



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

E.L.C. CIVIL SUIT NO. 71 OF 2012

ROBERT MUGO KIGOROPLAINTIFF

VERSUS

IVARA CUE1ST DEFENDANT

BENJAMIN KAMAU MAHUNGU2ND DEFENDANT

FREDRICK NJERU MTETU3RD DEFENDANT

E. KENNETH N. WAMAI4TH DEFENDANT

JASON NYAGA5TH DEFENDANT

NDARU BARAGU6TH DEFENDANT

RULING

The plaintiff filed this suit against the defendants seeking orders that he is among clan members entitled to a share of the parcels of land No. MBETI/GACHURIRI/613 – 666 which are the resultant sub-divisions of MBETI/GACHURIRI/170 and that the defendants be restrained from transferring the said land until the beneficiaries thereof have been determined.

The plaintiff also filed a Chambers Summons under ***Order 40 Rules 1, 3 and 4 of the Civil Procedure Rules*** seeking an injunction against the defendants with respect to the aforesaid parcels of land. It is the plaintiff's case that the defendants being representatives of the Kathi Clan hold the said parcels of land in trust for other beneficiaries yet they are now disposing the said land to third parties having sub-divided it into 50 portions.

The application is opposed and in his replying affidavit on behalf of the other defendants, the 1st defendant IVARA CUE has deponed, inter alia, that the defendants are not trustees of Kathi Clan and that infact the land is registered under Kathi Group Ranch and the title being a first registration cannot be challenged.

I have considered the application, the rival affidavits and the oral submissions by both Mr. Kagio and Mr. Wandugi.

This being an application for injunction, it has to be considered in light of the principles set out in the case of ***GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A. 358.***

The plaintiff/applicant describes himself as among the members of the Kathi Clan and therefore has an interest in the suit property which is designated as MBETI/GACHURIRI/170. According to the Certificate of Search annexed to the supporting affidavit of the applicant, the defendants/respondents are registered as proprietors “**AS TRUSTEES” FOR KATHI GROUP RANCH**”. There is yet another document being the adjudication record which shows that the same property is owned by “**KATHI CLAN LAND GROUP RANCH**”. Clearly therefore, there is prima facie evidence that the land subject matter of this case is trust property belonging to Kathi Clan or Group. As to whether the plaintiff/applicant is a member or who indeed are members of the clan is a matter of trial. There is no sufficient evidence that infact the land has already been sub-divided into 50 portions. Mr. Wandugi argues that the property being registered under the then Registered Land Act, the title is inviolable. However, in GATHIBA VS GATHIBA 2001 2 E.A 342, Justice Khamoni (as he then was) held that registration of a parcel of land under the Registered Land Act (now repealed) does not relieve the registered proprietor from any duty or obligation to which he is subject as a trustee. This decision was affirmed by the Court of Appeal in MUKANGU VS MBUI K.L.R (E & L) 1 at Page 622.

On the material placed before me, I am unable to make a finding that the applicant has established a prima facie since his interest in the land or his membership of the Kathi Clan are issues to be established at the trial. All we have is his word that he is a member but we have no evidence of who the other members are and why they are not parties in this suit. Further, it is not clear what irreparable loss will ensue if the injunction is not granted. The first two principles in the GIELLA case (supra) have not, in my view, been established.

This application will therefore be determined on the basis of the third principle in the GIELLA case (supra) which is that when in doubt, the application will be determined on a balance of convenience. What tilts the balance in favour of the applicant in this regard is the un-controverted fact that the property in dispute is being held in trust for a clan and as I have indicated above, judicial authority dictates that no trustee can use trust property in such a manner as to defeat the interests of the beneficiaries. Substantial justice will be done in this case if the property is preserved and on a balance of convenience, therefore, I find it prudent to grant the orders sought.

The application for injunction dated 8th October 2012 is accordingly allowed. Costs in the cause.

B.N. OLAO

JUDGE

6TH AUGUST 2013

6/8/2013

Coram

B.N. OLAO - JUDGE

CC – Muriithi

Ms Muthike for Maina for Plaintiff – present

Wandugi for Defendant absent

COURT: Ruling delivered this 6th day of August 2013 in open Court

B.N. OLAO

JUDGE

6th August 2013