



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERUGOYA

ELC CASE NO. 263 OF 2014

JOSEPH MUNENE MURIITHI.....1ST PLAINTIFF

GEORGE WACHIRA GATHUNGU.....2ND PLAINTIFF

VERSUS

EDWARD MURIITHI GATHUNGU.....1ST DEFENDANT

JOSEPH NJAGI MUNENE.....2ND DEFENDANT

NANCY KARUANA MURIITHI.....3RD DEFENDANT

RULING

By a plaint filed herein on 25th September 2014, the plaintiffs/applicants sought judgment against the defendants/respondents in the following terms:-

- a. A declaration that the registration of land parcels No. MUTIRA/KIRUNDA/2426 and 2427 in the 2nd and 3rd defendants names was fraudulent and the said registration be revoked*
- b. A declaration that MUTIRA/KIRUNDA/2426 and 2427 belong to the plaintiffs and the same be registered in their names*
- c. Costs of this suit.*

Simultaneously with the filing of that plaint, the plaintiffs/applicants filed a Notice of Motion under **Order 40 Rules 1 and 4, Order 51 Rule 1 of the Civil Procedure Act** seeking the following orders:-

- 1. Spent*
- 2. Spent*
- 3. That this Honourable Court be pleased to issue a temporary injunction restraining the Respondents herein either by themselves, their agents, invitees, workmen and/or servants from evicting, demolishing, alienating, selling and/or interfering with the suit property in any manner whatsoever pending hearing and determination of this suit*

4. The costs of the application be provided for

The said application is supported by the affidavit of the 1st applicant herein in which he has deponed, inter alia, that the 1st defendant/respondent is the father of both applicants and that on 16th January 2014, a family meeting was convened and it was agreed that two parcels of land being MUTIRA/KIRUNDA/262 and MUTIRA/KAGUYU/3043 would be shared between the 1st respondent's two families. That resolution was reduced in writing (annexture JMM 1) and following that agreement, the caution on MUTIRA/KIRUNDA/262 was removed by the applicant's mother to pave way for the sub-division after which the 1st respondent obtained Land Control Board consent and sub-divided it as follows:-

- a. MUTIRA/KIRUNDA/2425 to be registered in the names of applicant's mother and their seven (7) sisters**
- b. MUTIRA/KIRUNDA/2426 to be registered jointly in the 2nd applicant's names, his wife and his minor son**
- c. MUTIRA/KIRUNDA/2427 to be registered in the 1st applicant's names**
- d. MUTIRA/KIRUNDA/2428 to be registered in the 1st respondent's names.**

However the 1st respondent sold parcels No. MUTIRA/KIRUNDA/2426 and 2427 to the 2nd and 3rd defendants without the family's consent and fraudulently yet he had given as a gift the said parcels of land to the two applicants and even obtained the necessary consent. That the applicants and their families live on those parcels of land and they will be rendered homeless if the 2nd and 3rd respondents evict them.

The application is opposed by the 1st defendant/respondent who has filed a replying affidavit in the following terms:-

- That the applicants are his children by his divorced wife Jane Wangechi and the 3rd respondent is his wife whom he married after Jane Wangechi left him and they used to cultivate the parcel No. MUTIRA/KIRUNDA/262 with his wife Nancy but Jane and her children threw them out**
- That MUTIRA/KIRUNDA/262 was later sub-divided and distributed as follows:-**
 - 1. MUTIRA/KURUNDA/2425 to Jane Wangechi**
 - 2. MUTIRA/KIRUNDA/2426 to Nancy Karuana – 3rd respondent**
 - 3. MUTIRA/KIRUNDA/2427 to Joseph Njagi Munene – 2nd respondent**
 - 4. MUTIRA/KIRUNDA/2428 to Edward Muriithi Gathungu – 1st respondent.**
- That MUTIRA/KIRUNDA/2427 was later sub-divided out of which MUTIRA/KIRUNDA/2516 is held by the 2nd applicant.**
- He denied having attended the meeting of 16th January 2014 or having signed the agreement (applicant's annexure JMM 1) adding that he does not even know the office of Maina Kagio Advocates or the witness named therein**
- That he voluntarily sold his land to the 2nd respondent and does not hold land in trust for the applicants and they cannot interfere with how he deals with the same.**

The 2nd and 3rd respondent have also filed replying affidavits in which the 2nd respondent depones that he bought the parcel MUTIRA/KIRUNDA/2427 from the 1st respondent for Ksh. 1.6 million. He later

sub-divided it into several portions. He denied any fraudulent dealings.

On her part, the 3rd respondent deponed that she is wife to the 1st respondent and that he had transferred to her parcel No. MUTIRA/KIRUNDA/2426 and therefore there is no ground for injuncting her.

Submissions have been filed by both Mosi Advocate for the applicants and Thungu Advocate for the respondents.

I have considered the application, the rival affidavits and annexures and the submissions by counsels.

This is an application for the grant of an interlocutory injunction and I therefore have to consider it in light of the principles enunciated in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

- 1. The applicant must show that he has a prima facie case with a probability of success***
- 2. The applicant must show that if the injunction is not granted, he will suffer irreparable loss which cannot otherwise be adequately compensated by an award of damages and***
- 3. In case of doubt, the Court shall determine the application on a balance of convenience.***

And with regard to what a prima facie case is, the answer is found in **MBAO VS FIRST AMERICAN BANK OF KENYA & TWO OTHERS C.A CIVIL APPEAL NO. 39 of 2002 (2003 e K.L.R)** where the Court of Appeal defined it in the following terms:-

“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”.

The applicants herein are sons to the 1st respondent and the 3rd respondent is their step mother. The 2nd respondent is sued as having purchased parcel of land No. MUTIRA/KIRUNDA/2427 from the 1st respondent. That parcel of land was part of the original MUTIRA/KIRUNDA/262 which it is admitted as registered in the names of the 1st respondent. It is also clear from the documents herein that parcel of land No. MUTIRA/KIRUNDA/262 is registered under the now repealed **Registered Land Act**. By virtue of that registration, the person in whose names land is registered is considered to be the absolute and indefeasible owner thereof subject only to any encumbrances, easements, restrictions and conditions contained therein and the same cannot be challenged except on grounds of fraud or mis-representation to which the registered owner is proved to have been a party. However, the registration of a parcel of land in one's names does not relieve him from any duty or obligation to which he is subject as a trustee.

At this point, I cannot make definite findings of fact or law particularly where the rival affidavits are contradictory. The first question that I must answer is whether the applicants have established a prima facie case as set out in the **GIELLA** case (supra). The land parcels subject of this suit are:-

- 1. MUTIRA/KIRUNDA/2426 registered in the names of the 3rd respondent and***
- 2. MUTIRA/KIRUNDA/2427 registered in the names of the 2nd respondent.***

I shall refer to those two parcels of land as the suit land for the purposes of this application. Being the registered proprietors of the suit land, the 2nd and 3rd respondents are entitled to all the rights and privileges that go with that registration save as provided for in law as indicated above. The applicants' case, as can be gleaned from their pleadings, is that by an agreement dated 16th January 2014, the 1st respondent had agreed to sub-divide his land among his family yet he went ahead to transfer the suit land to the 2nd and 3rd respondents as indicated above. What the applicants are really seeking is the

enforcement of that agreement and revocation of that registration. The 1st respondent has denied signing that agreement. In his replying affidavit, he has deponed at paragraph 15 as follows:-

“That the alleged meeting of 10.1.14 is strange to me as I never attended such a meeting and the said minutes of the meeting are strange to me. I never signed such an agreement dated 16.1.14 and I don’t even know the office of Maina Kagio and Co. advocates. Even the witness Susan Nyaga is a stranger to me. There can be no family agreement without informing my other family of Nancy Karuana”

That averment was in response to the supporting affidavit of the 1st applicant JOSEPH MUNENE MURIITHI in which he had deponed at paragraph 4 as follows:-

“That on or about 16th January 2014, we convened as a family of the 1st respondent and agreed on how to share two land parcels numbers MUTIRA/KIRUNDA/262 and MUTIRA/KIRUNDA/3043 between two families of 1st Respondent”

Whether or not the said agreement was signed by the 1st respondent will be a matter to be decided at the hearing of the main suit. What is clear however is that while the applicants want the 1st respondent to sub-divide his land among them, the 1st respondent is obviously not prepared to do so. His argument as per paragraph 16 of his replying affidavit is that he has already sub-divided parcel No. MUTIRA/KIRUNDA/262 into four portions distributed as follows:- MUTIRA/KIRUNDA/2425 to Jane Wangechi, MUTIRA/KIRUNDA/2426 to Nancy Karuana. These two are his former and current wives. Parcel No. MUTIRA/KIRUNDA/2427 he has sold to 2nd respondent and he has retained MUTIRA/KIRUNDA/2428. He adds that the 2nd respondent has his house on MUTIRA/KIRUNDA/2516. He further denies holding the land in trust for any person and that he cannot be told what to do with his property. The legal issue that the applicants have to surmount in this matter is to establish that infact they have a right to demand part of the 1st respondent’s property during his life-time. It is clear from the case of **MURIUKI/MARIGI VS RICHARD MARIGI MURIUKI AND THREE OTHERS CIVIL APPEAL NO. 189 of 1996** that a person cannot be forced to distribute his property among his wives and children during his life time. The Court of Appeal in that case expressed itself as follows:-

“The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to sub-divide and distribute among them. He may not be urged, directed or ordered to do it against his will”.

The above was cited with approval by the Court of Appeal in the recent case of **NAHASHON KIBENGE AND ONOTHER VS LAWRENCE KIBENGE C.A CIVIL APPEAL NO. 222 of 2010 (NYERI)** where the learned Judges addressed that issue in the following terms:-

“The learned Judge further erred in law by issuing an order restraining a registered proprietor from entering and dealing with his own property and enforcing an inchoate right which had not occurred. Whereas a child cannot compel a parent to distribute his estate during his lifetime, we hasten to add that a child who is in occupation of his/her parent’s property that is held in trust has occupational rights that should be protected”.

What the Court of Appeal stated in the above two cases is similar to the circumstances in this case. The applicants are seeking a share of their father’s property during his life time. Part of it has already been transferred to other parties. He is not willing to do so and his argument is that infact he has already given each of his two wives (houses) their shares. The law is that he cannot be compelled to do so. Clearly, the applicants have failed to surmount the first hurdle in the **GIELLA** case (supra) which is to show that they have a prima facie case with a probability of success. It has not even been suggested that the 1st respondent held the original parcel MUTIRA/KIRUNDA/262 in trust for the applicants.

The applicants having failed to establish that they have a prima facie case with a probability of success which is the first test in the **GIELLA** case (supra), they are not entitled to the orders sought and I need not consider the other two tests.

In the circumstances, the applicant's Notice of Motion dated 25th September 2014 is dismissed. Each party to meet their own costs.

B.N. OLAO

JUDGE

21ST APRIL, 2015

21/4/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Ojijo for Mr. Mosi for Plaintiff – present

Ms Kiragu for Ms Thungu for Defendant – present

COURT: Ruling delivered this 21st day of April, 2015 in open Court.

Mr. Ojijo for Mr. Mosi for Plaintiff present

Ms Kiragu for Ms Thungu for Defendant present.

B.N. OLAO

JUDGE

21ST APRIL, 2015