



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Environmental & Land Case 765 of 2012

DR. PETER NGANGA NJENGA..... PLAINTIFF

-VERSUS-

LOISE WANJIRU NGANGA.....DEFENDANT

RULING

I have before me the plaintiff's Notice of Motion application dated 22<sup>nd</sup> October, 2012 and filed in court on 30<sup>th</sup> October, 2012 that substantively seeks the following order the court having already given an interim order pending the hearing of the application:-

***“That a temporary injunction do issue restraining the Defendant by herself and/or by her agents, servants and/or any persons acting under her authority from entering, trespassing or interfering in any manner with operations or opening of Dr. Njenga foundation of sustainable HIV/AIDS project self help Group- orphanage situated in L.R No. Gatamaiyu/Kamuchege/809 until the determination of this suit”.***

The application is supported on the following grounds set out on the face of the application:-

(a)That L.R No. Gatamaiyu/Kamuchege/809 is legally owned by the applicant.

(b)That the respondent through herself or her agents has threatened workers and other well wishers from assisting or operating the orphanage and therefore putting into jeopardy the entire project.

(c)That the respondent having been estranged from the applicant has no right whatsoever to interfere with a project aimed at assisting orphans.

(d)That the orphanage only covers quarter of an acre and other land is still available to the applicant's family.

The application is further supported by the plaintiffs supporting affidavit sworn on 22<sup>nd</sup> October, 2012 and a further affidavit sworn on 16<sup>th</sup> November, 2012.

The defendant for her part opposes the application for injunction and relies on the replying affidavit filed on 8<sup>th</sup> November, 2012 and a further affidavit filed on 23<sup>rd</sup> November, 2012.

Both the affidavits by the plaintiff and the defendants dwell extensively on matters that touch and relate to their matrimonial issues which do not relate directly to the issue of the disputed suit property. I will

largely not concern myself with the matrimonial issues that do not concern the suit property in determining this application as I believe this cannot be the fora in which to make findings as regards those issues.

Briefly however the facts that are not in issue can be summarised as follows:-

- (i) That the plaintiff and the defendant were married under Kikuyu customary Law and subsequently converted this marriage to a statutory marriage which meant the marriage could only be dissolved through the process of the court.
- (ii) The plaintiff is the registered proprietor of Title No. Gatamaiyu/Kamuchege/809.
- (iii) The plaintiff and defendant are now divorced pursuant to divorce proceedings initiated by the plaintiff in Canada in which the defendant did not participate as the defendant had returned to Kenya after failing to obtain resident status in Canada.
- (iv) The suit property has four (4) cautions registered against the title including one by the respondent registered on 30<sup>th</sup> June 2030 claiming a beneficial interest.
- (v) That the plaintiff is one of the founders and sponsors of Dr. Njenga Foundation of sustainable HIV Aids Project Self Help Group registered as a community based organisation (CBO) under the Ministry of Gender Children and Social Development.

The plaintiff contends that as the registered owner of the suit property he was free and at liberty to make a donation to the Self Help Group Orphanage Project. The plaintiff states that he indeed made a donation of a quarter acre portion and a building to house the orphanage and contends that the defendant has no basis to challenge his gesture since at any rate he has allowed the defendant to utilise the remainder of the land and even pick/pluck the tea leaves from the tea bushes on the balance of the land. The plaintiff states the orphanage has been started and that at the institution of the suit there were already 16 children at the home.

The Defendant for her part contends that the suit property forms party of matrimonial property and that she actually contributed towards the construction of the house that the orphans are now using as orphanage. The defendant contends that she has a beneficially interest in the suit property and that her consent/approval was not sought and/or obtained by the plaintiff before making the donation for use of the quarter acre of land and house as a orphanage.

The parties have filed written submissions and on the part of the plaintiff it is urged that the plaintiff has established a prima facie case with a probability of success and irreparable loss/damage would accrue if the injunction sought is not granted. The plaintiff further argues the balance of convenience tilts in favour of the plaintiff.

On the part of the defendant it is submitted that the plaintiff has not demonstrated that he has a prima facie case with a probability of success. The Defendant submits that she has a beneficial interest on the suit property and that she specifically registered the caution to protect and preserve her beneficial interest. The defendant in her submission contends that the attempted disposal of a part of the suit property by way of a donation is a dealing in breach of the defendant's interest protected by her registered caution.

The defendant has contended that there is no evidence or proof of any donation having been made and even if there was proof of the donation the same is incapable of taking effect as there is no compliance with Section 89 of the Registered Land Act (repealed) which was replaced by Section 42 of the Land Registration Act of 2012 which provides as follows:-

***“No part of the Land comprised in a register shall be transferred unless the proprietor has first subdivided the land and duly registered each new sub division”.***

In case the plaintiff also intended to give a donation and/or gift to the Foundation of the quarter acre portion this would equally have required the sanction of the local Land Control Board pursuant to the provisions of Section 6 of the Land Control Act Cap 302 of the Laws of Kenya as the suit property is agricultural land and the transaction would be a controlled transaction being a disposition of an interest in land.

The defendant has finally submitted that having been married to the plaintiff and the property having been acquired during the subsistence of the marriage and she having partially been engaged in the construction of the house the plaintiff has converted to an orphanage she has spousal interest within the meaning and provisions of Section 28(a) of the Land Registration Act which acknowledges spousal rights over matrimonial property. The plaintiff indeed under paragraph 8 of his further affidavit sworn on 16<sup>th</sup> November, 2012 conceded that the respondent is entitled to a share of the suit property.

I have considered the plaintiff's application the parties affidavits and the submissions and the various authorities referred to me and I am not satisfied that the plaintiff has established a prima facie case with a probability of success. Firstly the plaintiff has not established that there is indeed a donation/gift in the form of quarter acre of land capable of being given effect to. In my view for such donation/gift to take effect the quarter of acre portion should have been delineated and subdivision effected as envisaged under Section 42 of the land Registration Act (Supra). The plaintiff in purporting to give the donation or gift to the foundation also omitted to acknowledge the defendant had an interest in the suit property. The defendant demonstrated this by registering a caution against the title and by accepting to register the caution the Land Registrar must have satisfied himself that the claim by the defendant was well grounded. Besides the defendant is the ex-wife of the plaintiff and as expressed by Honourable Justice Kimaru in the Case of **John Silverster Chege Kihake vs. Julia Wambui HCCC No. 15A of 2005 (Nakuru)** even as a divorced wife she continued to retain an interest in the matrimonial property. Honourable Justice Kimaru rendered himself thus in the said suit:-

***“I have considered the case put forward by the applicant and while it is not disputed that the applicant is registered owner of all that parcel of land known as Nyandarua/Nandarasi/768, after evaluating the evidence I do find that the said parcel of land was purchased when the applicant was married to the respondent in 1978. While there is no evidence that the respondent directly contributed to the purchase of the said property, the fact that she is now divorced means that she is entitled to part of the said parcel of land being part of matrimonial property”.***

It seems that the applicant is harbouring under a misconception that once he had obtained a decree absolute granting him divorce from the respondent the respondent had no business ***“interfering” with his parcel of land. After considering the evidence adduced before court, I do find the applicant was within her rights to lodge a caution prohibiting any transaction related to the said parcel of land. The respondents concern is for the welfare of their family”.***

The circumstances in the case before Honourable Justice Kimaru were similar to the instant case as the defendant herein has a daughter of the marriage to take care of in addition to herself. It is my view that the plaintiff could not deal with the suit property to the exclusion of the defendant and that ***“the donation”*** could only take effect if the approval or consent of the defendant who also had an interest in the property was sought and obtained.

The plaintiff could not assume the defendant had no interest in the suit property and deal with the property howsoever he wished.

In the premises I find and hold that the plaintiff has failed to establish that he has a prima facie case with probability of success and on the question whether or not the plaintiff stands to suffer irreparable harm if the injunction is not granted I would answer in the negative. In case the donation/gift is not regularised in consultation with the defendant the plaintiff can relocate the orphanage to some other place either as suggested by the defendant to some of his other properties and/or to rented premises. Quite clearly relocation of the orphanage would entail costs but this can be quantified and damages would in my view be adequate compensation. The maximum that ***“equity must follow the law”*** is applicable in the

circumstances of this case as the plaintiff sought to dispose part of the suit property without observing the law and he therefore approached the court for an equitable relief for an injunction with unclean hands and the court declines to aid and abet a transaction that on the face of it appears to have been carried out without any due regard to the law. As I am satisfied the first two principles for grant of an injunction as enunciated in the **GIELLA VS. CASMAN BROWN** case have not been met I need not consider the balance of convenience although I may observe that where the law has not been observed balance of convenience cannot in my view tilt in favour of the party who has failed to observe the provisions of the Law.

I order the application by the plaintiff dismissed with costs and discharge the interim order of injunction issued in this matter at the exparte stage.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MAY 2013.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the Plaintiffs

..... for the Defendant