



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 246 OF 2014

BETHSHEBA BOGITI OMAO..... 1ST PLAINTIFF

DR. THOMAS OMBUYA OMAO GETABU...2ND PLAINTIFF

EVANS LUMUMBA OMAO..... 3RD PLAINTIFF

BEAUTER MORARA OMAO..... 4TH PLAINTIFF

VERSUS

JULIA KEMUNTO1ST DEFENDANT

GLADSON MOGIRE NYAMBANE..... 2ND DEFENDANT

NYAMIRA LAND REGISTRAR..... 3RD DEFENDANT

RULING

1. What I have before me is a typical family dispute over the division of ancestral or family land. The 2nd, 3rd and 4th plaintiffs and 1st defendant are the children of the 1st plaintiff. While the 2nd, 3rd and 4th plaintiffs are male, the 1st defendant is a female. At all material times, the 1st plaintiff was registered as the proprietor of all that parcel of land then known as **LR No. Mwangori Settlement Scheme/2** which measured approximately 27 hectares (about 65.6 acres). In the year 2011 or thereabout, the 1st plaintiff and her children who included the 2nd, 3rd and 4th plaintiffs and the 1st defendant agreed to sub-divide the said parcel of land, LR No. Mwangori Settlement Scheme/2 (hereinafter referred to only as "Plot No. 2") into eight (8) portions of various sizes. The purpose of this subdivision was to enable each of the 1st plaintiff's children to have their own parcels of land from the said larger parcel that was hitherto held in the name of the 1st plaintiff alone. Plot No. 2 was subdivided and the same gave rise to LR Nos. Mwangori Settlement Scheme/ 795, 796, 797, 798, 799, 800, 801 and 802. LR No. Mwangori Settlement Scheme/796 to 801 measured 3.6ha. each while LR No. Mwangori Settlement Scheme/795 measured 4.35ha. and LR No. Mwangori Settlement Scheme/802 measured 0.36ha. It is not clear from the record as to who got what. It has been claimed however that the 1st plaintiff and her children, the 2nd to 4th plaintiffs and the 1st defendant included, had agreed that the 1st plaintiff's six (6) sons would each be allocated nine (9) acres of the original plot. This I believe explains why LR Nos. Mwangori Settlement Scheme/796 to 801 measures 3.6ha each which translates to 9 acres each. It has been claimed further that it was agreed that the 1st defendant being a girl would be allocated one (1) acre of the original plot for agricultural purposes only.

2. It is not clear from the record whether the 1st plaintiff has transferred to the 2nd to 4th plaintiffs LR Nos. Mwangori Settlement Scheme/796 to 801 which seems to have been reserved for them. However, upon the completion of the sub division of Plot No. 2 as aforesaid, the 1st plaintiff allegedly caused LR No. Mwangori Settlement Scheme/795 to be further sub-divided into two (2) portions namely, LR Nos. Mwangori Settlement Scheme/949 and 950 of which the 1st plaintiff is said to have transferred to the 1st defendant LR No. Mwangori Settlement Scheme/949 measuring 0.81ha. on 23rd January 2014 . The 1st defendant in turn sold and transferred LR No. Mwangori Settlement Scheme/949 to the 2nd defendant at a consideration of kshs. 3,000,000.00 on 11th February 2014.
3. The plaintiffs have now brought this suit seeking; the revocation of the titles for LR Nos. Mwangori Settlement Scheme/949 and 950 and the restoration of the original title LR No. Mwangori Settlement Scheme/795, a permanent injunction to restrain the defendants from trespassing on, encroaching onto and/or otherwise interfering with LR No. Mwangori Settlement Scheme/795 or any title emanating there from and an order for the eviction of the defendants from LR No. Mwangori Settlement Scheme/795 or any title emanating there from. In their plaint dated 30th June 2014, the plaintiffs averred that the 1st plaintiff was at all material times the registered owner of all that parcel of land known as LR No. Mwangori Settlement Scheme/795 (hereinafter referred to only as “Plot No. 795”) while the 2nd to 4th plaintiffs were the beneficial owners and/or dependants (sic) of the same. The plaintiffs have averred that the defendants fraudulently proceeded to subdivide Plot No. 795 and caused LR Nos. Mwangori Settlement Scheme/949 (“Plot No. 949”) and LR No. Mwangori Settlement Scheme/950 (“Plot No. 950) to be registered in their names without the participation and/consent of the plaintiffs. The plaintiffs have averred that the defendants have unlawfully invaded Plot No. 949 and 950 and illegally put up structures thereon and are in the process of transferring the same to third parties.
4. Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 30th June 2014 seeking; a temporary injunction to restrain the defendants from trespassing, disposing off, encroaching onto and/or otherwise interfering with Plot No. 795 or any title emanating there from pending the hearing and determination of this suit. The plaintiffs’ application was brought on the grounds that the 1st and 2nd defendants had acquired titles to Plot No. 949 and 950 fraudulently and had invaded the same, put up structures thereon and were in the process of transferring the same to third parties. The plaintiffs contended that the 1st and 2nd defendants have no right to be on the said parcels of land. The plaintiffs’ application was opposed by the 1st and 2nd defendants and interestingly, by the 1st plaintiff. The 1st and 2nd defendants swore separate replying affidavits both dated 8th July 2014 in opposition to the application.
5. The 1st plaintiff filed in court on 8th July 2014, a notice to act in person, a notice of withdrawal of suit as against the defendants and an affidavit disowning this suit. In her affidavit, the 1st plaintiff, stated that she was at all material times the registered proprietor of Plot No. 795 and that she caused same to be sub-divided into two and transferred a portion thereof namely, Plot No. 949 to the 1st defendant. The 1st defendant subsequently sold and transferred the said Plot to the 2nd defendant lawfully and procedurally. The 1st plaintiff stated that the 1st defendant is her daughter and that the 1st defendant was given Plot No. 949 which the 1st plaintiff transferred to her name. The 1st defendant thereafter with the consent of the 1st plaintiff sold Plot No. 949 to the 2nd defendant enable her purchase land wherever she wished to stay. The 1st plaintiff stated that she was a witness to the agreement between the 1st defendant and the 2nd defendant for the sale of Plot No. 949. The 1st plaintiff stated that she was misled by the 4th plaintiff into filing this suit. On her part, the 1st defendant contended that by the time the 1st plaintiff subdivided Plot No. 795 and transferred a portion thereof to the 1st defendant, the 2nd to 4th plaintiffs had each been allocated their share of the ancestral land (Mwangori Settlement Scheme/2). The 1st defendant contended that prior to the filing of this suit, the 2nd to 4th plaintiffs had forged the 1st plaintiff’s signature and purported to institute a suit against the defendants before this court in Kisii ELC Case No. 215 of 2014 which suit was withdrawn by the 1st plaintiff before this suit was again filed by the plaintiffs. The 1st defendant contended that Plot No. 949 was transferred to her as of right as her

- share of ancestral land.
6. On his part, the 2nd defendant contended that he is the registered proprietor of Plot No. 949 having purchased the same from the 1st defendant. The 2nd defendant contended that when he purchased Plot No. 949 the same was registered in the name of the 1st defendant.
 7. When the plaintiff's application came up for hearing on 28th July 2014, Mr. Begi, advocate appeared for the plaintiffs (except the 1st plaintiff) while Mr. Nyambati appeared for the 1st and 2nd defendants. In his submission, Mr. Begi reiterated the contents of the 2nd plaintiff's affidavit in support of the application. Mr. Begi submitted that the sub-division of Plot No. 795 and the transfer of a portion thereof to the 2nd defendant by the 1st defendant was done without the consent of the Land Control Board and that the land registrar had raised the issue with the 1st defendant. Counsel cited a number of authorities to the effect that pursuant to section 6 of the Land Control Act, Cap 302 Laws of Kenya, a controlled transaction is null and void in the absence of consent from the Land Control Board. Mr. Begi submitted that Plot No. 795 was an agricultural land and as such the sub-division and transfer of a portion thereof to the 1st defendant and subsequently to the 2nd defendant required the consent of the Land Control Board.
 8. In his submission in reply, Mr. Nyambati also reiterated the contents of the replying affidavits sworn by the 1st and 2nd defendants in opposition to the plaintiffs' application. Mr. Nyambati submitted that the plaintiffs' suit is time barred under the Public Authorities Limitation Act, Cap. 39 Laws of Kenya which provides that a suit against the Government for tort must be brought within 6 months of the accrual of the cause of action. Counsel submitted further that the 2nd to 4th plaintiffs have no locus standi to bring this suit. Mr. Nyambati submitted that Plot No. 795 was sub-divided by the 1st plaintiff who was the registered owner thereof and who caused a portion thereof namely, Plot No. 949 to be transferred to the 1st defendant who is her daughter.
 9. Counsel submitted that the 2nd to 4th plaintiffs have no business challenging the transaction between the 1st plaintiff and the 1st defendant that did not concern them. Counsel submitted that the 1st defendant acquired title to Plot No. 949 lawfully before she sold and transferred the same to the 2nd defendant who is an innocent purchaser for value. Counsel submitted further that the prayers sought by the plaintiffs are improperly framed and as such cannot be granted by the court. Counsel submitted that Plot No. 795 in respect of which injunction is sought is nonexistent and as such no order can issue in respect thereof. Counsel submitted further that the plaintiffs placed no material before the court to prove that no consent was issued in respect of the transactions complained of. Counsel submitted finally that the plaintiffs have not met the conditions for granting a temporary injunction.
 10. I have considered the plaintiffs' application and the affidavits filed by the 1st and 2nd defendants and the 1st plaintiff in opposition thereto. I have also considered the submissions that were made before me by the advocates for the parties and the case law and statutes that were cited by them in support of their respective positions. In the case of **Mrao Ltd. -vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** it was held that the principles for granting interlocutory injunction are that:-
 - a. The applicant must show a prima facie case with a probability of success.
 - b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages;
 - c. If the court is in doubt it will decide the application on a balance of convenience.

11. In the same case, the court stated that;

“A prima facie case in a civil application includes but is not confined to “genuine and arguable case”. It is a case which on the material presented to 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.”

The onus was upon the plaintiffs to satisfy the above conditions for granting interlocutory injunction. As

I have stated above, the 1st plaintiff withdraw her claim against the defendants and filed an affidavit disowning this suit and opposing the application before me. It is not in dispute that the 1st plaintiff was at all material times the registered proprietor of Plot No. 795. This is the parcel of land, which upon sub-division gave rise to Plot No. 949 and 950. Whereas the 2nd to 4th plaintiffs have contended that Plot No. 795 was sub-divided fraudulently and a portion thereof namely, Plot No. 749 transferred to the 1st defendant who in turn sold and transferred the same to the 2nd defendant, the 1st defendant has contended that Plot No. 749 was voluntarily and lawfully transferred to her by the 1st plaintiff who is her mother as her share of the family or ancestral land and that she sold and transferred the same to the 2nd defendant lawfully with the consent of the 1st plaintiff in a willing seller, willing buyer transaction. The 1st plaintiff has in her affidavit confirmed the 1st defendant's contentions aforesaid and disowned the 2nd to 4th plaintiffs.

12. It is not clear to me as to what interest the 2nd to 4th plaintiff's have on Plot No. 795 or the sub-divisions thereof. In my view, the property was registered in the name of the 1st plaintiff and she was within her right in law to transfer the same to whoever she wished. The 2nd to 4th plaintiffs have not contended that by sub-dividing Plot No. 795 and transferring a portion thereof namely, Plot No. 949 to the 1st defendant they were being deprived of their share of the family or ancestral land. As I have observed hereinabove, the 9 acres each that was reserved for the 2nd to 4th plaintiff's out of the original parcel, namely Plot No. 2 are intact. The 2nd to 4th plaintiffs have not persuaded me that they have any right over Plot No. 795 and the sub-divisions thereof which has been infringed by the defendants. Plot No. 795 as I have stated above belonged to the 1st plaintiff and if any wrong was committed in relation thereto, it was for the 1st plaintiff to complain. Now that the 1st plaintiff has not complained and has in fact confirmed that the dealing with the said property was lawful, I cannot see the merit of the case before me.

13. Having reached the conclusion that the 2nd to 4th plaintiffs have not established sufficient interest in the suit property which can entitle them to maintain this suit, it is not necessary for me to consider the merit of the application as that finding is sufficient to dispose of the present application. I would say however that whether or not consents were obtained from the Land Control Board before the sub-division of Plot No. 795 and the transfer of a portion thereof to the 1st defendant and subsequently to the 2nd defendant is a matter which can only be determined at the trial. The same applies to the issue as to whether the sub-division of the said property and the transfer of a portion thereof was carried out fraudulently. I have no material before me from which I can conclude that no consent of the Land Control Board was obtained or that any act of fraud was committed. I don't think that the letter of 21st March 2014 that was addressed to the 1st defendant by the District Land Registrar, Nyamira County which called upon the 1st defendant to furnish him with a copy of the consent letter is sufficient proof that no such consent was obtained.

14. I am fully in agreement with the findings in the cases that were cited by the 2nd to 4th plaintiff's advocate. I am however unable to apply those findings to this case because I am not convinced that no consent was obtained with regard to the transactions complained of herein. For the foregoing reasons, I am not satisfied that the plaintiffs have established a prima facie case with a probability of success against the defendants. The plaintiffs having failed to satisfy the main condition for granting interlocutory injunction, I am not obliged to consider the other conditions. I would say nevertheless that the 2nd to 4th plaintiffs have not demonstrated that they would suffer irreparable injury if the orders sought are not granted. They have not established any interest in the disputed property. I am unable in the circumstances to see the loss that would be occasioned to them if the orders sought are not granted.

15. In conclusion, it is my finding that the plaintiffs have failed to satisfy the conditions for granting interlocutory injunction. I therefore find no merit in the application dated 30th June 2014. The same is accordingly dismissed with costs to the 1st and 2nd defendants.

Delivered, signed and dated at KISII this 14th of November, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Begi for the 1st, 2nd, 3rd and 4th plaintiffs

N/A for the 1st, 2nd and 3rd defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE