



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
ELC CASE NO. 4 OF 2016

BENSON MWANIKI NJUKI & 16 OTHERSPLAINTIFFS

VERSUS

HENRY MICORO NGUTA.....1ST DEFENDANT

JOHN MWANIKI MICORO.....2ND DEFENDANT

BENARD KARIUKI MUNYI.....3RD DEFENDANT

RULING

This is in respect to the plaintiff/applicants Notice of Motion dated 27th January 2016 brought under **Section 68 of the Land Registration Act 2012 Sections 1A 1B and 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules** seeking the following remedies:-

1. *Spent.*
2. *Spent.*
3. *That the Court do issue an order inhibiting any dealings with parcels of land No:-*
 - a. *MBEERE/KIRIMA/3661*
 - b. *MBEERE/KIRIMA/3679*
 - (c) *MBEERE/KIRIMA/3680*
 - d. *MBEERE/KIRIMA/3681 and*
 - e. *MBEERE/KIRIMA/3682 pending the hearing and determination of this suit.*
4. *That costs of the application be provided for.*

The application is premised on the grounds set out therein and supported by the affidavit of **BENSON MWANIKI NJUKI, JUNIUS NJERU MUTEMBEI and PETER NJIRU MAGU** the 1st, 2nd and 3rd applicants herein sworn on behalf of the other applicants. Their case is that the above mentioned parcels of land (herein the suit land) was originally designated as MBEERE/KIRIMA/3394 and belonged to the **MWENDIA CLAN** of which they are members and which is held in trust for them by the 1st respondent but which has been sub-divided resulting to the suit land and transferred to the respondents herein who have refused to share it equitably among the applicants yet some of the clan members are buried there hence the need to prevent the respondents from selling or disposing the same.

The application is opposed and in a replying affidavit sworn by **JOHN MWANIKI MICORO** the 2nd

respondent herein, it is deponed inter alia, that the suit land is registered in their names being part of the land awarded to them by the clan and that the applicants have never occupied the same and have land on which they live and are therefore motivated by malice.

Submissions have been filed both by Ms Njeru advocate for the applicant and Mr. Muyodi advocate for the respondents.

I have considered the application, the rival affidavits and annextures thereto and the submissions of counsel.

It is not in dispute that the suit land is now registered in the names of the respondents herein and their counsel Mr. Muyodi has rightly submitted that such registration vests in them the absolute ownership of the suit land. **Section 24 and 25 of the Land Registration Act 2012** are clear on that and similar provisions are found in **Sections 27 and 28 of the repealed Registered Land Act**. However, the registration of land in the names of a party does not extinguish the rights of those claiming an interest in the same under a trust including a customary trust – see **MUMO VS MAKAU 2004 1 K.L.R 13, KANYI VS MUTHIORA 1984 K.L.R 712** among other cases. **Section 28 (b) of the Land Registration Act** expressly recognizes interests in land arising out of trust. It states:-

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without being noted on the register.

- a. ***spousal rights over matrimonial property***
- b. ***trusts including customary trusts”.***

Therefore, even as the respondents seek protection by virtue of being the registered proprietors of the suit land, that registration would not relieve them of their obligations as trustees on behalf of the applicants.

At this point in time, this Court cannot decide conclusively on whether or not the respondents hold the suit land in trust for the applicants. That is what is sought by the applicants in the suit which is yet to be determined. What is before me now is an application for an order of inhibition and **Section 68 of the Land Registration Act** empowers this Court to make an order referred to as an inhibition order inhibiting for a particular time or until the occurrence of a particular event or generally until a further order, the registration of any dealing with any land, lease or charge. Such an order just like an interlocutory injunction is meant to preserve the suit property and in granting it, the Court will consider if the land in dispute is likely to be alienated or transferred thus making it un-available by the time the trial is concluded, whether the applicant has an arguable case and also, if the refusal to grant such an order would render the suit nugatory. The prejudice, if any, that will be caused to the respondent is an important consideration including the conduct of the parties to the dispute.

What is the applicants’ claim to the suit land? Their interest is based on trust and as I have stated above, this will be a matter for the trial Court. However, from the annextures availed by both parties, it is clear to me that the suit land was originally held by the Mwendia Clan to which the applicants belong. That is obvious from the annextures herein including minutes of the meetings held by the clan members and demonstrates an arguable prima facie case in their favour. Secondly, the suit land has been disposed off before and the chances that it may further be alienated to third parties and therefore not available by the time this suit is heard and determined cannot be discounted and if that happens, this suit would be rendered nugatory because the substratum of the dispute would be lost. Finally, the respondents’ claim that they occupy and have extensively developed their respective portions of the suit land – see paragraph 15 of the replying affidavit of **JOHN MWANIKI MICORO**. An order of inhibition which is meant to restrict any dealings with the suit land would not prejudice the respondents who remain in occupation.

In the circumstances therefore and upon considering all the matters herein, I grant the orders sought in the applicants’ Notice of Motion dated 27th January 2016.

Costs shall be in the cause.

B.N. OLAO

JUDGE

13TH MAY, 2016

Ruling delivered, dated and signed this 13th day of May 2016 in open Court

Mr. Muyodi for the Respondent present

Ms Muthike for Ms Njeru for Applicant present.

B.N. OLAO

JUDGE

13TH MAY, 2016