



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 21 of 2011**

**ESTHER RUGURU NJOROGE & ANOTHER .....PLAINTIFF**

**VERSUS**

**JAMES WAKIBI MUNGAI.....DEFENDANT**

**RULING**

The defendant has filed a Notice of Motion dated 11<sup>th</sup> July 2011 2012 under Order 2 Rule 15 (1) (b) of the Civil Procedure Rules, seeking the following orders;

- a) That the plaintiff's pleadings be struck out and the suit be dismissed on the ground same is scandalous, frivolous and vexatious.
- b) That the 1st plaintiff be ordered to withdraw cautions registered against suit lands title numbers Kiambaa/Ruaka/3257, Kiambaa/Ruaka/3258 and Kiambaa/Ruaka/3259 with 15 days of the date of the order and in default the Registrar of this Court be authorized to execute the applications to withdraw on behalf of the 1st plaintiff.
- c) That the costs of this suit and application be provided for.

The application is based on the following grounds;

- i. That the plaintiff's suit lacks merit and does not show in clear terms that the plaintiff have any legal right to file a suit against the defendant.
- ii. That the plaintiffs by filing the suit on the basis of special grant clearly shows that the interest of 1st defendant is to pursue her own interest in the suit land in order to achieve what she is claiming in HCC No. 353 of 1993 (OS) which she filed against the deceased.
- iii. That the title to the suit plots vested unto the defendant under section 27 of the Registered Land Act Cap 300 and there is no indication in the plaint that the provision of sections 28 or section 143 of the Registered Land Act Cap 300 apply in this case.
- iv. That there is no basis for lodging cautions against the suit lands because there was no trust in existence which the deceased breached and if he did the transfer to the defendant is lawful.

The defendant /applicant James Wakibi Mungai swore an affidavit dated 19/1/2012. It is quite detailed and sets out his case. I have extensively quoted from the said affidavit. He avers as follows; that the plaintiff's suit has no legal basis in that according to paragraph 4 of the plaint the plaintiffs claim that the Land parcel number Kiambaa/Ruaka/139 was acquired and developed through the joint effort of the 1st

plaintiff and her late husband Njoroge Njabi hereinafter referred to as the deceased, but the assertion is contradicted by the certified copy of the register a photocopy JWM -1 relating to the said land parcel number Kiambaa/Ruaka/139 which title was closed. That the first registration was on the 28/11/1956 in the name of the late Ndiguitha Njabi who was the deceased's brother as an absolute owner. That the said certified copy of the register clearly shows that the deceased acquired the said piece of land after the death of his said brother through succession process on 16th April, 1970 and not through purchase and therefore the allegation in the plaint that the land Kiambaa/Ruaka/139 was acquired by the 1st plaintiff and the deceased through joint effort does not have any basis and accordingly the issue of the land being held in trust by the deceased in trust for the plaintiffs is far from being a reality. That the plaintiffs' allegation that land parcel number Kiambaa/Ruaka/139 was existing as at the 20th February 1998 when the High Court Nairobi in its Civil Suit No. 353 of 1998 (OS) issued a restraining order, JWM-2 is not true because according to the certified copies of the registers hereto annexed and marked JWM-3 and JWM-4 respectively land title for LR No. Kiambaa/Ruaka/139 was closed on subdivision of same into above two new parcels numbers namely Kiambaa/Ruaka/1338, and Kiambaa/Ruaka/1338 and Kiambaa/Ruaka/1339 parcel number Kiambaa/Ruaka/139 was not in existence and therefore the restraining order was of no significance as same did not bind the said parcel numbers Kiambaa/Ruaka/1338 and Kiambaa/Ruaka/1339 which were combined on 29th August, 2008 into Land Reference number Kiambaa/Ruaka/3250. That after the combination the new land parcel number Kiambaa/Ruaka/3250 was divided into five parcel numbers Kiambaa/Ruaka 3255, Kiambaa/Ruaka/3256, Kiambaa/Ruaka/3257, Kiambaa/Ruaka/3258, Kiambaa/Ruaka/3259 and it was on the 11th November, 2008 when three out of the five portion namely Kiambaa/Ruaka/3257, Kiambaa/Ruaka/3258, Kiambaa/Ruaka/3259 were transferred by the deceased to him openly and as such cautions registered in favor of the 1st plaintiff in the three above titles as entry No. 4 on each title as per the bundle of annexure Marked JWM-5 are wrongful and don't serve any useful purpose. That it is clear from the above account that the deceased and him did not act fraudulently in any manner and he merely got the said properties transferred to him when the deceased title was free from encumbrances and at a time when to his knowledge never held the land in trust for anybody. That the plaint does not disclose the fact constituting trust or when the trust was created and by whom the trust was created and therefore the plaintiff's suit is frivolous and vexatious and same should be struck out with costs to him and all cautions lodged by the 1st plaintiff or both plaintiffs be ordered removed by the Land Registrar Kiambu.

The 1<sup>st</sup> plaintiff filed a replying affidavit dated 15/2/2012. She avers as follows; that the land parcel number Kiambaa/Ruaka/139 was indeed acquired by the joint efforts of the late Njoroge Njabi and herself as his wife and further that the said property formed their matrimonial home in which she and their children resided in and occupied and on the following grounds:-

(a) That the late Njoroge Njabi indeed did inherit the said property known as Kiambaa/Ruaka/139 with the understanding that the said property was to be held in trust for his mother, Wanjiku (also known as Gacheke) Njabi (deceased) and his brothers Njiri Njabi and Karanja Njabi and that the said property would be subdivided between the said beneficiaries, she annexed ERN-1 is a copy of an agreement verifying the same and Court documents for the succession cause of the late Ndiguitha Njabi (deceased).

(b) That in the early 1970's the said Njoroge Njabi (deceased) whilst married to her and with her support purchased from his brothers Njiri Njabi and Karanja Njabi their portions which he was holding in trust and which portions were belonging to them thereby owning almost the whole property known as Kiambaa/Ruaka/139.

(c) That further it is in accordance with their cultural law that land in which the matrimonial home was built and established was land belonging to the family and not solely to the registered proprietor of land noting that his property was inherited save the portion that were purchased.

(d) That they shall show through the witness evidence at the main hearing of the suit that the subdivisions of the said property known as Kiambaa/Ruaka/139 carried out by the late Njoroge Njabi were done secretly and aimed at defrauding and defeating the rights of his wife Esther and her children over the said property.

(e) That they shall also demonstrate that the transfers of the parcels of land made to the defendant were done secretly with the knowledge of the defendant as a conspiracy and for the purposes of defrauding her and her children as her late husband was trying to escape or avoid the lodging of cautions on the said parcels of land.

(f) That the property known as Kiambaa/Ruaka/139 which has now been subdivided into several portions namely title number Kiambaa/Ruaka/3257, Title Number Kiambaa/Ruaka/3258 and title number Kiambaa/Ruaka/3259 is wherein the family graveside lies.

That when she filed High Court Civil Case No. 353 of 1998 she was not aware that her late husband had gone ahead of her to subdivide the said parcel of land known as Kiambaa/Ruaka/139 as he did so secretly and her advocates on record then whose expertise and advise she was relying on, did not advise her on the position of the property at the time of filing the suit nor the manner in which to circumvent the subdivision of the land. That they even obtained a Court order by consent of parties issued on the 23rd February 1998 restraining her husband from selling the suit property herein namely Kiambaa/Ruaka/139, clearly showing that her late husband allowed the orders by consent without disclosing to the Court that he had already subdivided the said property rendering the Court Order to have been overtaken by events see ERN-3 is a copy of the said orders verifying the same. That nonetheless, the subdivisions of the land were done secretly with the main aim of preventing her from claiming her rightful share as a wife over the property which formed their matrimonial property and inheritance for their children. That the transfers by her husband to the defendant were not done openly but were done secretly wherein both her husband and the defendant willingly and knowingly in collusion conspired to defraud and disinherit her and her children of their rights in the suit properties herein known as Title Number Kiambaa/Ruaka/3257, Title Number Kiambaa/Ruaka/3258 and Title number Kiambaa/Ruaka 3259. That the actions of the defendant were not fraudulent as he knew and willingly conspired with her late husband to deprive her of her rights over their matrimonial home and to deprive her children of their rightful inheritance which actions offend the provisions of the constitution, their cultural laws and basic morality and decency. That further the actions of the defendant and of her said deceased husband Njoroge Njabi were cleverly calculated to defeat any future legal action brought before the Court by her or her children as the said transfers were not indicated that the said property was to be held in trust yet the conduct of her late husband in his various attempts to sell the said three parcels of land as the owner even after the transfers were already effected to the defendant is proof that the defendant was just a proxy holding the said parcels in trust for her late husband. That she therefore prays that this Court will dismiss the defendant's application with costs and that in the interests of justice and equity she and her son should be given an opportunity to have this suit heard and determined.

In a further affidavit of James Wakibi Mungai dated the 7<sup>th</sup> March 2012, he depones as follows; That from the documents on record and more particularly annexure JWM-1 it is clear that the land was inherited by the late Njoroge Njabi deceased from his brother and both the 1st plaintiff and the late Njoroge Njabi deceased did not make any financial contributions and therefore the issue of trust does not arise because the 1st plaintiff as a wife of deceased Njoroge Njabi was not entitled to inherit the deceased late brother's property and at the time of the order of the District Magistrate in the said land succession case No. 497 of 1969 at Kikuyu had made no order constituting any trust and therefore the 1st plaintiff's claim that the late Njoroge Njabi held the land in trust for her is misplaced and the plaintiff's suit is incompetent because the grant which she used when filing the suit is wrong and does not cater for the interest of the deceased in the suit. That on the 3rd February 1998 when order of the Court was issued by High Court in Civil suit no.353 of 1998 (OS) which order ERN-3 the land parcel number Kiambaa/Ruaka/139 had ceased to be in existence as the same was subdivided into two parcel numbers Kiambaa/Ruaka/1338 and Kiambaa/Ruaka/1339 and title was closed on 16th June 1997 as per annexure marked JMM-1 and as such the order in question is irrelevant. That he denies that the late Njoroge Njabi bought what was his own from people whose origin of their ownership in LR Kiambaa/Ruaka/1339 is not shown since they were not parties to the succession proceedings in Kikuyu Land Succession and the District Magistrate did not deal with matters of trust. It can therefore be safely concluded that the annexures purporting to show that the late Njoroge Njabi bought the land have no evidential value to support the plaintiff's allegation that the late Njoroge Njabi held the land parcel number Kiambaa/Ruaka/139 in trust for the plaintiff and when the deceased voluntarily transferred the suit plots

unto him he did it as an absolute proprietor with the result that he also got an indefeasible title which the plaintiffs have no capacity to challenge. That when the subdivision and transfer of the 3 subdivision was effected in his favour he got titles as absolute proprietor.

Parties filed written submissions, authorities were cited. I have read them together with the affidavits and the annexures. In the applicant's submissions he relies on **HCCC No. 318 of 2000 Mpaka Road Development Vs. Abdul Gafur Kana T/A Anil Kapuri Pan Coffee House** where the Court defines frivolous and vexatious pleading as one that which lack seriousness and a vexatious pleading as one which annoy or tends to annoy, and that a pleading would annoy or tend to annoy if it is not serious. He also relied on the case of **Murri Vs. Murri and another (1999) IEA 212 where Lakha J.A** stated that **the summary remedy of striking out pleading out is applicable whenever it can be shown that an action cannot succeed**. He submitted that there is nothing to show that the late Njoroge Njabi was registered proprietor of L.R. Number Kiambaa/Ruaka/139 and was also registered as a trustee for the 1<sup>st</sup> plaintiff and that JWM-1 a certified copy of the register entry No. 1 shows the land previously belonged to Njoroge Njabi's brother Ndiguitha Njabi (II) and that the late Njoroge Njabi was registered as the heir of the said land parcel free from any trust and for that reason the late Njoroge Njabi got an absolute title not capable of being defeated both under section 27 and 28 of the said Registered Land Act Cap 300 (now repealed). That the pleadings are frivolous and vexatious because the plaintiffs are making false allegations that L.R No. Kiambaa/Ruaka/139 was acquired by the late Njoroge Njabi and that he held the land in trust. He also submits that the late Njoroge Njabi had a right to subdivide the land and sell it. That under section 85 of Cap 300 (now repealed) the plaintiff's case is not likely to succeed because the suit premises was closed on subdivision into 3 parcels No. 1338 and 1339 and thereafter parcel No. 1338 and 1339 were combined to form Kiambaa/Ruaka 3250. That the defendant's right to the suit was acquired legally and in accordance of the law before the coming into effect of the provisions of constitution on 8/7/2010 and Land Registration Act 2011 which came into effect on 2/5/2012 are rights not subject to the provisions of the constitution and/or an Registration of Title Act 2012 in view of the Transition Provisions contained in section 107 and 1 of the said Land Registration Act 2012 and therefore the pleadings are frivolous and vexatious and the suit is without a possibility of success. Lastly that the grant which the plaintiffs obtained could not have been used to file the present suit against the defendant as he was not a party to the alleged breach of trust by the late Njoroge Njabi (deceased) which trust in any case has never existed as far as the facts and law in the present case apply because section 126 (3) of the Registered Land Act Cap 300.

The plaintiffs in their submissions state that their case is not frivolous they cited the case of Kenya Power & Lighting Company Ltd – vs. **American Life Insurance Company (K) Ltd (2005) eKLR and HCCC No. 318 of 2000 Mpaka Road Development Co.Ltd Vs. Abdul Gafur Kana t/a Anil Kapuri Pan Coffee House** where Justice Ringera (as he then was) held as follows;

**“I would hold that a matter would only be scandalous if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned. Such would be the case where an imputation is made of a character of a party when the character is not in issue. And I would say a pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. a pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matter which were irrelevant to the action or defence. In short, it is my discernment that a scandalous and/or frivolous pleading is ipso fact vexatious”.**

They submitted further that striking of pleadings should be done sparingly and in the clearest of circumstances, see **Murri Vs. Murri & another (1999) 1 E.A 212 at p. 216 J.A Lakha pronouncement**. To develop this point further the plaintiff relied on Court of Appeal decision in the case of **DT. Dobie & Company (Kenya) Ltd Vs. Muchina (1982) KLR1** and urged this Court in the interest of Justice to allow the suit to proceed in trial. The respondents argued that the Court need to look into the genesis of the suit property and manner in which it was obtained by the deceased Njoroge Njabi and how he transferred it to the defendant/applicant. Counsel submitted at length on the facts to be considered that touch on fraud, malice and illegality and further submitted that the requisite Land Board consent was never procured thus invalidating the entire transfers to the defendant. Counsel submitted on the issue of the relationship

between the parties and relied on the case of *Wilfred Kina Mwangi Vs. Harrison Mwangi Gacheche*, where Justice Musinga ruled that ***despite the fact that a person is registered as a sole proprietor as the absolute owner, he cannot purport to disinherit his family by selling such property to a third party unless their consent is sought especially where such property is where the matrimonial home is situate.*** The applicant also relied on article 45 (2) of the Constitution which provides that parties to a marriage have equal rights at the time of the marriage during and at its dissolution and submitted further that the 1<sup>st</sup> plaintiff therefore has a right over the property which right includes consenting or declining to consent to any transaction to any of the property and as such any transaction made without her consent would be construed as null and void ab initio. Lastly the plaintiffs submitted on the provisions of sections 28 and 162 (1) of the Land Registration Act 2012 and Cap 300 on the issue of absolute proprietorship.

Having considered all the above the task I have is to make a finding on whether the plaintiff's pleadings the plaint should be struck off and suit dismissed as sought in the application. In the case of *D.T Dobie and Company Ltd vs. Muchina (1982) KLR 1*, the Court of appeal ruled that,

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of a case before it.”***

I have perused the plaint and in my view it raises issues at paragraphs 6 and 7. At paragraph the plaintiff particularizes what they allege as the fraudulent and illegal acts that were done during the transfer of the said property so as to deny the 1<sup>st</sup> plaintiff her right full share of the matrimonial property if at all it was so. At paragraph 8 the plaintiff gives the status of the defendant and seeks to have the titles cancelled. Although the applicant has pointed out the relevant law dealing with the suit premises and various annextures that proves absolute proprietorship bearing in mind the relationship between the parties and that the issues between them could prolong as long as they are alive and even to their extended family, in the interest of justice I find that striking out the plaint and dismissing the suit will not be a just decision. The submissions made by the parties do also bring out the issues between the parties the need to be adjudicated upon at a full hearing. In my view the plaint is not scandalous, frivolous and vexatious. I decline to grant prayer 2 as in doing so I would be granting orders that could prejudice the hearing of this suit. I therefore decline to grant prayers 1 and 2 of the application dated 19<sup>th</sup> January 2012. The application is dismissed. Parties to fix this matter for full hearing so that the issues between them are dealt with once and for all. Cost shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 19<sup>th</sup> day of April 2013.

**R. OUGO  
JUDGE**

.....Defendant/Applicant

.....1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents

.....Court Clerk