



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 23 OF 2014

DAVID WAMUNYA KINGORI

MARGARET WANJIRU KINGORI PLAINTIFFS

VERSUS

WAMBUI NDERITU

MARY NYAGUTHI KINGORI

GRACE MUKAMI KIAMA

JANE WANGUI KAIRU

ELINA MUTHONI GACHERU DEFENDANTS

R U L I N G

1. The two applicants as well as the five respondents are all children of the late John Mwangi Kingori and Ruth Nyokabi Kingori. Before John Mwangi Kingori died in 1996, he had transferred LR NO Bungoma/Kiminini/753 to his wife the late Ruth Nyokabi Kingori.

2. The late Ruth Nyokabi Kingori died in January, 2013. The applicants discovered that their late mother had secretly started the process of subdividing her land amongst the respondents to the exclusion of the applicants. The process of subdivision was completed after Ruth Nyokabi had died and titles were issued in the names of the defendants in June 2013. It is upon discovery of this that the applicants filed notice of motion dated 10/4/2014 in which they are seeking an order of injunction restraining the respondents, their agents and or servants from selling disposing, charging or otherwise interfering with titles for parcel Nos Bungoma/Kiminini/2122, 2123, 2124, 2125 and 2126 which are all subdivisions of LR. NO Bungoma/Kiminini/753.

3. The applicants contend that LR NO Bungoma/Kiminini/753 was transferred by their late father to their late mother as a gift and that the land was therefore family land which should have been shared amongst all the children of their mother. The applicants are contending that the respondents are holding the subdivided parcels in trust of all the children of Ruth Nyokabi Kingori and that if the injunction is not granted, the respondents might sell their portions thus rendering the suit nugatory.

4. The application is opposed by the respondents through a replying affidavit sworn by the 5th respondent who has authority to do so on behalf of the first, third and fourth respondents. The respondents contend that the land in issue was sub-divided by the late Ruth Nyokabi Kingori during her lifetime and that the first applicant did not benefit from it as he had already been given 10 acres at Maili Inya in Nyahururu by

their parents. The respondents also contend that the second applicant did not benefit from the suit land as she had expressly excluded herself from the land on grounds that she was a Ugandan citizen and was not claiming any share of the suit land.

5. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. It is important to note that the second respondent has filed a statement of admission to the plaintiffs claim. She is conceding that indeed the suit land before subdividing was family land and that all the children of their parents should benefit from the same.

6. The purpose of an injunction is to preserve the subject matter and the principles for grant of injunction are well settled. First an applicant must demonstrate that he has a prima facie case with probability of success. Secondly an injunction will not issue unless otherwise the applicant will suffer injury which will not be compensated by way of damages. Thirdly, if the court is in doubt it will decide the application on a balance of convenience.

7. In the present case, it is not contended that all the parties herein are children of the late Ruth Nyokabi Kingori who was proprietor of LR. NO. Bungoma/Kiminini.753 which had been transferred to her by her husband as a gift. It therefore follows that the applicants should have been considered in the sharing out of the family land. The respondents are not denying that the land in issue was family land. The question which then arises is whether the applicants have demonstrated that they have a prima facie case with probability of success. In the case of *Mrao -Vs- First American Bank of Kenya Limited & 2 others* (2003) KLR 125, a prima facie case was described 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.”

8. In the present application, the applicants have demonstrated that their right to inheritance of family land has been infringed by the respondents who have had family land registered in their names to their exclusion. The respondents must then be called upon to explain how they had themselves registered as owners of family to the exclusion of the applicants. I find that in the circumstances, the applicants have demonstrated that they have a prima facie case with a probability of success. I do not have to consider the other principles in the circumstances of this case.

9. The respondents are already in possession of the suit properties. What the applicants are interested in is preservation of the same until the hearing and determination of this suit. I therefore find that the applicants' application is well founded. The injunction which was given on 22/5/2014 is hereby confirmed. The same shall be in force until the hearing and determination of this suit.

It is so ordered.

Dated, signed and delivered at Kitale on this 22nd day of July, 2014.

E. OBAGA

JUDGE

In the presence of Mr Kiarie for plaintiffs. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

22/7/2014