



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO.191 OF 2012

LUCY GATHONI NG'ANG'A1ST PLAINTIFF
THAIRU NG'ANG'A NJURANGA.....2ND PLAINTIFF
PETER MUNGAI NG'ANG'A.....3RD PLAINTIFF
CATHERINE NUNGARI NG'ANG'A.....4TH PLAINTIFF
STANLEY NG'ANG'A NGUGI.....5TH PLAINTIFF
GRACE WAMBUI NGUGI.....6TH PLAINTIFF

VERSUS

STANLEY NG'ANG'A THAIRU1ST DEFENDANT
JANIFFER WANJIKU NG'ANG'A..2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 12/4/13 in which the Applicants are seeking for an order restraining the Defendant/Respondents from transferring, selling or in any manner dealing with or evicting the Applicants from the property known as Kabete/Kabete/T.161 (hereinafter referred to as the "Suit Property") pending the hearing and determination of this application and suit together with the costs of the application.

The application is premised upon the grounds appearing on the face of the application together with the Supporting Affidavit of Lucy Gathoni Ng'ang'a, the 1st Plaintiff/Applicant. She stated that she is the daughter of the 1st Defendant, the 2nd - 4th Plaintiff are her brothers and sister respectively, the 5th and 6th Plaintiff are her nephew and niece respectively and that the 2nd Defendant is her sister. She stated that the 1st Defendant, her father inherited the Suit Property from his father. She further stated that over 20 years ago, the 1st Defendant called her brother namely the 2nd and 3rd Plaintiffs together with another brother of hers called Charles Ngugi and showed them where on the Suit Property to build stating that the Suit Property was his father's land and he would therefore distribute it to all his children. She further swore that in 1998, he called her and showed her where on the Suit Property she could build as she was unmarried and that he also showed her sister the 4th Plaintiff where on the Suit Property to build. She further stated that the only person who was not shown where to build was the 2nd Defendant who was away. She then stated that they embarked on developing the Suit Property building their respective

homes on the Suit Property. She further stated that her brother Charles Ngugi got into a dispute with his wife and he abandoned his wife and children on the Suit Property and that later the wife also left leaving the 5th and 6th Plaintiff on the Suit Property. She indicated further that all along the 2nd Defendant was not home as she was working outside the home and rarely visited. She stated further that when their mother passed away on 21/10/09, the 2nd Defendant came back and moved into their mother's house and began taking care of their father. She further swore that in January 2012, they came to learn that their father had been to the Land Board at Kikuyu with the 2nd Defendant seeking consent to transfer the Suit Property to the 2nd Defendant. She further stated that the 3rd Plaintiff rushed there and objected to the same as a result of which the consent was not granted. She also indicated that she and the 2nd Plaintiff placed a caution on the Suit Property at Kiambu District Land Registry which was subsequently removed and the Suit Property was transferred to the 2nd Defendant. She further stated that the 2nd Defendant was now looking for prospective purchaser of the Suit Property and that a sale of the Suit Property would cause irreparable damage to them as this is the only home they know. She further swore that they believe that all of them including the 2nd Defendant should jointly own the Suit Property.

The Application is contested. The 1st Defendant filed his Replying Affidavit sworn on 23/10/12 in which he stated that he is the registered owner of the Suit Property upon which he sired and raised all his six children, four of whom are the Plaintiffs/Applicants herein. He said that he acquired the Suit Property which measures 0.21 acres from his deceased father way back in the late 1950's but it is only in 2009 when the succession was concluded and title was issued to him. He also said that it is true that when some of his children came of age, he allowed them to construct semi-permanent houses on the Suit Property. He said that at the moment, there are 4 semi-permanent houses made of corrugated iron sheets within the compound in which 3 of his children and himself reside. He denied having intimated to his children he would eventually distribute the Suit Property to them or that they would be joint owners of the same. He further stated that it is not true that the 2nd Defendant was not at home all along and stated further that she was the one who has been taking care of him whilst the Plaintiffs/Applicants have shown little or no concern for his general welfare. He also stated that it was not true that he intends to sell the Suit Property as alleged by the Applicants but merely intended to transfer the same to the 2nd Defendant in order to ensure that her inheritance is not jeopardized by the Applicants who have ostracized her. He also stated that in addition to the Suit Property, he also owns another parcel of land known as Kabete/Lower Kabete/82 measuring 0.583 acres and it was always his intention that the Applicants herein do relocate and settle on that other land, while the 2nd Defendant remains on the Suit Property. He also indicated that it is his desire that the 2nd Defendant inherit the Suit Property since she is the one who has been taking care of him since his wife passed away in 2009. He also stated that it is in his absolute discretion to decide how his assets and more specifically his parcels of land should be distributed amongst his children. He stated that he was not disinheriting the Applicants hence his decision to allocate them the larger parcel of land and that he was willing to cater for costs of relocation provided they were reasonable.

The 2nd Defendant also filed her Replying Affidavit sworn on 23/10/12 in which she stated that she is not aware of any intimation by their father that he would distribute the Suit Property to them or that they would hold the same jointly. She also stated that it is not true that she was away from home for long and that the only times she was away was when she was on duty working to support her parents. She also stated that she was not aware of any intention of the 1st Defendant to sell the Suit Property to any 3rd Party. She also stated that she did not see eye-to-eye with the Applicants since she moved into their late mother's home to take care of their father in his old age. She also stated that she was disturbed by the Applicant's seeking to succeed their father while he was still alive. She stated further that she believed that as the registered owner of the Suit Property, her father had an absolute and indefeasible right over the same and as such, the Applicants cannot compel or direct him to share the Suit Property in any particular way.

A further Affidavit sworn by Lucy Gathoni Ng'ang'a on 6/11/12 was filed. In it, she stated that their brother Charles Ngugi passed away 2 weeks ago leaving the 5th and 6th Applicants without any parent as their mother went to Sudan. She also stated that they have no wish to force their father to share any of

his properties and that they only took action when they learnt that he and their sister had secretly gone to transfer the Suit Property without their knowledge. She also said that they have lived on the Suit Property for a long period now and have put up various social amenities. She also said that it is not true that the 2nd Defendant looks after their father exclusively as they all do including his grandchildren but that their sister restricts access to him and is unilaterally influencing him to transfer the Suit Property solely to her. She also said that she and the other applicants had no interest in disinherit their sister. She also stated that her father's other parcel of land known as Kabete/Lower Kabete/82 was the subject of a succession cause and was in any event too small to accommodate them. She also said that they have not been hostile to their sister but were only against her secretly trying to get their father to transfer the Suit Property to her and that their apprehension was that she would sell the Suit Property once it is transferred to her rendering them destitute.

Both Counsels for the Plaintiffs and Defendants filed their written submissions which have been read and taken into consideration by this court.

The principles to be applied while assessing whether or not to issue an interlocutory injunction as is sought herein are the ones enunciated in the celebrated case of *Giella v. Cassman Brown [1973] EA 358* as follows:

1. ***That an Applicant has a prima facie case with a probability of success.***
2. ***That unless the order sought is granted the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.***
3. ***If in doubt, the court to decide an application on the balance of convenience.***

Applying the above principles to the instant case, I am to determine whether the Applicants have established a *prima facie* case with a probability of success. Looking at the foregoing facts and evidence, it emerges as an undisputed fact that the 1st Defendant/Respondent is the registered proprietor of the Suit Property. All the Applicants live on the Suit Property with the permission of the 1st Defendant. None of them can claim any title to the Suit Property. Their father/grandfather is still alive and his property is not distributed to them. The law is very clear on the ownership rights of a titleholder. Section 24 (a) of the Land Registration Act provides as follows:-

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

This provision of the law confers upon the 1st Defendant all the rights and privileges of the Suit Property. These rights include the right to transfer the Suit Property to whomever he chooses. This right cannot be curtailed by the Applicants. In that event therefore, I find that the Applicants have failed to show that they have *prima facie* case with a probability of success. To that extent, I do not see any need to interrogate whether the other two conditions in the *Giella* case have been satisfied.

In view of the foregoing, I hereby dismiss this application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 19TH

DAY OF JULY 2013.

MARY M. GITUMBI

JUDGE