



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL NO. 203 OF 2014

FLORENCE NJOKI NDUATI..... PLAINTIFF

VERSUS

MOSES MUKURIA MUCHENE..... DEFENDANT

RULING

The plaintiff by a plaint dated 24th February 2014 and filed in court on 25/2/2014 claims that she is the widow and that she has letters of administration to the estate of **John Nduati Kariuki** granted in **HC Succession cause NO. 2787 of 2006** and that she brings the suit on her own behalf and on behalf of the estate of the deceased and avers that the defendant and one **John Mburu Kago**, deceased as well as **John Nduati Kariuki** also deceased were all registered as tenants in common of all that parcel of land known as **Dagoretti/Waithaka/32** measuring 5.7 acres. The plaintiff avers that the parcel of land was held by the tenants in the following shares:-

- a. **Moses Mukuria Muchene - 11/95 share**
- b. **John Mburu Kago (deceased) – 11/95 share**
- c. **John Nduati Kariuki – 73/95 share**

The plaintiff simultaneously with the plaint filed a Notice of Motion the subject of this ruling seeking the following substantive order:-

That the Honourable court be pleased to issue an interlocutory injunction directed against the defendant restraining the defendant either by himself or through any of his agents or servants from selling, transferring, charging, offering for sale, cultivating, working or in any other way dealing with **L.R.NO. Dagoretti/Waithaka/32** and/or the resultant subdivisions namely **L.R.NO. Dagoretti/Waithaka/1527**, **L.R. NO. Dagoretti/Waithaka/1528**, **L.R. NO. Dagoretti/Waithaka/1529**, **L.R.NO. Dagoretti/Waithaka/1530** and **Dagoretti/Waithaka/1531**, pending the hearing and determination of this suit.

The plaintiff in support of the application states that:-

- a. That the subdivision and the transfer of the said parcels of land has been done fraudulently,
- b. That the said subdivision and transfer has been done by the defendant after the deaths of the plaintiff's late husband and the death of the other proprietors.
- c. That the subdivision and transfer were not done in accordance with the respective acreages as agreed amongst all the proprietors before the deaths of the others.
- d. That the Defendant is in the process of further subdividing the remaining parcels and may sell

them to other people.

The plaintiff in her supporting affidavit sworn on 24/2/2014 repeats her grounds in support of the application set out on the body of the application. She avers that the Defendant, after the death of her husband, unlawfully subdivided the parcel of land title number **Dagoretti/Waithaka/32** where the Defendant, her husband and another person were registered as tenants in common as per a copy of title annexed and marked “**FNN1**”. She further avers that the defendant sold some of it and registered the remainder fraudulently in an attempt to defeat her claim as per annexed copy of search for title **Dagoretti/Waithaka/1531** and map marked “**FNN2**”. The plaintiff contends that the subdivisions and the new registration are fraudulent and should be cancelled.

The Defendant did not file any replying affidavit but filed a defence on 3rd April 2014 and grounds of opposition to the plaintiff’s application dated 23rd March 2014 but filed in court on 2nd April 2014. The Defendant in the grounds of opposition raises the following grounds:-

1. The application is frivolous, vexatious misconceived and an abuse of the due process of the court.
2. The Applicant/Plaintiff has no locus standi.
3. The applicant has no prima facie case against the defendant at all.
4. The Applicant has come to the court of equity with dirty hands delay, laches and acquiesces with no such notice at all.
5. The application is defective and bad in law.
6. The Applicant has not met all the conditions to warrant the issuance of orders sought.

The Defendant in his defence denied the plaintiff has the locus to bring this suit and further that the Defendant the said **John Nduati Kariuki** (alleged husband of the plaintiff) and **John Mburu Kago** were registered as tenants in common in respect of land parcel **Dagoretti/Waithaka/32**. The Defendant further denied having committed any fraudulent acts as alleged by the plaintiff and specifically denied having caused the subdivision of land parcel **Dagoretti/waithaka/32** into plot **NOS. 1527, 1528, 1529, 1530 and 1531** and/or making any sale or transfers as alleged. In essence the Defendant denies being involved in any of the acts complained of by the plaintiff.

Under paragraph 3 of the filed defence the Defendant pleads thus:-

3. The Defendant denies to have any knowledge of the plaintiff being the widow and legal representative of the estate of John Nduati Kariuki as claimed to have been in H.C Succession Cause NO. 2787 f 2006 and puts the plaintiff into strict proof.

The parties filed written submissions as per the court’s directions. The plaintiff filed her submissions on 22nd May 2014 while the Defendant filed his submissions on 9th June 2014. Having perused the pleadings, the affidavit sworn in support of the plaintiff’s application the annexures thereto, the Defendant’s grounds of opposition and the parties filed submissions the issues that stand out for the court to determine are firstly, whether the plaintiff has the locus to bring this suit and secondly, whether she has demonstrated a prima facie case against the Defendant with any probability of success to warrant her to a grant of a temporary injunction.

The plaintiff states she is bringing this suit as the widow and the personal legal representative of **John Nduati Kariuki (deceased)** who held a legal interest in the property described as **Dagoretti/Waithaka/32**. The plaintiff claims to hold grant of letters of administration to the estate of **John Nduati Kariuki** issued in Nairobi HC Succession Cause **NO.2782 of 2006**. Curiously the plaintiff has not annexed any document to her application and the suit to show that she was the wife of **John Nduati Kariuki** or that the said **John Nduati Kariuki** is deceased or that she has been issued with grant of letters of administration to her deceased husband’s estate. The current status of **Nairobi HC Succession Cause NO. 2787 of 2006** has not been disclosed to the court. For instance is the succession Cause concluded, and, if any letters of administration to the estate were issued have they been confirmed and have the assets of the estate been distributed?. These are pertinent issues. If the issue of the plaintiff’s locus standi had not been raised by the Defendant, the court may perhaps have accepted the

averment that the plaintiff is the widow of **John Nduati Kariuki (deceased)** and that she holds the grant of letters of administration to entitle her to bring this suit but in the face of the Defendants contestations another perspective is brought into the matter which is, that the plaintiff may infact not be the personal legal representative that she claims to be or there could be issues attaching to the grants of letters of administration she claims to hold to the deceased estate.

The Defendant having raised the issue in his defence and in the grounds filed in opposition, the plaintiff should have seized the opportunity to file a supplementary affidavit to clear the air as to her standing. She did not do so and the court is left in the situation where it can only hold that the plaintiff has not established she has the capacity to bring this suit as the personal legal representative of **John Nduati Kariuki** and I so hold.

Even if I had found the plaintiff had the capacity to bring the suit I doubt I would have found that she has demonstrated she has a prima facie case against the Defendant to entitle her to an order of a temporary injunction. The plaintiff asserts that land parcel **Dagoretti/Waithaka/32** has been fraudulently subdivided and portions sold out and further she states that land parcels **Dagoretti/Waithaka/1527, 1528, 1529, 1530** and 1531 are the resultant subdivisions of land parcel **Dagoretti/Waithaka 32**. Questions linger as which of the plots have been sold and transferred and to who? Further where is the evidence that these subplots resulted from the subdivision of land parcel **Dagoretti/Waithaka/32**. Ofcourse certificates of official search would have shown the status of the subtitles if the subdivisions have been registered and would have shown who the current registered owners are if they have been sold and transferred as alleged.

The registered owners, if any, would be persons who would stand to be directly affected by any orders that the court may give in this matter considering the application for injunction is directed against all the titles. Further the suit seeks the cancellation of these titles and that would require that all the registered owners be enjoined to the suit.

As to whether the stated subtitles resulted from the sub-division of Title **Dagoretti/Waithaka/32** the plaintiff would have been able to establish that if she applied for and obtained an abstract of title in respect of the mother title and/or if she applied and obtained a copy of the registered Mutation of title in respect of Title NO. **Dagoretti/Waithaka/32** which would have clearly shown who applied for the mutation, the survey or who carried out the subdivision and the particulars of the resultant subdivisions.

Thus it is my view that the plaintiff cannot demonstrate and/or show that she has a prima facie case against the defendant to entitle her to an order of interlocutory injunction. I therefore hold even if the plaintiff had the locus she cannot satisfy the conditions for grant of a temporary injunction as set out in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** and I accordingly order the plaintiff's Notice of Motion application dated 24th February 2014 dismissed with costs to the Defendant.

Orders accordingly.

Ruling dated, signed and delivered this 25TH day of **September 2014**.

J.M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant

