



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT

ELC. 302 OF 2012

GRACE NJOKI KAGO

EUNICE WANGUI KAGO (Suing as the Administrators

Of the Estate of the Late **KAGO GITAU**).....**PLAINTIFFS**

VERSUS

DICKSON NDICHO KAGO.....**1ST DEFENDANT**

CO-OPERATIVE BANK OF KENYA LTD.....**2ND DEFENDANT**

RULING

The applicants herein **Grace Njoki Kago** and **Eunice Wangui Kago** have brought this Notice of Motion filed on 24/09/2012 under *Order 40 Rules 1, 2 & 3 and Section 3A, 63(3) of the Civil Procedure Act Cap 21 Laws of Kenya* for orders that:

- a. The court to restrain the 1st Defendant from selling off, disposing, alienating for sale or in any other way dealing with and/or interfering with the plaintiffs/applicants possession of that parcel of land known as LR No. Githunguri/Kimathi /1246 pending the hearing and determination of the suit.
- b. That costs of this application be provided for.

The application was premised on the grounds stated on the face of the application, notably: -

- i. That the 1st defendant is the registered proprietor of that parcel of land known as LR No. Githunguri/Kimathi/1246, the same having been transferred to him by his father Kago Gitau who is now deceased and whole estate is now administered by the plaintiffs herein.
- ii. The plaintiffs/applicants as administrator of the estate of the deceased Kago Gitau have instituted the suit herein on the basis that the 1st defendant was at all material time to hold the parcel of land in trust for the benefit of all the beneficiaries of the estate of the said Kago Gitau.
- iii. The plaintiffs/applicants reckon that at all material time, there was a construed trust between the deceased and the 1st defendant which trust relationship the 1st defendant/respondent is keen on breaching.
- iv. That the plaintiffs who are widow and daughter of the late Kago Gitau have lived on the said parcel of land since time immemorial and continue living on the said parcel of land to date.
- v. The applicants are apprehensive that they risk being evicted out of the said premises unless the

court intervenes.

The application is also supported by the affidavit of Grace Njoki Kago, the widow of the late Kago Gitau who was also the father to the 1st defendant. She averred that the deceased acquired the land parcel known as LR No. Githungiri/Kimathi/1246 during his lifetime and now it forms part of his Estate and that is also where the deceased had built his homestead.

She also acknowledged that the deceased transferred this parcel of land in the year 1997 to the 1st Defendant. However she alleged that the said parcel of land was transferred to 1st defendant so that he can take a loan with Co-operative Bank. The 1st defendant was late to transfer the same to Kago Gitau after paying the loan. However, the deceased died before such transfer could be effected. She further alleged that the 1st Defendant is holding the said parcel of land in trust for the beneficiaries of the Estate of Late Kago Gitau. That the other beneficiaries live on the said parcel of land and the 1st defendant now intends to dispose off the property to 3rd parties.

The said application was opposed by the 1st Defendant Dickson Ndicho Kago. He acknowledged that he is the registered proprietor of L.R No. Githuguri/Kimathi/1246 which land was gifted to him by his father in the year 1997. That the said land does not form part of the Estate of Kago Gitau and there is no fiduciary relationship between the applicants and 1st respondent. He prayed for dismissal of the plaintiffs' application.

The parties herein canvassed the application through written submissions. I have now considered the written submissions and the pleadings generally and I make their findings:

The issue for determination is whether the applicants have established the threshold principles for grant of interlocutory injunction as was laid down in the case of Giella vs Cassman Brown 1973 EA 358.

These principles are

- i. Applicant must show that he has a prima-facie case with high probability of success.
- ii. Applicant will suffer irreparable loss or harm if orders not granted.
- iii. If court in doubt to decide on a balance of convenience.

From the available evidence, there is no doubt that the suit land was initially in the name of Kago Gitau now deceased. There is also evidence that the said Kago Gitau transferred the land to 1st defendant, Dickson Ndicho Kago in 1997 as a gift. In the said transfer, it was not indicated that Dickson Ndicho Kago is holding the land in trust for the family of Kago Gitau. The 1st defendant is the registered owner of the parcel of land and thus has absolute ownership as provided by Section 24 of the Land Registration Act. Section 24(a) reads as follows: -

“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.”

The 1st Defendant as the registered owner with no encumbrance has absolute ownership of the said parcel of land.

The applicants alleged that the land was transferred to 1st Defendant by late Kago Gitau so that 1st Defendant could take a loan using the title deed. However, if it was only a loan that 1st defendant needed to take, then the late Kago Gitau could have been a guarantor of 1st defendant without going through the hassle of transferring the land to 1st Defendant and later have the land re-transferred to him. The green card shows the land was transferred as a gift to 1st defendant. There is no evidence brought out to disapprove that fact.

It is evident that the Estate of the Late Kago Gitau has been distributed. This suit land was never mentioned as one of the property left behind by the Late Kago Gitau. There is no evidence that the 1st Defendant was given any property from the deceased's Estate during the Confirmation of Grant. The court finds that the suit land was not included in the Estate of the deceased because it was not his property by the time of his death. He had already gifted it to 1st Defendant.

The applicants have therefore failed to establish that they have a *prima facie* case with high probability of success. The land is registered in the names of the 1st Defendant.

There is evidence that the Estate of the Deceased was distributed as per the certificate of Confirmation of Grant. In the said Certificate Grace Njoki Kago and Eunice Wangui Kago, the applicants herein have inherited each a share of land from the said Estate. However, the 1st Defendant was not given any property, in the said distribution.

The applicants therefore have each another property and they cannot claim they have nowhere to live. The applicants have therefore failed to show that they will suffer irreparable harm or loss which cannot be compensated by damages if orders sought are not granted.

In the instant case, I have seen a copy of the green card. The parcel of land was gifted to the 1st defendant and no indication that he was holding it in trust for the family of the late Kago Gitau. The land is registered in the name of the 1st Defendant and he is therefore the absolute owner. The court is therefore not indoubt and the balance of convenience does not tilt in favour of the applicants.

Having now considered the pleadings herein, the annexure thereto and the written submissions, the court finds that the applicants have failed to establish the threshold principles for grant of injunctive relief. Consequently the court finds that the applicants' Notice of Motion dated 19th September, 2009 and filed on 24/9/2012 is not merited. The same is dismissed. Costs in the cause.

The plaintiffs to set the matter down for hearing so that the main suit can be decided expeditiously.

It is so ordered.

Dated this 29th day of August, 2013.

L.N. GACHERU

JUDGE