



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

LAND & ENVIRONMENT NO. 47 OF 2013

SUSAN MUGURE JUSTUS.....1ST PLAINTIFF/RESPONDENT

JOHN KITHINJI JUSTUS.....2ND PLAINTIFF/RESPONDENT

MURITHI K. MEMEU.....3RD PLAINTIFF/RESPONDENT

JOB MUTUA MEMEU.....4TH PLAINTIFF/RESPONDENT

VERSUS

JUSTUS MEMEU MUGWIKI.....DEFENDANT

RULING

The application herein is dated 22nd February, 2013 and is premised on provisions of the law set out on the face of the Notice of Motion. It seeks orders:

1. **THAT this Honourable Court be pleased to certify this matter as urgent and hear it exparte in the 1st instance on that account.**
2. **THAT this Honourable Court be pleased to discharge, or vary , or set aside the orders of the 11th February 2013 in as far as they relate to TIMAU/TIMAU BLOCK 7/761 and specifically the resultant subdivision being number TIMAU/TIMAU/BLOCK 7/804 pending the hearing interparties of application dated 8.2.2013 or further orders of the Court.**
3. **THAT this Honourable Court be pleased to lift and or cancel the inhibition placed on parcel NO. TIMAU/TIMAU BLOCK 7/761 and specifically the resultant subdivision being parcel no. TIMAU/TIMAU BLOCK 7/804 pending the hearing interpartes of application dated 8.2.2013 or further orders of this Court.**
4. **THAT this Honourable Court be pleased to issue such orders and or directions it may deem just in the interest of justice.**
5. **THAT costs be borne by the Respondents.**

The orders issued on 11th February 2013 were temporary orders of injunction and inhibition against parcel numbers TIMAU/TIMAU SS B7/804,805,806,807,808,809 and 810 (Original No. TIMAU /TIMAU BLOCK 7/761). The application in which the temporary orders were issued is dated 8th February, 2013. Before the application could be heard interpartes, the defendant filed this application

about two weeks after this application was filed.

Before this application could be heard interpartes the advocates for both parties and parties themselves attempted to settle the dispute out of Court. On 11/3/2013 the court was informed that the parties had reached a compromise and would come back to Court on 13.3.2013 to record settlement terms. On 13.3.2013 the Court was informed that the parties had failed to reach a settlement. As a result the matter was fixed to be heard on a priority basis the following day that is 14.3.2013.

During the hearing, counsel for the applicant, told the Court that he was asking it to set aside or vary the orders of 11.2.2013 as far as they related to TIMAU/TIMAU BLOCK 7/761 and specifically the resultant subdivisions TIMAU/TIMAU 804 pending interpartes hearing of the application dated 8.2.2013. He stated that the application was supported by the affidavit of the applicant sworn on 22nd February, 2013 and annexures thereto.

He said that Order 40 rule 7 of the Civil Procedure Rules allowed the Court to discharge or vary orders of injunction and sections 68 and 70 of the Land registration Act allowed the Court to lift or cancel an inhibition in such terms as may end in the interests of Justice. He proffered that the applicant in this application who is the defendant in the main suit was the father of the Respondents/Plaintiffs.

He said that when the plaintiffs came before the Court on 11.2.2013, they failed to disclose that the family had agreed on the subdivision of Parcel No. TIMAU/TIMAU/BLOCK 7 /761 and on how their father would share out his land. He reiterated that these facts were well known to the plaintiffs but were not disclosed to the Court. He stated that the plaintiffs as ex-parte applicants had an obligation to make the fullest disclosure to the Court. He relied on the case of **Shamji versus Jamal et al, Civil Appeal No. 210 of 1997** (court of Appeal, Nairobi). He also argued that if an applicant fails to disclose any material fact and the Court finds that the same has been suppressed or not properly disclosed before the court, the injunction in issue must be set aside. He gave as his authority the case of **Andrew Ouko versus KCB et al, Civil Case No. 558 of 2004** (High Court, Milimani, Nairobi). He concluded his submissions by urging the court to vary the exparte orders in question and specifically as they touched on TIMAU/TIMAU/BLOCK 7/804. He referred to annexures showing that the applicant and his wife were elderly sick people who required constant medical attention. He said that parcel No. TIMAU/TIMAU/BLOCK 7/804 was their only source of income and it was unjust for them to suffer at the hands of the plaintiff who had failed to make material disclosure.

Counsel for the plaintiffs, the respondents herein, opposed the application and pointed out that all the depositions alluded to in the Replying Affidavit in this application and the supporting affidavit in the application dated 8.2.2013 had not been controverted by the applicant and the defendant was therefore deemed to have fully admitted the contents therein. He felt that this application to discharge, vary or set aside the orders of this court was made in utmost bad faith and out of malice because, as at the time of hearing this application interpartes, the defendant had not opposed the application dated 8.2.2013 in which the interim orders were granted. He should have done so in terms of Order 51 of the Civil Procedure Rules. He noted that the defendant had not filed any statement of defence to demonstrate that the plaintiffs did not have a prima facie case to persuade the court not to issue the Interim Orders. He told the Court that it had no basis to vacate its orders or otherwise deal with them when the application dated 8.2.2013 and the main suit had not been opposed and described the defendants' attempts to vacate the Court orders as a fishing expedition to obtain undeserved orders so that he could sell family property he holds in trust for family members. He could thus render them destitute as he enjoyed the benefits of sale of family property.

He told the Court that the plaintiffs did not need to disclose the ages of their parents to obtain the interim Orders in question. He also stated that the plaintiffs were not required to disclose the family agreement to share out the suit land as it is because they realized that they had been shortchanged that they decided to file a case in Court. In any case, he further pointed out, the 1st and 2nd plaintiffs were not parties to the agreement in question.

Counsel for the plaintiff argued that the purpose of interim orders such as orders of Injunction and

Inhibition was to preserve the subject matter and maintain the status quo pending hearing and determination of the suit. In this case the subject matter was family land.

He stated that the authorities relied upon by the defendants amount to sound principles which he agreed with but to him were not relevant to the present circumstances. He further stated that the plaintiffs had not failed to disclose any material facts in their knowledge at the time of filing their application dated 8.2.2013. Finally, he referred the Court to the authorities he was relying upon.

I have considered the affidavits, all the documents adduced and the authorities offered by the parties. This application seeks to discharge, or vary or set aside the orders of this Court issued on 11th February, 2013 pending the hearing interpartes of the application dated 8.2.2013. By its very nature it amounts to an application within an application. It envisages the interpartes hearing of the application dated 8.2.2013 which application prays for the orders the defendant seeks to impeach. The application according to me fully recognizes the need to have the application dated 8.2.2013 heard interpartes. This puts the court in an invidious position as it may be required to decide on matters touching on the application dated 8.2.2013 before it is heard interpartes.

I do not find that the plaintiffs had failed to make material disclosure to the court. In this respect, I note that the 1st and 2nd plaintiffs were not party to the agreement being relied upon by the defendant.

I am also of the view that interpartes hearing of the plaintiffs' application dated 8th February, 2013 will allow all the parties to ventilate all issues relating to the temporary injunction and temporary inhibition issued by this Court on 8.2.2013. At this stage, I hesitate to make any decisions regarding the many facts contained in the affidavits filed by the parties and the annexures as this may have a bearing on the determination of the application dated 8th February, 2013 which has not yet been heard interpartes. Indeed such decisions may have a bearing with respect to the determination of the main suit.

Regarding the postulation that the defendant depends for livelihood on the parcels of land in dispute and therefore this is justification for the Interim Orders issued on 11th February 2013 to be discharged, varied or set aside, the court is not inclined to be persuaded. The subject orders merely preserve the subject parcels of land and the defendant has the liberty to continue to depend on them for his livelihood.

In the circumstances, I dismiss the defendant's/applicant's application dated 22nd February, 2013.

I grant no order as to costs. It is so ordered.

WRITTEN AT MERU THIS 7TH DAY OF MAY, 2013.

P. M. NJOROGE

JUDGE

DELIVERED AND SIGNED IN OPEN COURT AT MERU THIS 13TH DAY OF MAY, 2013 IN THE PRESENCE OF:

P. M. NJOROGE

JUDGE