



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA

ELC CASE NO. 103 OF 2015

EPHANTUS MUGO NDAMBIRI.....1ST PLAINTIFF/APPLICANT

PATRICK NJERU.....2ND PLAINTIFF/APPLICANT

CYRUS MUCHIRA.....3RD PLAINTIFF/APPLICANT

ISAAC KABENGI.....4TH PLAINTIFF/APPLICANT

VERSUS

FAITH WANJIRU NDAMBIRI.....1ST DEFENDANT/RESPONDENT

MARKO KARIMI MURIITHI.....2ND DEFENDANT/RESPONDENT

RULING

This is in respect to the applicants' Notice of Motion dated 27th August 2015 seeking the following orders:-

1. *Spent*

2. *Spent*

3. *That this Honourable Court be pleased to grant a temporary injunction against the 2nd respondent restraining him from trespassing, disposing, selling, charging land parcel No. BARAGWE/THUMAITA/3638 and 3639 and/or in any way interfering with the applicants quiet possession, use and enjoyment of land parcel No. BARAGWE/THUMAITA/3638 and 3639 pending the hearing of the suit.*

4. *That the costs of this application be provided for.*

The application is premised on the grounds set out therein and supported by the affidavit of **EPHANTUS MUGO NDAMBIRI** the 1st applicant herein sworn on behalf of the other applicants.

It is the applicants' case that they are the children of the late **PETER NDAMBIRI NDINWA** while the 1st respondent was his 3rd wife. During his life time, their deceased father was the registered proprietor of land parcel No. BARAGWE/THUMAITA/2314 which he sub-divided into parcels NO. BARAGWE/THUMAITA/3636, 3637, 3638 and 3639 which were then registered in the 1st respondents

names and their late father to hold in trust for the applicants. However, in breach of the said trust, the 1st respondent, without the knowledge of the applicants transferred the land parcel No. BARAGWE/THUMAITA/3638 and 3639 (the suit land) into her names and sold them to the 2nd respondent hence this application which was filed simultaneously with a plaint in which the applicants as plaintiffs seek, inter alia, a declaration that the 1st respondent holds the suit land in trust for them, a determination of the said trust and a permanent injunction restraining the 2nd respondent from transferring, disposing, selling or charging the suit land or interfering with the applicant's quiet possession and enjoyment thereof.

The application is opposed and both respondents have filed replying affidavits.

The 1st respondent confirms that she is one of the three wives of the deceased **PETER NDAMBIRI NDINWA** and the land parcel No. BARAGWE/THUMAITA/2314 was registered in their names as joint proprietors. That later, the land was sub-divided into two so that each could have their own share. However, the 1st applicant who was assigned the responsibility of doing the sub-division decided to sub-divide it into four portions fraudulently. She therefore sold the suit land to the 2nd respondent and this application is an abuse of the Court process.

On his part, the 2nd respondent confirmed that the 1st respondent is his aunt and sold him the suit land as she needed money for her medication having been disinherited following the death of her husband. The 1st applicant later invaded the suit land with the help of the Provincial Administration even after he had issued him with a notice to leave the land. The 1st applicant was subsequently charged at the **GICHUGU COURT** in Criminal Case No. 490 of 2015. This application is therefore an abuse of the Court process.

Submissions have been filed both by the firm of **WANGECHI MUNENE** Advocate for the applicants and **NDUKU NJUKI** Advocate for the respondents.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

This is an application for a temporary injunction pending trial and has to be considered in light of the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358**. These are:-

- a. The applicant must show that he has a prima facie case with a probability of success at the trial.*
- b. The applicant must demonstrate that unless the order for injunction is granted, he might suffer irreparable injury that cannot be compensated by an award of damages, and*
- c. If in doubt, the Court will decide the application on the balance of convenience.*

A prima facie case was defined by the Court of Appeal in the case of **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) e K.L.R** as follows:-

“A prima facie case in a civil application includes but is not confined to “a genuine and arguable case”. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

A Court considering such an application should, as was held in the case of **FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALE LTD 1986 3 ALL E.R 772**, consider taking the course that appears to carry the lower risk of injustice.

This application will therefore be considered in light of the above principles.

It is not in dispute that the applicants are the step-sons of the 1st respondent and that the suit land is a sub-division of land parcel No. BARAGWE/THUMAITA/2314 which belonged to the applicants' father before being sub-divided into four portions two of which are the subject of this suit and which were registered in the joint names of the applicants' deceased father and the 1st respondent. While it is the applicants case that the suit land was registered in the joint names of the 1st respondent and their deceased father in trust for them, the 1st respondent's case is that she and her late husband decided to sub-divide the original land and share it equally during his life time. The 2nd respondent's case is that he bought the suit land from the 1st respondent who needed money for her medication.

Whether or not the 1st respondent holds the suit land in trust for the applicant is a matter for trial to be determined on evidence. The Court cannot therefore make any determination on that issue at this stage. It is also clear that the suit land is currently registered in the names of the 2nd respondent who bought it from the 1st respondent. Whether or not the 1st respondent had a proper title to pass to the 2nd respondent will also be a matter for trial to be determined on evidence. It is however trite law that the registration of land in one's names does not relieve the registered proprietor of his obligation as a trustee – **MUKANGO VS MBUI C.A CIVIL APPEAL No. 281 OF 2000 NYERI.** See also **KANYI VS MUTHIORA 1984 K.L.R 712.**

It is also common ground that the applicants are currently in occupation of the suit land notwithstanding the registration thereof in the names of the 2nd respondent. That, in my view, is sufficient evidence on which a Court can base a finding that the applicants have established a prima facie case with a probability of success at the trial.

On the issue of irreparable injury which cannot be compensated by an award of damages, the suit land is a resultant sub-division of land that originally belonged to the applicant's deceased father. It is therefore part of their inheritance which has now been sold to their step-mother's nephew. The conventional approach in land matters ought to be that depriving one of an interest in land is not among those cases where it can be held that compensation in damages would be a sufficient remedy. As was held in **MUIRURI VS BANK OF BARODA (KENYA) LTD 2001 K.L.R. 183 at page 188**

“Besides, disputes over land in Kenya evoke a lot of emotions and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”.

And if indeed the 1st respondent holds the suit land in trust yet proceeded to transfer it to the 2nd respondent, that would amount to a transgression against the provisions of **Section 25 (2) of the Land Registration Act** which imposes a duty on a trustee notwithstanding the registration of land in his names. I am persuaded that in the circumstances of this case, damages would not be an adequate remedy.

Lastly, even if this application is to be determined on the balance of convenience, the scales would tilt in favour of the applicants. In my view, this is one case in which there would be much greater risk of causing an injustice by withholding an injunction (if the applicants prove their case at the trial) rather than by granting it (should the applicants not prove their case at the trial). As the suit land is registered in the names of the 2nd respondent, the applicants have no way of transferring it. On the other hand, the only loss that the 2nd respondent stands to suffer is the delay in developing it. Therefore, the likely risk of injustice would fall upon the applicants rather than the 2nd respondent.

In the circumstances therefore and upon considering all the evidence herein, I am persuaded that the applicants are entitled to the orders sought in their Notice of Motion dated 27th August 2015. I allow it in the following terms:-

1. A temporary injunction is issued restraining the 2nd respondent from transferring, disposing, selling, charging land parcels No. BARAGWE/THUMAITA/3638 and 3639 and/or in any way interfering with the applicant's quiet possession, use and enjoyment thereof pending the hearing and determination of this suit.

2. As the parties are related, each will meet their own costs.

3. It is further directed that the parties do expedite compliance with all pre-trial directions and have this suit heard in the next 12 months.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016

Ruling dated, signed and delivered in open Court this 30th day of September 2016.

Mr. Mwangi for Ms Wangechi for Plaintiff/Applicants present

Mr. Nduku Njuki for Defendant/Respondents absent.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016