefore find the principle of Lis pendens applicable to this suit pursuant to the provisions of **Section 107 of the Land Registration Act No. 3 of 2012**. Accordingly, I find the application dated 21st November 2019 merited and allow the same as follows:

(1) The temporary injunction orders issued on 21st November 2019 are hereby confirmed pending the hearing and determination of this suit.

(2) The costs of the application to abide the event.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 5th day of June, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Mwangi for Plaintiffs
2. Mr. Asimwe holding brief for Ann Thungu for Defendants
3. Mbogo – Court clerk.