



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 202 OF 2014

DORIS WANGITHI MAINA 1ST PLAINTIFF

KENNEDY MUKURI MAINA 2ND PLAINTIFF

MARTHA WANGARI 3RD PLAINTIFF

VERSUS

PERIS WANJIRU MAINA 1ST DEFENDANT

MARK MURIUKI MAINA 2ND DEFENDANT

RULING

This is in respect to the Plaintiffs/Applicants Notice of Motion dated 27th June 2014 and filed in this Court on 2nd July 2014 under **Order 40 Rule 1 of the Civil Procedure Rules** seeking the following orders:-

1. ***That this Court do issue an order restraining the Defendants/Respondents from sub-dividing, transferring, leasing out, charging or in any way alienating land parcel numbers KIINE/THIGIRICHI/2134 and KIINE/THIGIRICHI/2135 pending the hearing and determination of this suit***
2. ***That this Court do issue a further order restraining the Defendants/Respondents whether by themselves, their agents, employees or any persons claiming on their behalf from either evicting, demolishing the Plaintiffs' house in the land or interfering with the Plaintiffs quiet possession of their land***
3. ***The Respondents do bear the costs of this application.***

The application is supported by the affidavit of the 1st Plaintiff/Applicant DORIS WANGITHI MAINA in which she has deponed, inter alia, that she and the 2nd and 3rd Plaintiffs/Applicants who are her siblings are children of DANSON MAINA (deceased) and the 1st Defendant/Respondent. Following the death of their father, their mother the (1st Defendant/Respondent) took out a grant of letters of administration in Succession Cause No. 10 of 1994 at Karatina Court which was confirmed and the 1st Defendant/Respondent was to hold 5 acres out of parcel of land No. KIINE/THIGIRICHI/346 in trust for the Plaintiffs/Applicants who were then minors. However, the 1st Defendant/Respondent has sold 3 acres to the 2nd Defendant/Respondent fraudulently which he is now fencing and wants to demolish the Plaintiffs/Applicants homes following the disappearance of the 1st Defendant/Respondent from home.

The 2nd Defendant/Respondent has sworn a replying affidavit in which he has deponed, inter alia, that the original land parcel No. KIINE/THIGIRICHI/346 was 10 acres in size but was later sub-divided into KIINE/THIGIRICHI/2118 and 2119 each measuring 5 acres and thereafter, KIINE/THIGIRICHI/2119 was further sub-divided into KIINE/THIGIRICHI/2134 and 2135 measuring 3 acres and 2 acres respectively. Prior to those sub-divisions, the 2nd Defendant/Respondent was desirous of purchasing property and both the Plaintiffs/Applicants and the 1st Defendant/Respondent agreed to sell him 3 acres out of KIINE/THIGIRICHI/346 and an agreement was drawn and they obtained the necessary consent and he became the registered proprietor of KIINE/THIGIRICHI/2134 and therefore the Plaintiffs/Applicants are attempting to deceive this Court and further, that the Plaintiffs/Applicants who are married live on different properties and locations.

Submissions have been filed both by Mr. Kirubi Mwangi for the Plaintiffs/Applicants and Mr. Magee for the Defendants/Respondents. I have considered those submissions, the application, the rival affidavits and the annexures thereto.

It is clear from the record that the Plaintiffs/Applicants are children of the 1st Defendant/Respondent who has not opposed this application. Their late father one DANSON MAINA passed away on 6th February 1994 and following Succession Cause No. 10 of 1994 the land parcel No. KIINE/THIGIRICHI/346 was registered in the names of the 1st Defendant/Respondent to hold in trust for his minor children namely:-

1. DORIS WAGITHI MAINA - 1st Plaintiff/Applicant
2. ELIJAH KAMAU MAINA
3. KENNEDY MUKURI MAINA - 2nd Plaintiff/Applicant
4. MARTHA WANGARI - 3rd Plaintiff/Applicant

It is also clear from the documents herein including the replying affidavit of the 2nd Defendant/Respondent that the land parcel No. KIINE/THIGIRICHI/346 was later sub-divided into KIINE/THIGIRICHI/2118 and 2119. Later on, the parcel No. KIINE/THIGIRICHI/2119 was sub-divided into KIINE/THIGIRICHI/2134 and 2135. The 1st Defendant/Respondent subsequently bought KIINE/THIGIRICHI/2134 which was registered into his names after the Plaintiffs/Applicants consented to that transaction and therefore there was no fraud on his part as the 1st Defendant/Respondent and her family were aware of the transaction. However, the Plaintiffs/Applicants through the supporting affidavit of the 1st Plaintiff/Applicant DORIS WAGITHI MAINA have deponed that the parcel of land KIINE/THIGIRICHI/346 was registered in the names of the 1st Defendant/Respondent to hold in trust for them and that it was illegally and fraudulently sub-divided and part thereof sold to the 2nd Defendant/Respondent.

This being an application for a temporary injunction, it has to be determined in line with the principles set out in the case of *GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A. 358* which are:-

1. ***The Applicant must show a prima facie case with a probability of success***
2. ***Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages***
3. ***If in doubt, the application will be determined on a balance of convenience.***

A prima facie case was defined by the Court of Appeal in *MBAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS 2003 K.L.R 125* 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”

Have the Plaintiffs/Applicants established a prima facie case to warrant the orders sought? I would answer that question in the affirmative for the following reasons:-

Firstly, it is not in dispute that the parcel of land KIINE/THIGIRICHI/346 from which the parcel KIINE/THIGIRICHI/2134 was hived off and sold to the 2nd Defendant/Respondent was held in trust by the 1st Defendant/Respondent on behalf of the three Plaintiffs/Applicants and also one ELIJAH KAMAU MAINA who is not a party to these proceedings. This is clear from the Certificate of Confirmation of grant (**annexture DW 1**) which is attached to the 1st Plaintiff/Applicant's supporting affidavit. In the said supporting affidavit, the Plaintiffs/Applicants depone that the said land was sub-divided and a part thereof sold to the 2nd Defendant/Respondent/ fraudulently. In response, however, the 2nd Defendant/Respondent has deponed that he bought that land with the consent of the Plaintiffs/Applicants and has annexed to his replying affidavit a sale agreement between him and the 1st Defendant/Respondent (annexture MMM 2) and an affidavit signed by the Plaintiffs/Applicants authorizing the 1st Defendant/Respondent to sell that land (**annexture MM 1**). There is also an acknowledgement (**annexture MMM 5**) signed by the Plaintiffs/Applicants witnessing the receipt of Ksh. 150,000/= by the 2nd Defendant/Respondent as part payment of part of L.R No. KIINE/THIGIRICHI/346. What is strange, however, is that all the other subsequent receipts of the balance of the purchase price have not been witnessed by the Plaintiffs/Applicants. Indeed even the sale agreement (**MM 2**) by which the 1st Defendant/Respondent received the down payment of Ksh. 175,000/= is not witnessed by any of the Plaintiffs/Applicants. Given those circumstances, the Plaintiffs/Applicant's claim that the transaction was not above board cannot be easily wished away.

Secondly, the parcel No. KIINE/THIGIRICHI/346 was, as I have stated above, bequeathed not only to the three Plaintiffs/Applicants herein but also to one ELIJAH KAMAU MAINA who is not a party herein. Since the said ELIJAH KAMAU MAINA was also a beneficiary of that land, it is doubtful if any dealings in that land could be legally carried out without involving him. This Court has not been informed about the whereabouts of the said ELIJAH KAMAU MAINA or why he is not a party to these proceedings. Perhaps that will become clear at the time of the trial. What is strange, however, is that the 1st Defendant/Respondent has opted not to respond to all the allegations raised by the Plaintiffs/Applicants. The bottom line, however, is that as a trustee, the 1st Defendant/Respondent had a duty to ensure that the land subject of this suit is employed solely for the beneficiaries who in this case are the Plaintiffs/Applicants herein. Prima facie, that appears not to have been done in this case and on that basis, I have no hesitation in making a finding that the Plaintiffs/Applicants have established that their case has a probability of success.

On the issues as to whether the Applicants might otherwise suffer irreparable injury that cannot otherwise be compensated by an award of damages. It is worth noting that what the Applicants are seeking to protect is part of their inheritance from their late father which must be a matter of great sentimental attachment and not a chattel that they purchased. Further, what the Applicants are alleging is a breach of trust and I would agree with the sentiments adopted by Waki J. (as he then was) in **MOHAMED VS COMMISSIONER OF LAND & 4 OTHERS K.L.R E & L 1 at Page 217** that it is no answer to a prayer for injunction that the Applicant may be compensated in damages as no amount of money can compensate one for the infringement which amounts to a transgression of the law should that turn out to be the case during the trial.

As indicated above, the Plaintiffs/Applicants' claim to the land subject to this suit is through inheritance. It is not, for instance, a right acquired through a commercial purchase. That is bound, therefore, to attract some emotive attachment to the land and this may be a proper case to adopt the words of the Court of Appeal in the case of **MUIRURI VS BANK OF BARODA KENYA LTD (2001) K.L.R 183 at Page 188** where the Court in rejecting counsel's submissions that the land was commercial and therefore its loss compensable in damages stated as follows:-

“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”

Finally, as was held in *FILMS ROVER INTERNATIONAL 1980 3 ALL E.R. 772*, the Court should take the course that appears to carry the lower risk of injustice. In the circumstances of this case, I am persuaded that granting the injunctive reliefs sought will carry the lower risk of injustice.

Ultimately therefore, having considered all the matters herein, I am satisfied that the application is well merited and I grant the orders sought in the Plaintiffs/Applicants' Notice of Motion dated 27th June 2014.

Costs to the Plaintiffs/Applicants.

B.N. OLAO

JUDGE

24TH APRIL, 2015

24/4/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Ben for Applicant – absent

Mr. Abubakar for 2nd Respondent – present

COURT: Ruling delivered this 24th day of April, 2015 in open Court

Mr. Ben for Applicant absent

Mr. Abubakar for 2nd Respondent present.

B.N. OLAO

JUDGE

24TH APRIL, 2015