



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 281 OF 2014

GABRIEL WAWERU NG'ANGA 1ST PLAINTIFF

PERIS WAIRIMU NG'ANG'A 2ND PLAINTIFF

VERSUS

SAMUEL GITAU NG'ANG'A 1ST DEFENDANT

BERNARD KINYORO NELSON 2ND DEFENDANT

RULING

This is in respect to the plaintiffs/applicants Notice of Motion dated 15th October 2014 and filed herein on 16th October 2014 seeking the following substantive orders:-

- 1. That this Honourable Court do issue an order restraining the defendants/respondents from in any way sub-dividing, transferring, charging, leasing, conveying or in any way alienating land parcel numbers LOC 6/MUNGUINI/3, LOC 6/GIKARANGU/1692 and LOC 6/GIKARANGU/292 pending the hearing and determination of this suit or any further Court orders.***
- 2. That this Honourable Court be pleased to issue a Court inhibitory order inhibiting all dealings in the above land title numbers and the titles be protected by the Court.***
- 3. The defendants/respondents do bear the costs of this application.***

The application is based on the grounds that the parties herein are children of the late NGANGA NGETHE who died in 1973 and that although the land subject of this suit ought to be shared equally among his children, the defendants/respondents have fraudulently registered themselves as proprietors of the said parcels (herein the suit properties). In their supporting affidavit, the plaintiffs/applicants have deponed that their late father left the suit properties to be shared equally among his six (6) children but the defendants/respondents fraudulently and through mis-representation have registered themselves as proprietors of the same.

In reply, the 2nd defendant/respondent filed a replying affidavit supported by the 1st defendant/respondent in which it was pleaded, inter alia, that the matters being raised herein were finalized in Succession Cause No. 385 of 1979 through the Public Trustee where sub-division of the property was done. The 2nd defendant/respondent further deponed that parcel No. LOC 6/GIKARANGU/1692 was registered in his names and does not form part of the property that was being distributed.

Submissions have been filed by counsels for both parties.

I have considered the application, the rival affidavit and annexures as well as the submissions by counsel.

This being an application for injunction, it has to be considered in light of the principles set out in the case of **GIELLA VS CASSMAN**

BROWN & CO. LTD 1973 E.A 358 which are:-

- 1. That the applicant must show a prima facie case with a probability of success.***
- 2. That the applicant must demonstrate that if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages, and,***
- 3. If in doubt, the Court will determine the application on the balance of convenience.***

What is a prima facie case? In **MRAO LTD VS FIRST AMERICAN BANK OF KENYA & TWO OTHERS 2003 K.L.R 125**, the Court defined such a case as one 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 met the threshold set out in the case of **GIELLA VS CASSMAN BROWN** (supra), to warrant the orders sought? Both in their plaint and their Notice of Motion subject of this

ruling, the plaintiffs/applicants have pleaded that the defendants/respondents who are their siblings were only registered as proprietors of the suit properties in trust for the children of their late father NGANGA NGETHE who died in 1973 and that the suit properties were thereafter fraudulently registered in the sole names of the defendants/respondents. Trust is a matter to be determined on the evidence but a casual glance at the Green card in respect of the property No. LOC 6/MUNGUINI/3 shows that the same was initially in the names of the late NGANGA NGETHE but in 2013, was registered in the names of the defendants/respondents with the following remarks:-

“Heirs and Trustee for other children of the deceased as tenants in common in equal shares”

Though not very legible (hopefully a more legible document will be availed at trial) the certificates of search in respect of land parcel No. LOC 6/GIKARANGU/292 also shows that the same was registered in the names of the defendants/respondents as trustee for the family of

the deceased. It is not in dispute that the plaintiffs/applicants are part of the family of the deceased NGANGA NGETHE. That parcel of land has now been registered in the names of the defendants/respondents and a title deed issued to them under the new **Land Registration Act of 2012**. It is clear from **Section 25 of the Land Registration Act** that the registration of a person as proprietor of land does not relieve him from any duty or obligation to which the person is subject as a trustee. The documents produced herein indicate that the defendants/respondents are infact registered as proprietors of at least two of the suit properties in trust for their siblings. The other documents, as indicated earlier, are not very legible but this Court is minded to decide, as I hereby do, that infact that is the position with regard to the third property i.e. LOC 6/GIKARANGU/1692 although a final determination will be made at the trial. It must be realized that at this stage, what the plaintiffs/applicants are required to do is establish a prima facie case which, in my view, they have done. Indeed, even the annexure

JKN1(a) and (b) which are the 2nd defendant/respondent’s own documents clearly show that the parcels No. LOC 6/GIKARANGU/292 and No. LOC 6/MUNGUINI/3 were transferred to the two defendants/respondents ***“as heirs and as trustee for the other children of the deceased as tenants in common in equal shares”***. In the circumstances, the 2nd defendant/respondent cannot be correct when he depones in his replying affidavit that the properties were transferred to their names by the Public Trustee.

That transfer was only to them as trustees.

From the above, it is clear that the plaintiffs/applicants have established a prima facie case to warrant the orders sought in their Notice of Motion dated 15th October 2014.

On the issue of damages being an adequate remedy, it has been held that damages cannot atone for a clear violation of the law and so a party in breach cannot seek refuge in the mere fact that he is able to pay damages to a party whose rights have been infringed. The dispute herein touches on the inheritance rights of the plaintiffs/applicants as is clear from the pleadings. And finally, if this application were to be determined on the balance of convenience, the interests of justice will best be served by granting the orders sought in the Notice of Motion.

Ultimately therefore, and upon considering all the evidence placed before me, I grant the orders sought in the plaintiffs/applicants Notice of Motion dated 15th October 2014.

Costs in the cause.

B.N. OLAO

JUDGE

13TH NOVEMBER, 2015

13/11/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Mbugua for Plaintiffs/Applicants– present

Mr. Gitau for Defendants/Respondents – absent

COURT: Ruling dated, delivered and signed this 13th day of November, 2015 in open Court.

B.N. OLAO

JUDGE

13TH NOVEMBER, 2015