



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.17 OF 2015

LUCIA GESARE ARICHAPLAINTIFF

VERSUS

ARICHA NYANG'AU1STDEFENDANT

BERIA NYABATE ARICHA..... 2NDDEFENDANT

RULING

1. The plaintiff and the 2nd defendant are the wives of the 1st defendant. The plaintiff is the first wife while the 2nd defendant is the second wife. At all material times, the 1st defendant was registered as the proprietor of all that parcel of land known as **LR No. Machoge/Bombaba/666** (hereinafter referred to only as "**Plot No. 666**"). Plot No. 666 was registered in the name of the 1st defendant on first registration on 25th April 1969. The plaintiff has brought this suit against the defendants claiming that Plot No. 666 was purchased by the plaintiff and the 1st defendant in 1964 before the marriage between the 1st defendant and the 2nd defendant in the year 1985 and that at all material times, the 1st defendant held a portion of Plot No. 666 in trust for the plaintiff. The plaintiff has claimed that on 24th October 1996 the plaintiff and the defendants entered into an agreement on how to share Plot No. 666 amongst the members of the 1st defendant's family following which agreement the two houses of the 1st defendant represented by the plaintiff and the 2nd defendant took possession of distinct portions of Plot No. 666. The plaintiff has claimed that in breach of the trust relationship that existed between her and the 1st defendant in relation to Plot No.666 and the terms of the said agreement of 24th October 1996, the defendants fraudulently and through misrepresentation caused Plot No. 666 to be sub-divided into three (3) portions namely; LR Nos. Machoge/Bombaba/3289, 3290 and 3291 (hereinafter referred to only as "Plot Nos. 3289, 3290 and 3291"). The plaintiff has claimed that following the said sub-division, the 1st defendant transferred Plot No. 3289 to the 2nd defendant and retained Plot Nos. 3290 and 3291 in his name. The plaintiff has claimed that the said acts by the defendants are intended to defeat the plaintiff's proprietary interest in Plot No. 666.
2. The plaintiff has sought; a declaration that Plot No. 666 was matrimonial property in which the plaintiff had a right and as such its sub-division was null and void, a permanent injunction to restrain the defendants from entering and/or dealing with Plot Nos. 3289, 3290 and 3291 that resulted from the sub-division of Plot No. 666, an order for the cancellation of the titles for Plot Nos. 3289, 3290 and 3291 so that the land comprised therein can revert to Plot No. 666 and an order for fresh sub-division of Plot No. 666 in accordance with the agreement that was reached by

- the family of the 1st defendant in the year 1996 aforesaid.
3. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 20th January 2015 under certificate of urgency seeking a temporary injunction to restrain the defendants from entering and/or encroaching or doing anything on those portions of land occupied by the plaintiff and her children on the parcel of land formerly known as Plot No. 666 and its resultant titles namely Plot Nos. 3289, 3290 and 3291. The plaintiff also sought an order of inhibition to inhibit any further dealing with Plot No. 666 and its resultant titles mentioned above. The application was brought on the grounds that were set out on the face thereof and on the supporting affidavit of the plaintiff sworn on 20th January 2015. In her affidavit and grounds set out in support of the application, the plaintiff reiterated the contents of the plaint that I have set out above.
 4. The plaintiff contended that the 2nd defendant did not make any contribution towards the acquisition of Plot No. 666 that was acquired solely by the plaintiff and the 1st defendant. The plaintiff contended that following the agreement that was reached in 1996 between the plaintiff, the defendants and their children on how Plot No. 666 was to be shared, the said parcel of land was sub-divided on the ground and the plaintiff and the 2nd defendant together with their respective children took possession of their respective portions of the said plot with fixed boundaries. The plaintiff contended that the 2nd defendant took advantage of the 1st defendant's advanced age and prevailed upon him to sub-divide Plot No. 666 into three (3) portions as aforesaid contrary to the agreement that the 1st defendant's family had reached concerning the sharing of Plot No. 666. The plaintiff contended that following the said sub-division that was carried out by the 1st defendant under the influence of the 2nd defendant aforesaid, the portion of Plot No. 666 that was transferred by the 1st defendant to the 2nd defendant namely, Plot No. 3289, exceeded the acreage that had been agreed upon by the 1st defendant's family and encroached on the portion of Plot No. 666 that had been given to the plaintiff and her children. The plaintiff contended that upon obtaining a title deed for Plot No. 3289, the 2nd defendant proceeded to file a suit against the plaintiff's sons seeking their eviction from Plot No. 3289. The plaintiff has contended that she has a prima facie case against the defendants with a probability of success.
 5. The plaintiff's application was opposed by the defendants through a replying affidavit sworn by the 1st defendant on 16th March 2015. The 1st defendant admitted that the plaintiff and the 2nd defendant are his wives. The 1st defendant averred that he purchased Plot No. 666 alone and that the plaintiff did not make any contribution towards the purchase of the same. The 1st defendant averred that he allocated his entire ancestral land to the plaintiff and that the 2nd defendant did not get any share thereof. He averred further that he allocated Plot No. 666 to the plaintiff and the 2nd defendant. The 1st defendant denied that the 2nd defendant has encroached on the plaintiff's land as claimed and contended that it is the plaintiff who has trespassed on the parcel of land owned by the 2nd defendant. The 1st defendant termed the plaintiff's application as malicious and an abuse of the court process.
 6. When the plaintiff's application came up for hearing on 20th April 2015, Mr. Ogari advocate appeared for the plaintiff while the defendants appeared in person. In his submission in support of the application, Mr. Ogari adopted the contents of the plaintiff's affidavit in support of the application. He reiterated that Plot No. 666 was purchased by the plaintiff and the 1st defendant. He submitted that it would only be fair in the circumstances if the parties continue to occupy those portions of the former Plot No. 666 that they had occupied prior to the sub-division of the said parcel of land. This according to counsel, would stop the 2nd defendant from encroaching on the portion of the said former Plot No. 666 that the plaintiff's children have occupied since the year 1996. In his response to the submission by the plaintiff's advocate, the 1st defendant reiterated that he purchased the suit property alone without any contribution from the plaintiff. The 1st defendant submitted that he was not a party to the alleged agreement that was made in the year 1996 on how Plot No. 666 was to be shared amongst his family members. He denied that Plot No. 3289 has encroached on the parcel of land that is occupied by the plaintiff's children. The 1st defendant submitted that he has shared his land among his two wives equitably. He submitted that

he has allocated to the plaintiff his ancestral land where the plaintiff's matrimonial home is situated together with a portion of the parcel of land formerly known as Plot No. 666 on which she has planted tea. The 2nd defendant on the other hand has been allocated only a portion of the former Plot No. 666. The 1st defendant submitted that this suit is unnecessary. On her part, the 2nd defendant submitted that the plaintiff was allocated a portion of the former Plot No. 666 and that the plaintiff's intention is to interfere with the portion of that parcel that was allocated to her (the 2nd defendant).

7. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavit that was filed by the defendants in opposition to the application. Finally, I have considered the submissions by the plaintiff's advocate and the submissions by the defendants in person. The plaintiff's application is seeking interlocutory reliefs in the nature of injunction and inhibition. The principles for granting interlocutory injunction are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**, an applicant for interlocutory injunction must establish a prima facie case against the respondent with a probability of success and must also demonstrate that unless the order is granted, he will suffer irreparable injury which cannot be compensated in damages. In case the court is in doubt as to the above, the application would be determined on a balance of convenience. For inhibition, section 68 (1) of the Land Registration Act, 2012 gives the court power to make an order of inhibition inhibiting the registration of any dealing with land for a particular time or until the occurrence of a particular event. The purpose of an inhibition is to preserve land for a limited time. The order is not issued as a matter of course. An applicant for the order must show sufficient interest in the land whose title is sought to be inhibited and must also demonstrate that the order is necessary. The onus was upon the plaintiff to satisfy the court that she is deserving of an order of injunction and that sufficient reason exists that would justify the issuance of an order of inhibition.
8. The plaintiff's case is that she contributed to the purchase of Plot No. 666 and as such the 1st defendant held a portion thereof in trust for her. The plaintiff has contended that in view of that trust, the 1st defendant could only sub-divide and share out the said parcel of land as between the plaintiff and the 2nd defendant in accordance with the agreement that the parties had reached on 24th October 1996. The plaintiff has contended that in breach of the said trust and agreement, the defendants fraudulently and through misrepresentation caused Plot No. 666 to be sub-divided into three (3) portions one of which was transferred by the 1st defendant to the 2nd defendant. The plaintiff has contended that the sub-division of Plot No. 666 by the defendants as aforesaid was unlawful and that the portion of Plot No. 666 that was transferred to the 2nd defendant is in excess of what she was entitled to under the family arrangement aforesaid that was entered into in the year 1996.
9. There is no dispute that Plot No. 666 was registered in the name of the 1st defendant on first registration on 25th April 1969. Although the plaintiff has claimed that she contributed to the purchase of the said parcel of land, the plaintiff has not tendered any evidence in proof of her said contribution. The plaintiff has also not explained in what manner she made the alleged contribution. It is not clear whether the contribution was monetary or otherwise. That being the case, the plaintiff's claim that she contributed to the purchase of Plot No. 666 is a mere allegation with no basis. The plaintiff has also grounded her claim against the defendants on a purported agreement that was made on 24th October 1996 which she claims to have set out the manner in which Plot No. 666 was to be shared between the plaintiff and the defendants. I have looked at a copy of the purported agreement that was annexed to the affidavit of the plaintiff as annexure "LGA1". The document was not signed by the plaintiff and the 2nd defendant. There is also no express reference to Plot No. 666 in the document. This document cannot qualify as a valid agreement that can be enforced by the plaintiff against the 2nd defendant. The plaintiff and the 2nd defendant were not parties to the said agreement and as such are not bound by the same. The agreement is said to have been made between the 1st defendant on the one hand and Maosa Nyangau, Orangi Nyangau and Erick Nyangau on the other hand. Maosa Nyangau, Orangi Nyangau and Eric Nyangau are not parties to this suit. The plaintiff seems to have brought this suit on behalf of the said Maosa Nyangau, Orangi Nyangau and Erick Nyangau on whose land the 2nd defendant is said to have encroached. The plaintiff has no business enforcing the purported

- agreement on behalf of the three (3) gentlemen who seems to be all adults going by the suit that was filed against them by the 2nd defendant in the Principal Magistrate's court at Ogembo in Ogembo PMCC No. 171 of 2014, Beria Nyabate Aricha –vs- Nyabwari Aricha and 2 others.
10. Due to the foregoing, I am not satisfied that the plaintiff has established a prima facie case against the defendants based on trust or the alleged agreement. I am also not satisfied that the plaintiff stands to suffer irreparable injury which cannot be compensated in damages unless the injunction sought is granted. The plaintiff has not persuaded me that the portion of land that she occupies in what was formerly Plot No. 666 has been interfered with by the defendants. The plaintiff's concern seems to be that, the 2nd defendant has encroached on land that is occupied by her sons. As I have stated above, the plaintiff cannot litigate on behalf of her adult sons. Injury that may be suffered by the plaintiff's said sons cannot be treated as injury to the plaintiff.
11. The plaintiff having failed to demonstrate that she has a prima facie case with a probability of success against the defendants and that she stands to suffer irreparable harm unless the injunction sought is granted, the plaintiff's application for injunction is not for granting. As I have stated above, the plaintiff has also sought an order of inhibition. The plaintiff has contended that she contributed to the purchase of Plot No. 666 and that the 1st defendant held a portion thereof in trust for her. Although I have stated above that the plaintiff has not placed before me a prima facie evidence that she contributed to the purchase of Plot No. 666, the plaintiff's suit is yet to be heard. The plaintiff still has an opportunity to prove her claim at the trial. The 1st defendant has already transferred one of the sub-divisions of Plot No. 666 namely, Plot No. 3289 to the 2nd defendant. The plaintiff is apprehensive that the 1st defendant may dispose of or alienate the remaining two (2) parcels of land that originated from Plot No. 666 namely, Plot No. 3290 and Plot No. 3291 which are still in his name to third parties with result that her interest therein would be completely defeated. I have noted that Plot No. 666 measured a total of 1.62ha. Assuming that the plaintiff contributed equally to the purchase of Plot No. 666, she would be entitled to 0.81ha. Plot No. 3289 that was transferred by the 1st defendant to the 2nd defendant measures 0.83ha. Plot Nos. 3290 and 3291 that are still registered in the name of the 1st defendant measures a total of 0.72ha.
12. I am of the view that no prejudice would be occasioned to the 1st defendant if an order of inhibition is issued against the titles of Plot No. 3290 and Plot No. 3291 pending the hearing and determination of the plaintiff's claim. I however see no good reason why an order of inhibition should be issued against the title of Plot No. 3289. From the material on record, the 1st defendant had two parcels of land, namely, Plot No. 666 and an ancestral land. The 1st defendant's ancestral land was wholly allocated to the plaintiff and her children. The 2nd defendant did not get any share thereof. Plot No. 666 was allocated to the plaintiff and the 2nd defendant. The 2nd defendant's share of the said parcel of land was transferred to her while the plaintiff's share is still registered in the name of the 1st defendant. Since the 2nd defendant was only allocated Plot No. 3289 from the original Plot No. 666 on which Plot she has her residence and farm, I see no chances of her selling the said parcel of land while this suit is pending. Plot No. 3289 is therefore not in imminent danger of being disposed of so as to justify the issuance of an order of inhibition to be registered against its title.
13. The upshot of the foregoing is that the plaintiff's application succeeds in part. The application is allowed in terms of prayer 4 thereof but limited only to LR Nos. Machoge/Bombaba/3290 and 3291. The cost of the application shall be in the cause.

Delivered, Dated and Signed at Kisii this 29th day of May 2015.

S. OKONG'O

JUDGE

In the presence of:

Mr. Ogari for the plaintiff

The 1st defendant present in person

The 2nd defendant present in person

Bosire Court Assistant

S. OKONG'O

JUDGE