



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 90 of 2011

JOHN GATERI KIMANI 1ST APPLICANT/PLAINTIFF

PERIS MUTUNDU KINGI 2ND APPLICANT/PLAINTIFF

VERSUS

NDIRITU THATHUA *Alias* KAYIYI IHUTHIA RESPONDENT/DEFENDANT

R U L I N G

The genesis of this matter can be discerned from the plaint dated at Nyeri on the 11th of July 2011 and filed on the same date. The 1st Plaintiff and Defendant are brothers whilst the 2nd Plaintiff is the widow of the Plaintiff's brother Kingi Ihuthia. The genealogy of this family is that Kingi Ihuthia (deceased), John Gateri Kimani and Ndiritu Thathua alias Kayiyi Ihuthia were all sons of Ihuthia Kayiyi (deceased).

It is alleged that Ihuthia Kayiyi owned fragment of land within Kiria Sublocation of Kirimukuyu Location. It is further claimed by the plaintiffs that during the period of consolidation, demarcation and registration Mr. Ihuthia Kayiyi caused these parcels of land to be consolidated and registered as KIRIMUKUYU/KIRIA/334 in the name of the defendant and that the defendant holds the same in trust for the plaintiffs in equal shares. The parcel measures 2.4 acres. The plaintiffs have alleged that during his lifetime Ihuthia Kayiyi informally shared out this land into three (3) equal parts on which they have settled as they were shown as having three distinct boundaries. Their father died and the issue of inheritance was placed before the clan elders who ruled that the land was to be shared as per the plans of Ihuthia Kayiyi. However, the defendant

refused to complete the distribution exercise when he declined to take the plans to the land office. According to the plaintiffs, the defendant has acknowledged the existence of the trust but has refused to terminate the same by distributing the property.

On his part the defendant alleges that he was jailed during emergency and when he came out he was registered as Kayiyi Ihuthia as per the Identity Card then. When he came out of detention his younger grand father one Kamutonyi Ndigithe took him around to five fragments of land left behind for him by his grandfather Ndigirigi Ndigithe. Mr. Kayiyi Ihuthia the defendant herein states that the same younger grandfather told him that he had shown his father Ihuthia Kayiyi his fragments of land left for him by Ndigirigi Ndigithe.

The defendant alleges that he took his fragments namely
(1) Karumba (2) Nyagithu (3) Kiriko (4) Ititu (5) Konyuto to the demarcation committee . All these fragments were consolidated in one to create KIRIMUKUYU/KIRIA/334 comprising approximately 2.9

Acres. He was registered as sole proprietor and not trustee. All this happened in the year 1958. In the year 1960 he settled in the land with his family.

In 1962, his father returned from Nanyuki where he had settled with one of his sons one Kingi Ihuthia and requested the defendant, who agreed, to give his younger brother a site to build until he settled him elsewhere. The defendant does not explain what happened after 1962 but states that on the 13th of May 2010, 48 years thereafter that the Land Registrar discovered that there was false evidence by one John Gateri Kimani that the proprietor of the land KIRIMUKUYU/KIRIA/334 Ndiritu Thathua alias Kayiyi Ihuthia was dead. This information is discerned from the defence of the defendant.

The application before this court for determination is the one filed on the 23rd July 2012 under certificate of urgency dated the same date accompanied by a Notice of Motion supported by the affidavit of the 1st plaintiff Mr. John Gateri Kimani. The gist of the supporting affidavit is that the defendant who is their elder brother was registered in the parcel of land KIRIMUKUYU/KIRIA/334 in trust for his two brothers that is the 1st and 2nd plaintiffs. The land belonged to their father who caused it to be registered in the name of the defendant. However, he put the plaintiffs on the land and marked their respective portions which are existing to date.

In the year 2009, the parties met the clan elders with the aim of sharing out the land so that each could get a title and all agreed to subdivide the land into three equal portions. Documents to that effect are annexed. They went to the land surveyor who divided the land into three equal portions for the parties. However, the defendant declined to proceed with the process prompting the plaintiffs to file a succession cause which they later withdrew due to a technicality and filed this suit. While this suit was pending, the defendant revisited the withdrawn succession cause and lifted the restriction registered on the title and threatened the plaintiffs with eviction and sale of the suit land.

The replying affidavit of Ndiritu Thathua in response to the application is sworn on the 5th of November 2012 and filed on the 6th November 2012. The gist of this affidavit is that the land was registered in his name on the 1st of July 1959 as the first registered owner under Section 143 of the RLA Cap 300 as it then was. He states that he is not registered as trustee of anybody or his father's family. He states that the parcel of land No. KIRIMUKUYU/KIRIA/334 was created from fragments of land and registered in his name. He was helped in the demarcation by his step grandfather known as Kamutonyi Ndigithe. He states that his father had his own fragments of land which he sold before demarcation and consolidation to one Kothi Njoroge now deceased. The defendant claims that he accommodated his father on his land on humanitarian grounds. The 1st plaintiff returned from Rift Valley where he was residing and joined his father who was still living on the land. He further states that his father kept on telling the first plaintiff to vacate the land but the latter refused. The dispute was once referred to the Assistant Chief who resolved the dispute in the following terms namely:-

1. The land is legally registered under Kayiyi Ihuthia alias Ndiritu Thathua ID No. 3493104 as a trustee on behalf of one Phylis Mutundu Kingi ID NO. 3187474 AND John Gateri Kimani ID NO. 0725325.
2. The inhibition on the said piece of land to be removed to allow the legal subdivisions of the said parcel of land in three equal portions among the following
 - (1) Phylis Mutundu Kingi Id 3187474
 - (2) Ndiritu Thathua Id No. 3493104
 - (3) John Gateri Kimani Id No. 0762325

The dispute was resolved by the Assistant Chief on 4th September, 2009 in the presence of 20 people including Assistant chief the defendant and plaintiffs.

The application dated 23rd July 2012 seeks a temporary injunction to restrain the Respondent, his agents, servants or any person claiming interest under him from subdividing, transferring, selling, charging or dealing in any manner with parcel of land reference number Kirimukuyu/Kiria/334 until the

suit is heard and determined. Secondly, the applicant seeks an order inhibiting the respondent, his agents, servants or any person claiming interest under him from registering any dealing in the parcel of land herein until the suit is heard and determined and that

the Land Registrar to be directed to register the inhibition against the title. There is no dispute that the parcel of land in issue is registered in the name of the defendant. The defendant is the brother to the 1st plaintiff. The 2nd and 3rd plaintiffs are sons of the defendant's brother Kingi Ihuthia (deceased). The father to the 1st plaintiff, Mr. Ihuthia Kayiyi, who is the grandfather to the 2nd and 3rd plaintiffs is alleged to have owned fragments of land within Kiria Sub- location of Kirimukuyu Location. It is further alleged that during the period of demarcation these parcels of land were consolidated and registered as Kirimukuyu/Kiria/334 in the name of the defendant which he holds in trust for the plaintiffs in equal shares.

The plaint filed on the 11th July 2011 was accompanied by the the statements of Peris Mutundu Kingi (deceased), John Gateri Kimani, Mr. Karungari Muchiri, Mr. John Ndemi and Mr. Meshullam Wachira Wanyiri. A casual look at the statements discloses serious issues that should go for trial. The defence filed by the defendant on the 1st of August 2011 is not accompanied by witness statements as required by law. Moreover none has been filed even before the hearing of the application herein. Both the supporting affidavit and the replying affidavit raise issues that intimate that the applicant has a prima facie case with a probability of success. The issues are as follows:-

- (1) That whether it is true that the father to the 1st plaintiff and defendant, who is the grandfather to the 2nd and 3rd plaintiff resided on the disputed parcel of land.
- (2) That whether the 1st plaintiff, defendant and the father of the 2nd and 3rd plaintiffs resided on the land as a family.
- (3) That whether it is true that the defendant was bequeathed the parcel of land in dispute by his grandfather.
- (4) That whether after the death of their father the 1st plaintiff, defendant and the father of the 2nd and 3rd plaintiffs continued living on the parcel of land.
- (5) That whether the 1st plaintiff, defendant and the father of the 2nd and 3rd plaintiffs were each settled on different portions of the suit land.

The deponents of both affidavits annexed documents from the office of the President, Provincial Administration and Internal Security, Nyeri District indicating that the parcel of land was within the jurisdiction of the Assistant Chief Thaiti Sub-location in the Nyeri District. The dispute had been referred to the Assistant Chief and resolved in the presence of a number of 20 people that the land is legally registered under Kayiyi Ihuthia alias Ndiritu Thathua as a Trustee on behalf of one Peris Mutundu Kingi and John Gateri Kimani.

Without prejudging the suit at this level of proceedings my task is to determine whether the plaintiffs have established a prima facie case with a probability of success and, whether if a temporary injunction is not issued the applicants will suffer loss that is incapable of compensation with an award of damages. If in doubt with the two matters I should decide on a balance of convenience. These principles are well know as the **Giella vs-Cassman** Brown Case Principles.

Mr. Kibuga Wachira for the applicants submitted that the Respondent/Defendant was registered as a Trustee of the parcel of land on his behalf and on behalf of the plaintiffs. The land belongs to the 1st plaintiff, defendant and the father of the 2nd and 3rd plaintiffs. Each had been given a place to settle.

The defendant, Mr. Ndiritu was in person. He submitted that he was given the land by his grandfather. He was given 4 pieces. A school was developed on part of the land leaving 2.4 acres. He was told by his step grandfather that the land was his but not his father's. He prayed that the court orders that

the plaintiffs stay on the land but they should not plough.

I have considered the Notice of motion, the supporting affidavit, and the annexes in both affidavits and do find that the fact that the applicants have been residing in the parcel of land as admitted by the defendant gives the suit all the chances of success. The damage likely to be suffered by the plaintiffs/applicants is irreparable especially if the defendant sells the parcel of land. This is due to the fact that the plaintiffs will be left homeless. One of the issues to be determined is the existing family relationship between the parties and the claim that the suit property was therefore family land, coupled with the fact that the land was registered in the Defendant's name which makes it sufficient for plaintiffs to raise the inference of trust.

The other issue to be determined is whether by registration of the defendant as the absolute proprietor of the suit land precludes a declaration of a trust in respect of the registered land even if it is first registration.

The upshot of the above is that the plaintiffs have established a prima facie case with a likelihood of success. The court further finds that if a temporary injunction is not issued the plaintiffs are likely to suffer irreparable loss that cannot be compensated in monetary terms and therefore the application is allowed with costs.

Dated at Nyeri this 25th day of January 2013

**A. OMBWAYO
JUDGE**