



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
ENVIRONMENT AND LAND COURT
CIVIL SUIT NO.11 OF 2012

P N K

A W K Suing on his behalf and on behalf of

A WPLAINTIFF/APPLICANT

VERSUS

G N K.....1ST DEFENDANT/RESPONDENT

S M..2ND DEFENDANT/RESPONDENT

RULING

1. This ruling relates to an application by notice of motion dated 11th October, 2012 in which the applicant seeks the following orders:

(i) That this application be certified as urgent and its service be dispensed with in the first instance.

(ii) That an interim order of injunction do issue restraining the respondents either by themselves, their servants, agents and/or relatives or anybody claiming in or under their names from in any way whatsoever entering, remaining or interfering with parcels of land Nos. **[particulars withheld] and [particulars withheld]** (hereinafter referred to as the suit properties) until this application is heard and determined.

(iii) That a permanent order of injunction do issue restraining the respondents either by themselves, their servants, agents and/or relatives or anybody claiming in or under their names from in any way whatsoever entering, remaining or interfering with parcels of land Nos. **[particulars withheld] and [particulars withheld]** measuring 9 acres pending the hearing and determination of this suit.

(iv) That costs be borne by the respondents.

2. The application was based on the grounds on the face thereof and the supporting and further affidavits of P N K sworn on 11th October, 2012 and 20th December, 2012.

3. The applicant is opposed. GNK the 1st respondent herein filed an undated replying affidavit on 23rd November, 2012.

4. The applicants are represented by the firm of Njeri Njagua and Company Advocates while the firm of Cherutich and Company Advocates represents the respondents.

5. On 14th November, 2013 the court directed that the application be disposed of by way of written submissions. 6. The applicant filed their written submissions on 18th December, 2013 rehearsing what was stated in the pleadings and affidavits of the applicant which I have considered together with the other pleadings but the respondent did not file any written submissions despite being given an opportunity to do so.

7. From the affidavits, there is common agreement between the parties that the suit land is registered in the name of AWK who is the mother to both the applicant and the respondents.

6. The point of departure begins with the mental health of their mother. The applicant avers that their mother is currently suffering from old age and a mental condition described as Schizophrenia and senile dementia and has exhibited a medical report. He states that before developing the aforesaid condition their mother donated a power of attorney to him registered on 29th July, 2010 giving him the right to run her affairs which he has been doing ever since. At some point his mother and him discovered that that one of her sons GNM in collusion with another son SMK had stolen the two original title deed to the suit properties, caused subdivision on the suit parcels without their mother's consent or the other family members and disposed the same to unsuspecting purchasers who are now in occupation of the same. The applicant has since registered a caution against the said titles and reported the matter at Njoro Police station. That notwithstanding, the respondents are now forcing their illiterate and ailing Mother to thumbprint blank transfer and consent forms for their use, actions which will see the entire suit property sold thus disinheriting the other five sisters and two brothers.

He urges the court to grant the orders sought and also order that the original titles to the suit land be deposited in court for safe keeping.

7. The respondents on the other hand dispute this, stating that their mother is in perfect mental health despite her old age. The 1st respondent avers that in 2009, their mother decided to subdivide her properties among her children. She called a meeting and in the presence of two elders and the Chief Njoro Location she made her intentions known. She gave each son 2 acres each, out of **Njoro/Ngata Block 4/95 (Rumwe)** and left one acre for herself. She also gave the 1st respondent an extra 1/2 acre in appreciation of the financial role he played when their mother had brought a suit Nakuru HCC NO. 51 of 1992 against one Peris Muthoni Kanagi. The daughters were to get 4 acres of the Kitale land. This was put in writing and all present signed except the applicant who said he was entitled to more. The said agreement is exhibited. A Survey was thereafter carried out as per their mothers instructions, the land was subdivided and each brother allocated their respective portion which they all occupy including the applicant. On 18th June, 2012 their Mother visited the Chief M Location Trans-Nzoia District to confirm the contents in the signed agreement. The Chief M location Trans-Nzoia District Joram Kimani, then wrote to the Chief Njoro Location requesting that assistance be given in subdividing the suit property as per their Mother's wishes which letter is exhibited. The respondents challenge the power of attorney which they say their mother never made reference to and allege that the applicant must have taken advantage of their mother to sign the power of attorney in his favour.

8. In response, the applicant denies that in the meeting held at Njoro, their Mother thumb printed any agreement but rather her decision was that both the Njoro and Kitale lands were to be divided equally among all her children and that the respondents do return the two titles they were holding to give way for subdivision of the land among all the children. This was opposed by the respondents who claimed that under Kikuyu customary Law daughters did not inherit their parents property. It is after this that their mother invited the applicant to visit with her Kiarie and Company Advocates in Kitale and the Power of Attorney was prepared. He denied demanding a larger portion of the suit property or their Mother visiting

the Chief at M in Trans Nzoia District.

9. The principles within which courts give temporary or interlocutory injunctions were settled in the *locus classicus* case of **Giella v Cassman Brown & Co. Ltd.** (1973) EA 358, namely that they have a *prima facie* case with a probability of success, that unless an injunction is granted, they might otherwise suffer injury which cannot adequately be compensated by an award of damages; and should the court be in doubt, it will determine the matter on a balance of convenience.

10. So has the applicant established a prima facie case with a probability of success?

11. As pointed out earlier, all the parties who are brothers agree that the suit land belongs and is registered in their Mother's name AWK. The applicant has exhibited a report from Kitale District Hospital showing that their Mother suffers from old age and a mental condition described as Schizophrenia and senile dementia and a registered power of Attorney drawn and certified by P.N Kiarie Advocate enabling him to deal with their mother's properties. Although the respondents have disputed this stating that their mother is of sound mind and able to conduct her affairs, they have not provided any medical records to support their allegation and generally state that they believe the applicant took advantage of their mother to have her sign the power of Attorney. They however do not deny its existence. The authenticity of the agreement and letters exhibited by the respondents has been challenged by the applicant and these together with all the other documents exhibited by both parties will need to be produced as evidence and witnesses called before the trial court.

12. There is no doubt that the land in dispute is family land. A parent has the right to share out their property as they so wish. However, if the mental capacity of the registered owner is in question and issues of fraud are alleged, then the court must first aim at protecting the land by preserving it until these issues are addressed during trial when the real intentions of the registered owner will be established. Both the applicant and respondents has a beneficial interest in this family land as do the other siblings not parties in this suit. In my view the applicant has established a prima facie case.

13. Secondly the applicant must show that unless the order of injunction is granted, they will suffer irreparable loss. In this dispute, the applicant has alleged that the respondents are involved in selling and subdividing the suit properties to strangers. I am convinced that if the respondents are not stopped, then the family land will continue to be interfered with and the applicant and his other siblings will suffer irreparable loss not adequately compensated by an award of damages.

14. Thirdly, if the court is in doubt, the balance of convenience will be applied. Since I am not in doubt, I do not need to consider this principle.

15. The applicant in prayer 3 has sought a permanent injunction. This I cannot give at an interlocutory stage as such an order will finalize the suit. Instead, Pursuant to the powers conferred on the court under Order 40(1) of the Civil Procedure Rules, 2010 I will preserve the suit property and order as follows:

1. An order of temporary injunction is granted and the respondents are restrained from subdividing, leasing, selling and or in any other way interfering with parcels of land Nos. **[particulars withheld]** and **[particulars withheld]** pending the hearing and determination of this suit

2. The original titles of **[particulars withheld]** and **[particulars withheld]** to be deposited in court until this suit is heard and determined.

3. Costs will be in the cause.

Dated, signed and delivered this 17th day of January 2014.

L WAITHAKA

JUDGE

PRESENT

Ms Wanjiku for the Applicant /plaintiff

N/A for Defendant/Respondent

Emmanuel Maelo : Court Assistant

L N WAITHAKA

JUDGE