



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL CASE NO. 12 OF 2010 (0S)

IN THE MATTER OF TRUSTEESHIP AND TRUSTEE LANDS ACT CAP 167 LAWS OF KENYA

AND

IN THE MATTER OF THE ESTATE OF NJUGUNA WAWERU MUNGAI alias NJUGUNA WAWERU

NAOMI WANJIKU WAWERU.....1ST APPLICANT

ALEX WAWERU KIBURIA.....2ND APPLICANT

VERSUS

TERESIA NYOKABI NJUGUNA.....RESPONDENT

RULING

1. The motion dated 4th February 2014 seeks orders that the defendant be restrained from dealing with Ndumberi/Ndumberi/2531 and 2532 (Originally Ndumberi/Ndumberi/392) pending hearing and determination of the suit. There is also a prayer for mandatory injunction to facilitate removal of barriers and/or fences erected on the parcel barring the plaintiff's access to the suit land.
2. The proceedings are linked to Kiambu CM CSC No. 114 of 2003 which is in respect of the estate of the deceased, Njuguna Waweru Mungai alias Njuguna Waweru. Representation in that cause was made to the defendant. She obtained confirmation of grant on 29th January 2013 .
3. The plaintiffs claim that the property that comprises the estate of the deceased and is the subject of Kiambu CM CSC No. 114 of 2003 did not belong to the deceased exclusively. It was family property which he held in trust for his extended family, which included the plaintiffs. They have filed the instant suit for declaration of trust. The property has been confirmed to the defendant in Kiambu CM CSC No. 114 of 2003, and they fear that if the defendant moves to implement the orders confirming the grant the suit herein would be compromised and they would suffer loss as a consequence. The injunctive orders are sought against that background.
4. The defendant has replied to the application *vide* an affidavit sworn on 18th March, 2014. She avers to

be the administrator of the estate of the deceased, the registered proprietor of Ndumberi/Ndumberi/2531 and 2532, which are resistant subdivisions from the original title Ndumberi/Ndumberi/392. She states that the plaintiffs had previously raised the issue of the alleged trust as at the confirmation of the grant in Kiambu CM CSC No. 114 of 2003. They had raised a protest to the proposed confirmation of the grant, but their protest was dismissed and the grant confirmed. She asserts that the plaintiffs have not challenged the confirmation by way of either appeal or review, and therefore the confirmation orders remain in force. She argues that in view of that the plaintiffs are trespassers on the subject land.

5. To her affidavit the defendant has attached three documents to support her case. There is a certificate of confirmation of grant dated 29th January 2014 and issued in a Kiambu CM CSC No. 113 of 2003. The confirmation orders devolved the entire estate of the deceased, including original title Ndumberi/Ndumberi/392, upon the defendant. The second document is the judgment delivered in the same cause with respect to the protest to the confirmation of the grant. The other document comprises the proceedings in the cause for the period running from 4th June 2013 to 16th November 2013, and they cover the protest proceedings.

6. It was directed on 24th June 2014 that the interlocutory application dated 4th February 2014 be disposed of by way of written submissions. The plaintiff's written submissions are dated 23rd June 2014 and were filed in court the same day. The defendant's submissions are dated 20th June, 2014 and were lodged in court the same day. The Defendant has also filed a list of authorities.

7. The plaintiffs submit that their application satisfies the conditions for ground of injunctive relief as set out in *Giella –vs-Cassmann Brown* (1973) EA 358. It is submitted that there is a *prima facie* case with probability of success. The land in question is said to be ancestral land. The plaintiffs have given a background to this. They assert that there is a trust over the property held by the defendant, through her dead husband, for the benefit of the plaintiffs. The plaintiffs argue that if the court ultimately finds that there is such trust, they would suffer irreparable loss should the defendant dispose of the subject property before the court reaches the said determination.

8. It is argued for the defendant that the application is built upon falsehoods. Firstly, the plaintiffs are said we saw to be lying where they claim when to have lived on the said land. Secondly, the Originating Summons herein dated 10th August 2010 was filed way before the confirmation orders were made on 20th July 2014, and therefore it cannot be founded on the determination made on 20th January 2014. It is argue on the strength of the decisions in *KIG Bar Grocery and Restaurant Ltd –vs- Galabaki and another* (1972) EA 504 and others, where it was held that equitable relief should not be granted to a party who does not come to court with clean hands.

9. These proceedings relate to property Ndumberi/Ndumberi/392 which was originally registered with names of Njuguna Waweru Mungai alias Njuguna Waweru, who is now deceased having died on 3rd January, 2003. Representation to his estate was sought in Kiambu SPM CSC No. 114 of 2003, initiated by his widow, the defendant in this cause. The said parcel was subsequently subdivided into Ndumberi/Ndumberi/2531 and Ndumberi/Ndumberi/2532. The grant made in Kiambu SPM CSC No. 114 of 2003 was confirmed on 20th January 2014. The confirmation orders were granted after the court dismissed the protest raised by the plaintiffs herein, and which they had founded on the alleged existence of a trust of the subject property in their favour.

10. The Originating Summons herein commenced on 11th August 2010. This was after Kiambu SPM CSC No. 114 of 2003 had commenced, but before the grant herein had been confirmed. In the Originating Summons the plaintiffs seek a declaration of trust over the property that was the subject of Kiambu SPM CSC No. 114 of 2003.

11. The Motion that I am called upon to determine, dated 14th February, 2014, seeks orders to restrain the Defendant herein for dealing with the property which is the subject of this cause and also Kiambu SPM CSC No. 114 of 2003. The question that I should seek answer is whether the orders made in the

Motion are grantable.

12. The restraining orders sought against a person who is the administrator of an estate of a deceased. The administrator of a deceased person's estate exercises powers that are granted to him by the law. In this the defendant was appointed administrator of the estate of the deceased in Kiambu SPM CSC no. 114 of 2003. By dint of that appointment the property of the accused vested in her by virtue of section 7 of the law of succession Act, which provides as follows:-

“The executor or administrator to whom a presentation has been granted shall be the personal representation of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant all the property of the deceased shall vest in him as personal representation”.

13. As the property of the deceased vests in the defendant, she enjoys all the rights and privileges of the owner thereof she can sue and be sued over the property. She can enter with contracts of all sorts in respect of the property. She effectively stepped into the shoes of the deceased upon her being appointed his personal representative, and she is capable of doing anything with the property that the deceased himself lived have done.

14. It is trite law that a legal owner of property cannot be restrained from exercising rights of ownership over his property ,unless they are acting in a manner which infringes on the rights of other parties who have acquired rights over the same property. It is incumbent upon Plaintiffs to establish that they have acquired such rights over the subject property or at any rule the such rights existed even before the deceased died.

15. I note that although the present suit was filed before the grant in Kiambu SPM CSC No. 114 of 2003 was confirmed the Plaintiff did not pursue this clause vigorously and the grant in Kiambu SPM CSC No. 114 of 2003 was confirmed before this suit was heard and determined. This developments will no doubt cause complication for the orders made in this cause cannot overturn the confirmation orders made in the other suit Kiambu SPM CSC No. 114 of 2003. The orders made in this suit can only take effect with the reversal of the confirmation orders made in Kiambu SPM CSC No. 114 of 2003.

16. Ideally, any time on ownership of property should be addressed before a grant in respect of any estate comprising the property in question is confirmed. In most cases, confirmation of the grant sets in motion processes the remove the property from the reach of any claimants, often resulting and transactions that are irreversible.

17. The resolution of questions relating to ownership of a property the subject of a confirmation application prior to lack confirmation is the subject of Rule 41(3) of the Probate and Administration Rules, which provides as follows:-

“Where a question arises as to the identity, share or estate of any person claiming to be beneficiary interested in, or of any condition or qualification attaching to, such share or estate which cannot be at that stage be conveniently determine, the court may prior to confirming the grant but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate on the property comprising it to abide the determination of the question in proceedings where order XXXVI, rule 1 of the Civil Procedure Rules and way thereupon subject to the provision to section 71 (2) of the Act, proceed to confirm the grant”.

18. From the record it is clear to me that the plaintiff raided the virtue trust with respect to Ndumbui/Ndumberi/392 long before the confirmation application was filed in Kiambu SPM CSC No. 114 of 2003 . When the confirmation was eventually filed, they filed a protest affidavit again raiding the issue of a trust incurring in the subject of property in his favour. The matter was urged in a full hearing, which alimented in a judgment delivered 20th January, 2014. In the Judgment, the trial court did not venture

into the merits as whether such a trust existed or not, for it concluded that it had no jurisdiction to deal with the issue.

19. The matters raised in the instant suit and in the protest to the confirmation application in Kiambu **SPMCSC No. 114 of 2003** in my view fall squarely within the purview of Rule 41(3) of the Probate and Administration Rules. It is a question as to the share of persons claiming to be beneficially interested in, or put differently it is a question as to a qualification attracting to a share of a claimant.

20. The matter therefore ought to have been concluded in terms of Rule 41(3) of the Probate and Administration Rules, by delaying the confirmation of Ndumbui/Ndumberi/392 to await the determination of the instant suit or any other suit brought under order XXXVI rule of the Civil Procedure.

21. The confirmation of Ndumbui/Ndumberi/392 sets in motion a process that is likely to see the disposal of the said parcel in a manner that is lured put beyond the reach of the Plaintiffs. This in effect moved render nugatory the instruct.

22. The Plaintiffs are not blameless they commenced the instant suit and want to sleep, only to be reminded about it by the outcome of the protest proceedings for the ruling of 20th January, 2014. The last time that in any step was taken in this matter was on 10th March, 2011. The next step followed on 10th February, 2014 after the determination of the protest proceedings on 20th January, 2014.

23. From the foregoing it is certain that the Plaintiffs are guilty of *coaches*. They have come to court for injunctive relief, Yes they have not themselves done equity delay defeats equity, and equity comes to the aid of the vigilant and reverses the indolent.

24. I am not satisfied that the orders sought in the application before we are available in the circumstances. I doubt fine any merit in the application dated 4th February, 2014 and I do hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF January 2015.

W. MUSYOKA

JUDGE