



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC CIVIL SUIT NO. 526 OF 2013

JOSEPH MUGO.....PLAINTIFF/APPLICANT

VERSUS

GRACE WANJIKU NJENGA1ST DEFENDANT/RESPONDENT

JAMES MUNENE WAMUHU....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff has brought a chamber summons application dated 6th May 2013 under section 3 and 3A of the Civil Procedure Act and Order 41 Rule 1 and 2 of the Civil Procedure Rules seeking an order that the Defendants be restrained from subdividing, surveying and registering Land Parcel no. LR Dagoretti/Kangemi/1052 pending the hearing of this suit. The court notes that Order 41 Rules 1 and 2 of the Civil Procedure Rules relates to appointment of receivers and cannot have any application to the substance of the applicants application and perhaps the applicant intended to cite order 40 of the Rules that relates to application for injunctions. The court nonetheless shall not concern itself so much with the form but with the substance. I need further not mention that under Order 51 Rule 1 all applications to the court are required to be by way of Notice of Motion and thus the Plaintiffs instant application out not to have been brought by way of Chamber Summons.

The application is supported by the Plaintiff's affidavit sworn on 6th May 2013 where it is deponed that the Plaintiff and the Defendants are children of the late Bernard Muhu Gathegu who was the proprietor of the suit property. The Plaintiff has contended that following the death of their father, their brother George Njenga, who later passed on, was appointed administrator of the estate and upon his demise, his wife was appointed administrator and distributed the properties. The Plaintiff has stated that the suit property was among the properties distributed to them and further, that the said property is jointly owned by the Plaintiff, the Defendants, Moses Wainaina Wamuhu and Kenneth Kungu Wamuhu who are their siblings. The Plaintiff has annexed a copy of the title deed to the suit parcel issued in the name of the said persons on 4th September 2006.

It is alleged by the Plaintiff that the Defendants have subdivided the suit property without his consent and further, that the Plaintiff stands to suffer irreparable damage since he has constructed residential houses on the property.

The application is opposed by the Defendants who in a replying affidavit sworn by the 2nd Defendant on 15th May 2013 stated that the suit property was among four parcels of land namely Dagoretti/Kangemi/1050,1051,1052 and 1053 owned by the late Bernard Muhu Gathegu. The Defendants have contended that the 1st Defendant was appointed as administrator of the estate of the late Bernard Muhu Gathegu whereof she faithfully distributed the deceased's properties to the beneficiaries according to the houses of the deceased's three wives. It is stated that following the said distribution, the Plaintiff jointly with his siblings inherited LR No. Dagoretti/Kangemi/1052 in equal shares and the role of the administrator came to an end.

The Defendants have alleged that on 8th March 2005 and 7th February 2009, all beneficiaries in the three houses held meetings where they nominated representatives by consensus, who were mandated to among other things, process transfers and carry out subdivisions to enable each beneficiary own and develop his/her own property. It is the Defendants' case that the Plaintiff and the 2nd Defendant applied for and obtained a letter of consent from the Dagoretti Land Control Board on 11th November 2009 for subdivision of LR No. Dagoretti/Kangemi/1052 into five portions of 0.020 hectares each and a copy of the consent has been annexed as evidence. Further, that although the beneficiaries of the other houses made similar applications for consent which were approved, the Commissioner of Lands in liaison with the Director of City Planning and the Director of survey declined to register the sub-divisions as proposed by the beneficiaries and instead approved sub-division and amalgamation of plots Dagoretti/Kangemi/1050, 1051, 1052 and 1053. The Defendants have annexed a copy of a letter from the Commissioner of Lands dated 16th May 2011 to this effect. The Defendants have also annexed a letter of consent, from the Land Control Board dated 8th February 2012, for the amalgamation and subdivision of Dagoretti/Kangemi/1050, 1051, 1052 and 1053.

According to the Defendants, the four family representatives with approval and funding from the other beneficiaries undertook the process of securing separate title documents for all the beneficiaries where of, title numbers Dagoretti/Kangemi/1772-1788 were issued by the Commissioner of Lands. It is the Defendants' case that the Plaintiff was registered as proprietor of land title Dagoretti/Kangemi/1781 measuring 0.020 hectares and a copy of the title said to be in the custody of the family representatives owing to the Plaintiff's refusal to pay the costs incurred has been annexed as evidence. According to the Defendants, Dagoretti/Kangemi/1052 no longer exists following the amalgamation with title numbers Dagoretti/Kangemi/1050, 1051 and 1053 and subsequent subdivisions which gave rise to Dagoretti/Kangemi/1772-1788 and reinstating Dagoretti/Kangemi/1052 would be prejudicial to all the other beneficiaries. The Defendants denied that the Plaintiff had suffered any irreparable damage following the sub-division and distribution of the deceased's estate to all the beneficiaries stating that any damage established can be monetarily compensated.

Parties filed written submissions and the Plaintiff's counsel in submissions dated 21st June 2013 stated that the Plaintiff did not attend any meetings as alleged by the Defendants and therefore, did not consent to the mutations forms and further, that the signatures purported to be the Plaintiff's were forged. It was submitted for the Plaintiff that the proposed subdivision will interfere with his storey building on his portion of the land causing him immense loss and damage. Lastly, Counsel argued that the Plaintiff had established a prima facie case with probability of success.

The Defendants reiterated the facts in submissions dated 20th June 2013 and stated that the Plaintiff got his rightful share of the estate where his share was to be 0.020 hectares which is the same acreage in plot 1781 where he resides. Counsel for the Defendants argued that the Plaintiff had not suffered any damages by being registered as the proprietor of plot 1781 measuring 0.020 hectares and further, that serious prejudice would be suffered by all the other beneficiaries in the three houses who now hold separate title deeds following the distribution of the estate. It was argued that it would be the Defendants and other beneficiaries in the three houses who would suffer irreparable damage and further, that any damage suffered by the Plaintiff could be compensated by an award of damages.

It was submitted for the Defendants that the Plaintiff concealed material facts and had approached the court with unclean hands. Lastly, Counsel for the Defendants submitted that the application must fail as

no prima facie case with probability of success had been established.

The issue for determination is whether the Plaintiff has satisfied the conditions for the grant of temporary injunctive orders.

In the grounds appearing on the face of the application, the Plaintiff has stated that the Defendants have subdivided the suit parcel without his knowledge and consent. This fact is reiterated by the Defendants who have stated that the suit parcel no longer exists having been amalgamated with title numbers Dagoretti/Kangemi/1050, 1051 and 1053 and subsequently sub-divided into Dagoretti/Kangemi/1772-1788. The Plaintiff did not rebut this allegation by way of a further affidavit.

The Orders sought by the Plaintiff cannot be granted as they seek to restrain what has already happened in respect to a parcel that no longer exists. The Court in the case of **Dyer & Blair Bank Ltd -vs- Equity Bank Ltd & Another [2012] eKLR** stated that since there is a purpose to be achieved by a court order If the achievement of that purpose is remote or impossible a court order cannot issue. In my view, the Plaintiff has not established a prima facie case with a probability of success and his application ought to fail.

Despite admitting that he owns the suit property jointly with his siblings, the Plaintiff has stated that he stands to suffer irreparable damage if the land is subdivided because he has constructed residential houses on the suit property. The Defendant have contended that the plaintiff resultant title after the sub-division being title number Dagoretti/Kangemi/1781 is sited where the plaintiff has constructed and hence he stands to suffer no damage. The other beneficiaries just like the plaintiff are entitled to have their rightful shares which it would appear the resultant sub-division has given them.

In the result and having considered all the material evidence placed before the court I find and hold that the order of injunction that the plaintiff seeks to restrain the sub-division of Title Number Dagoretti/Kangemi/1052 is incapable of being granted as subject property has already been sub-divided and new subtitles issued. The Plaintiff in the premises came to court after the event and what he seeks to restrain has already been overtaken by events and it is a kin to bolting the stable after the horses have already bolted.

The plaintiff's application therefore lacks any merit and t he same is ordered dismissed with costs to the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendants**