



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 14 OF 2015

BEN KARIUKI NDUNGU1ST PLAINTIFF

ISAAC KARIUKI NDUNGU.....2ND PLAINTIFF

SIMON NJUGUNA NDUNGU.....3RD PLAINTIFF

FLORENCE WANJIKU NDUNGU.....4TH PLAINTIFF

MARY MUTHONI NDUNGU (suing as legal

Representative of the Estate of the late

JOHN MWANGI NDUNGU5TH PLAINTIFF

DAVID MWANGI NDUNGU.....6TH PLAINTIFF

JOSEPH NDUNGU Suing as legal representative

Of the estate of the late

JECINTA NJERI NDUNGU.....7TH PLANTIFF

VERSUS

NDUNGU KARIUKI1ST DEFENDANT

WINNIE MWIKALI.....2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; applicants being children of 1st defendant from 1st wife; averment that the 1st defendant has taken a new much younger wife who is influencing him to sell his property; application to stop any intended sale on basis that properties held in trust for 1st wife and existence of agreement not to sell; no proof that properties held in trust; no proof of any agreement, mere existence of parent/child relationship not enough to interfere with proprietary rights of 1st defendants; application dismissed)

1. This suit was commenced by way of plaint filed on 27 January 2015. The 1st, 2nd, 3rd, 4th, 6th and 7th plaintiffs are brothers and sister whereas the 5th plaintiff was married to a sibling of the earlier named plaintiffs which sibling is now deceased. The 7th plaintiff also doubles up as the legal representative of the estate of Jacinta Njeri Ndungu who is the mother of the plaintiffs (now deceased). The 1st defendant is the father of the 1st, 2nd, 3rd, 4th, 6th and 7th plaintiffs and the father in law of the 5th plaintiff. The 2nd defendant is the third wife of the 1st defendant. It is averred that the plaintiffs had a cordial relationship until the 2nd defendant came into the picture. It is claimed that the 1st defendant is sickly, and that the 2nd defendant is taking advantage of that fact, to convince him to dispose of all his property, which is said was acquired during the lifetime of the 1st defendant's deceased wife. It is claimed that the 2nd defendant has gone ahead to sell some parcels of land without the requisite approval from the plaintiffs. It is averred that on 28 August 2014, an agreement was made between the 4th plaintiff, representing all plaintiffs, and the 1st defendant whereby the 1st defendant agreed to hand over the title deeds to the following properties, Nyandarua/Milangine/1798, Nyandarua/Milangine/1797, Bahati/Engashu Block 4/403 (Mwaki Muugu), Mau Summit/Molo Block 15/23 (Ndungu) and a motor vehicle registration No. KBK 624 B Toyota Station Wagon. In the suit, the plaintiffs want the following orders :-

- (a) A declaration that the defendant is bound by the terms of the agreement.
- (b) Specific performance.
- (c) Damages.
- (d) Costs of this suit and interest thereon at court rates.
- (e) Such other or further relief as this Honourable Court may deem just to grant.

2. Together with the plaint, the plaintiffs filed an application for injunction under Order 40 Rules 1 and 2 of the Civil Procedure Rules. They want orders to restrain the defendants from "transferring and or further interfering" with the land parcels Nyandarua/Milangine/1798, Nyandarua/Milangine/1797, Bahati/Engashura Block 4/403 (Mwaka Muugu), Mau Summit/ Molo Block 15/23 (Ndungu) and motor vehicle registration No. KBK 624B Toyota Station Wagon (collectively the suit properties).

3. Among the grounds listed is that the suit properties are in danger of being sold by the 1st defendant under the influence of the 2nd defendant; that the 1st defendant is a 75 year old sickly man while the 2nd defendant is 30 years and the 3rd wife of the 1st defendant; that the plaintiffs are children of the 1st defendant's first wife who is deceased; that the properties were acquired by the 1st defendant during his deceased wife's lifetime; that the plaintiffs have not consented to the sale of the properties; and that the plaintiffs have a prima facie case with a probability of success.

4. The application is supported by the affidavit of Florence Wanjiku Ndungu who is the 4th plaintiff in this matter. She has deposed that she is the daughter of the 1st defendant and that she and the plaintiffs are the children of the 1st defendant's first wife. It is averred that upon the death of their mother, the 1st defendant promised to hand over all the titles to the suit properties for safe keeping. It is said that just before the plaintiffs' mother died, the 1st defendant expressed his wish to sub-divide his properties among all his children but that to date, he has not done so.

5. It is stated that the 1st defendant executed an agreement stating and directing how his property should be divided. It is further averred that the 1st defendant married the 2nd defendant despite the plaintiffs opposing the same due to their wide age difference. It is stated that the suit properties are now in danger of being sold by the 1st defendant as the 2nd defendant has influenced him without consideration for his children. It is deposed that the plaintiffs are not opposed to the marriage but the mass disposal of the properties of the 1st defendant.

6. To the supporting affidavit, the applicants have annexed copies of the title deeds and the agreement dated 28 August 2014.

7. Despite being served with the pleadings and the application herein, the defendants have not filed any appearance or response to this application. That does not however mean that the application herein must automatically succeed. The plaintiffs still need to demonstrate a prima facie case with a probability of success and further demonstrate that they stand to suffer irreparable loss. If this court will be in doubt, it will decide the application on a balance of probabilities. These principles were laid out in the case of ***Giella v Cassman Brown (1973) EA 358***.

8. In order to assess whether the plaintiffs have laid out a prima facie case with a probability of success, it is inevitable that a preliminary assessment of the case of the plaintiffs be made. It will be discerned that the plaintiffs allege that the suit properties were acquired when their mother, who is said to have been deceased was still alive. The case of the plaintiffs is further hinged on the ground that their father, the 1st defendant, through an agreement signed on 28 August 2014, agreed to distribute the properties to the plaintiffs.

9. I have combed the pleadings, the application and the supporting affidavit. It is not disclosed when the mother of the plaintiffs died. Neither is any proof of death annexed. I cannot therefore tell whether or not the subject properties were acquired when the 1st defendant's first wife is said to have been alive. I have seen the agreement of 28 August 2014, which I believe is the agreement upon which the plaintiffs are seeking orders of specific performance. It inter alia provides that the 1st defendant has agreed to give as gifts to his children, the land parcels Dundori/Muguathi Block 732 and title No. I.R 31718/235, and that he has given the title deeds to the 4th plaintiff. It further states that the 1st defendant will continue collecting rent from the parcel I.R No. 31718/235 until his demise when his children will have the property absolutely. None of the suit properties herein were "gifted" to the plaintiffs through the said agreement. They are however mentioned in the said agreement, and their mention is that the 4th defendant has handed over the title documents of the said properties to the 1st defendant. I am not therefore too sure of the basis upon which the plaintiffs claim the suit properties herein.

10. The plaintiffs of course seem to be apprehensive that their father may dispose of the suit properties. But I have not been given anything which would make me bar the 1st defendant from dealing with his properties as he so wishes. The mere fact that he happens to be their father and intends to sell some of his properties is by itself not reason enough to stop him from doing so. There has to be a legal foundation to enable me interfere with his proprietary rights and I am not persuaded that the plaintiffs have provided me with that foundation.

11. It has been said that the 1st defendant is old and sickly and that the 2nd defendant is influencing him to sell some of his properties. However, no proof of age has been given and no proof of ill health has been demonstrated. More importantly, it has not been shown that the 1st defendant is not within his faculties or cannot make informed decisions. Neither has any proof of undue influence been tabled save for the mere mention of it. In fact, I have not been shown any agreement that proves that the 1st defendant has embarked on any sale of his properties.

12. A lot has been said about the age gap between the 1st and 2nd defendant. I do not know what quarrel the plaintiffs have if their father, in pursuit of his own happiness, wants to marry a person who is much younger than himself. So what if he is 75 years and so what that she is 30 years ? So long as they are both consenting adults within their faculties, and who have the capacity to marry, there is no bar to them being in a union. The person that the 1st defendant chooses to marry is his choice, not the plaintiffs. Is it that the plaintiffs want to chose a wife for their own father and bind him to that choice ? That sounds fairly absurd to me. Just because the plaintiffs are children of the 1st defendant does not give them a licence to control or interfere with the private life of their father.

13. I do not think that it is necessary for me to say more. The upshot of the above is that I am not convinced that the plaintiffs have tabled before me a prima facie case with a probability of success. I therefore dismiss this application, but since the defendants did not file any documents to oppose it, I make no orders as to costs.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 18th day of March 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of: -

Mr. Ikua holding brief for Ms Njeri Muiruri for plaintiffs

Defendant: absent

Emmanuel Juma: Court Assistant

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU