



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 388 OF 2012

NAOMI WAKONYU KAMAU.....1ST PLAINTIFF
ANNE WANGUI KAMAU.....2ND PLAINTIFF
KARIUKI KAMAU.....3RD PLAINTIFF
WILSON MBUGUA KAMAU.....4TH PLAINTIFF

**All suing as legal representatives of the Estate of BENSON KAMAU
KARIUKI (Deceased)**

Whilst the 1st Plaintiff partly sues on her own behalf

VERSUS

DORCAS WANJIRA KARIUKI.....DEFENDANT

RULING

The application for determination is a Notice of Motion dated 5th July, 2012 brought by the Plaintiffs under Sections 1A, 1B, and 3A of the Civil Procedure Act, Order 40 Rules 1, 2, 3 and 10 and Order 51 Rules 1, 2 and 3 of the Civil Procedure Rules. The Plaintiffs are seeking the following substantive orders:-

1. That the Defendant be restrained by herself, her servants and agents from transferring, charging or mortgaging Umoja Inner Core-Sector V Plot No. 231 and Umoja Inner Core-Sector V Plot No. 230 until the suit is heard and determined.
2. That the Defendant be restrained by herself, her servant or agents from interfering with the Plaintiffs' enjoyment of quiet possession and management of Umoja Inner Core-Sector V Plot No. 231 and Umoja Inner Core-Sector V Plot No. 230 until this suit is heard and determined.
3. That the Defendant be restrained from entering into or remaining on the said Umoja Inner Core-Sector V plot No. 231 and Umoja Inner Core-Sector V plot No. 230 until further orders of this Court.

The application is premised on fourteen grounds appearing on the face of the application which are reiterated in the supporting affidavit sworn by the 1st Plaintiff on 5th July 2012.

The 1st Plaintiff is the widow of the Benson Kamau Kariuki (Deceased) (hereinafter referred to as "the

Deceased”), who died on 16th May 2012, while the 2nd to 4th Plaintiffs are the adult children of the 1st Plaintiff and the Deceased. The Defendant is a sister of the Deceased and sister-in-law of the 1st Defendant. The Plaintiffs' case is that the 1st Plaintiff and the Deceased jointly acquired Umoja Inner Core-Sector V plot No. 231 and 230 in 1995 and 1999 respectively. The Plaintiffs have attached an agreement for sale dated 2nd November 1995 between Charles Gathari Kaniaru and the Deceased for the sale of plot number 231 Umoja Inner Core-Sector V at Kshs 290,000/- as well as a power of attorney of the same date evidencing the purchase. Further, the Plaintiffs have attached evidence of a power of attorney dated 27th August 1999 in respect of plot number 230 Umoja Inner Core-Sector V entered into by John Kenneth Macharia and the Deceased.

The Plaintiffs allege that despite the suit properties having being acquired by the 1st Plaintiff and her late husband, the Defendant who was not involved in the purchase at all, is attempting to collect rent and assert a right other than that of a bare trustee. The Plaintiffs contend that the Defendant is a bare trustee in respect of the suit properties which were transferred to her by the Deceased when his marriage with the 1st Plaintiff broke up in 2002.

The Plaintiffs further contend that the transfer was designed to cheat the 1st Plaintiff of her investment, since the Deceased did not part with possession of the suit properties where he continued to collect rent after the marriage broke up. The Plaintiffs have attached as evidence letters dated 06.10.04, 24.08.07, 20.09.04, 02.04.08 as well as a declaration of income, assets and liabilities form dated 30.09.03 wherein the Deceased stated that he was the owner of the suit properties after the purported transfer.

According to the Plaintiffs, the transfer of the suit properties to the Defendant took place in December 2002 without the 1st Plaintiff's consent. The Plaintiffs aver that the 1st Plaintiff learnt of the transfer in 2011 after which she filed High Court Civil Case No. 42 of 2011 (OS) against the Deceased under section 17 of the Married Women's Property Act, 1882, and copies of pleadings of the said suit were annexed as evidence.

The Plaintiffs further state that on 29th June, 2012 they obtained a limited grant of representation in Nakuru High Court Succession Cause No. 433 of 2012, to enable them preserve the estate of the late Benson Kamau Kariuki which includes the suit properties and the rent collected there from. A copy of the Limited Grant of Letters of Administration issued on 29th June 2012 has been annexed as evidence. The Plaintiffs has also annexed evidence of correspondence dated 27.06.12, 25.05.12, 04.07.12, 30.05.12 and 18.06.12 exchanged between the parties' Advocates in respect to the Defendant's dealings with the suit properties.

It is also contended by the Plaintiffs that the suit properties are some of the properties acquired by the 1st Plaintiff and her late husband between 1982 when they got married and 2004 when cohabitation came to an end, and a copy of the 1st Plaintiff's and Benson Kamau's marriage certificate number 11331 which was issued in 1982 has been annexed as evidence. The Plaintiffs have also annexed a copy of the affidavit in support of the Petition for grant of letters of administration sworn on 25th June 2012, listing the suit properties as part of the deceased's estate. The Plaintiffs have averred that Plot No. 231 and 230 Umoja Inner Core Sector 5 were in April 2012 valued at Kshs.25,400,000/= and Kshs.12,500,000/= respectively and the a copy of the valuation report from Petrum Valuers dated 5th April 2012 has been attached.

The Plaintiffs also stated that the matrimonial home built on L.R. No. 27/11 Ridge Ways was jointly acquired by the 1st Plaintiff and the Deceased in 1987, and a copy of the transfer in the names of Benson Kamau Kariuki dated 23rd December, 1987 has been annexed as evidence. It is further contended that the 1st Plaintiff and her husband also acquired plots in Ngangarithi and Ruring'u near Nyeri Town, houses in Buruburu and Dam estate Nairobi, a plot in Njiru as well as two plots in Githurai, Nairobi. The 1st Plaintiff is also said to have started a road construction business with her husband and the memorandum and articles of association of Kolio Construction Ltd as well as the certificate of incorporation have been annexed as evidence.

It is the Plaintiffs case that the businesses of restaurants, manufacture and sale of paints, road construction and hardware ran by the 1st Plaintiff and the Deceased between 1985- 2004 assisted them in developing the suit properties, and the Plaintiffs have furnished bank statements of joint business accounts held with Co-operative Bank of Kenya Ltd, Kiambu Branch and Barclays Bank Ltd Muthaiga Branch. The 1st Plaintiff in a further affidavit sworn on 17th September 2012 denied the Defendant's allegations that she neglected and deserted her Deceased husband when he fell sick.

By a supplementary affidavit sworn by the 1st Plaintiff on 4th May 2013, the Plaintiffs stated that they are the Petitioners in Nakuru High Court Succession Cause No. 433 of 2012, where the Defendant has filed an objection to the issuance of grant. The Plaintiffs have also stated that summons for revocation of the limited grant filed by a Beatrice Njoki are pending for hearing. It is the Plaintiffs' contention that this court's determination on the beneficial ownership of the suit properties would be acted on in Nakuru Succession Cause No. 433 of 2012. The Plaintiffs also relied on various affidavits filed by the 1st Plaintiff on 16th July 2012 in which she reiterated the above facts, and affidavits sworn on 16th July 2012 and 17th September 2012 by one Beatrice Wambeti Njoka, a Director of Lavender Properties Limited confirming that they managed the suit properties for the deceased Benson Kamau Kariuki from June 2006 until his death in May 2012.

The application is opposed by the Defendant who in a replying affidavit sworn on 12th July, 2012 detailed the circumstances under which the suit properties were transferred to her. It is the Defendant's case that following the ailing of the Deceased, the 1st Plaintiff neglected and deserted him. Further, that the Defendant stepped in to take care of the Deceased who transferred the suit properties to her as appreciation of the sacrifice she made in looking after him. The Defendant has annexed as evidence a medical report of the late Benson Kamau Kariuki dated 21st September 2011.

The Defendant has stated that after the transfer of the suit properties, the Deceased was in need of money for his maintenance and medical bills and continued receiving the rent. According to the Defendant, a fundraising organized to cater for the high hospital bills realized Kshs 1,800,000/= which was deposited in a joint account held by the 1st Plaintiff and the Deceased. It is alleged that the 1st Plaintiff secretly withdrew Kshs 1,500,000/= from the account and left for the United States of America where she sought asylum. The Defendant has annexed as evidence a supporting affidavit sworn by the Deceased on 3rd November 2011 and filed in Nairobi HCCC 42 of 2011(O.S).

The Defendant has averred that although the 1st Plaintiff knew of the transfer of the suit properties to her before the death of the Deceased, she did not challenge the said transfer nor enjoin the Defendant as a party in Nairobi HCCC 42 of 2011(O.S). According to the Defendant, failure to enjoin her in the said proceedings is an indication that the 1st Plaintiff knew that the properties were owned by the Defendant. It is the Defendant's case that the transfer was properly done and the properties belong her, and further, that she is not holding the same in trust for anybody.

The Defendant has averred that apart from the suit properties, all the other properties are in the name of the Deceased including Kijabe/Kijabe/Block 1/9068 and plot No. 12 Lakeview Naivasha which were bought after the 1st Plaintiff deserted him. According to the Defendant, if the Deceased had transferred the suit properties to her to hold in trust for his family, the he would have instructed that the properties be transferred back to him when the 1st Plaintiff left the country. Further, that the Deceased would also have transferred all the other properties which are in his name to the Defendant, which is not the case herein since the he did not intend to disinherit his family.

The Defendant has stated that the 1st Plaintiff has approached the court with unclean hand having abandoned her husband in his hour of need. Further, that the 1st Plaintiff has come to equity late since despite knowing that the Deceased had transferred the suit premises to the Defendant, she did not mount any challenge when the Deceased was alive.

Parties were directed to file submissions, and the Plaintiffs' counsel stated in submissions dated 26th September 2012 that the registration of a person as an owner of a property raises a rebuttable presumption that the registered owner is both legal and beneficial owner, and further, that the presumption can be rebutted by evidence that shows who the beneficial owner is. The counsel referred the court to the cases of **Stack -vs- Dowden, (2007) 2All ER 929, Echaria -vs- Echaria, CA No. 75 of 2001** as well as section 25(2) of the Land Registration Act in this respect.

It was further argued for the Plaintiffs that after the purported transfer of the suit properties to the Defendant in December 2002, the Deceased continued to describe the suit properties as his in applications made to the bank for loans, in a wealth declaration form filled with the Government in 2003 and in a contract with Lavender Properties between May 2006 - May 2012, which actions contradicts the Defendant's claim that the deceased intended to confer a beneficial interest in the suit properties to her. Counsel stated that the Defendant holds the legal estate in the suit properties upon trust for the estate of Benson Kamau Kariuki and the 1st Plaintiff is the beneficial owner, having contributed to the acquisition of the suit properties and the Plaintiffs relied on the case of **Echaria -vs- Echaria (supra)**.

It was also argued that the Deceased had no legal capacity to transfer to the Defendant a property belonging to both him and his wife. The Plaintiffs stated that the Defendant was an intermeddler with the estate of her late brother for purporting to assert property rights which she had not done since 2002 without obtaining a grant of representation as required by section 45 of the Law of Succession Act. Counsel for the Plaintiffs submitted that since the Deceased held the properties in trust for the 1st Plaintiff after purchase, the Deceased was still a trustee when he transferred the suit properties to the Defendant, and could therefore have not passed a better title than he himself had.

Further, Counsel stated that since the 1st Plaintiff is a co-owner of the suit properties jointly with the estate of the Deceased, she has a right to possession which includes the right to collect rent and keep the suit properties in a state of repair and the court was referred to the cases of **Bull -vs- Bull, (1955) 1 KB 234** and **Dorcas Wangari Macharia -vs- KCB & 2 Others, Nairobi HCCC No. 18 of 2033**. Reliance was also placed on the case of **Njoroge -vs- Ngari, (1985) KLR 480** for the proposition that where legal ownership is registered in the name of only one person but another contributed to its acquisition, the registered person is deemed to hold the land in trust beneficially for himself and the other person.

The Plaintiffs referred the court to sections 82 and 83 of the Law of Succession Act and submitted that they alone are under a duty to institute suits to recover assets of the estate of the late Benson Kamau Kariuki. Counsel for the Plaintiffs argued that under section 45 of the Law of Succession Act, any person who takes possession of the property of a deceased without a grant of letters of administration commits an offence.

While referring the court to the cases of **Assanand -vs- Pettitt, (1989)KLR 241, African Safari Club -vs- Safe Rentals Ltd Nairobi CA No. 53 of 2010** and **Akseli Lameck & others -vs- Methodist Church in Kenya & Others Mombasa HCCC no. 589 of 2011**, the Plaintiffs' Counsel submitted that the object of the prayers for injunction sought was to preserve the subject matter of the suit.

It was submitted for the Plaintiffs that the Defendant being a bare trustee, could not take possession of the suit properties or demand payment of rent. Counsel in addition submitted that the Defendant had not denied that the suit properties were acquired by the 1st Plaintiff and the Deceased through their joint funds and relied on the case of **Mumo -vs- Makau (2002)1 EA 170** where the court stated that trust is a question of fact to be proved.

Lastly, it was submitted that the Plaintiffs have established a *prima facie* case with a probability of success in that the suit properties were acquired and developed by the 1st Plaintiff and her late husband and therefore, that the Plaintiffs are the beneficial owners and have the right to possession; the Defendant has never collected rent or managed the suit properties in any way and has no legal justification to either have possession or claim a beneficial interest.

The Plaintiffs' counsel filed supplementary submissions dated 5th June 2013, and argued that they had demonstrated how the 1st Plaintiff and her husband acquired the suit properties, and relied on the case of **Muthembwa -vs- Muthembwa (2002) 1 EACA 186**, for this position. Further reliance was placed on the cases of **Karanja -vs- Karanja (1976) KLR 306** and **Echaria -vs- Echaria (supra)** for the submission that the contributions of a wife need not be direct but may be indirect. He further submitted that the Deceased could not give a gift *intervivos* to the Defendant since he was one of the co-owners of the suit properties where the 1st Plaintiff and the Deceased were tenants in common, and the court was referred to the case of **Bull -vs- Bull (1955) 1 KB 234** where it was stated that a tenant in common is entitled to possession of the land and to the enjoyment and use of it in a proper manner.

The counsel further stated that under section 83(e) of the Law of Succession Act, the Plaintiffs are under a duty to account for all the moneys received by them from all the income generating assets of the deceased. He also made reference to section 35-39 of the Law of Succession Act and that the 1st Plaintiff has a life interest in the estate of her late husband and upon its determination, all their three children will inherit the property in equal shares. The counsel contended that the Defendant who was a sister of the Deceased can only get a share in the estate of the Deceased through section 26 of the Law of Succession Act by showing that she was a dependant at the time of the Deceased's death.

On the contention that the Plaintiffs were guilty of laches, the counsel submitted that the 1st Plaintiff did not know of the purported transfer of the suit properties to the Defendant in 2002 since the Deceased dealt with the said properties in the same way he had dealt with them before he suffered a stroke. In respect to the Defendant's submission that the rent received be deposited interested earning account, the Plaintiffs' counsel argued that the orders should not issue owing to the Defendant's disobedience of the directions given by the court on 19th September 2012. He relied on the case of **Mawani -vs- Mawani (1977) KLR 159** for the proposition that a party who disobeys the court will not be allowed to make another application until he has purged the contempt.

The Defendant's Counsel filed submissions dated 16th April 2013 and argued that the application should fail since it seeks to retrain the Defendant from transferring or from entering into the suit properties which were transferred to the Defendant on 16th December 2002, a period of over 10 years before the institution of the current suit. It was submitted for the Defendant that this suit is *sub-judice* since 9 years after the transfer of the suit properties, the Plaintiffs filed an Originating Summons under the Married Women Properties Act claiming a share of the suit properties, which suit is still in existence. Further, the Defendant submitted that in a replying affidavit to the Originating Summons, the 1st Plaintiff's husband denied that the 1st Plaintiff contributed to the acquisition of the suit properties.

Counsel for the Defendant submitted that in both the claim for matrimonial property and the current suit, the 1st Plaintiff has not availed any proof to the court that she contributed to the purchase and acquisition of the suit properties. Further, the Defendant stated that the sale agreement dated 2nd November 1995 as well as the power of attorney annexed thereof do not indicate that the 1st Plaintiff was a co-purchaser or donee of properties by the vendor respectively. The Defendant relied on the case of **Echaria -vs- Echaria (2007) 2 EA 139** for the submission that a spouse must have put in a monetary contribution to the purchase and since no such evidence has been adduced, no *prima facie* case has been established and therefore, that the application must fail. It was submitted for the Defendant that the 1st Plaintiff having abandoned the late Benson Kamau Kariuki during his period of incapacitation, the Deceased transferred the suit properties to the Defendant on account of the sacrifice the Defendant made in looking after him during the deceased's period of illness.

Counsel for the Defendant submitted that since the Deceased had a choice on the person to transfer the property to and chose the Defendant, the said transfer was a gift *intervivos* which is recognized under Common Law. It was further argued that an indication that the transfer by the Deceased was a gift was that it is only the suit properties that were transferred to the Defendant from among all the matrimonial properties.

Counsel for the Defendant submitted that the Plaintiffs are not entitled to the equitable relief sought on account of their conduct, and stated that the 1st Plaintiff only came to the country after the demise of her husband and filed the claim herein a month after the burial of her husband. The counsel also submitted that the Plaintiffs are guilty of laches since the application has been filed 10 years after the transfer of the suit properties.

Lastly, counsel for the Defendant submitted that the Limited Grant Ad Colligenda which was obtained by the Plaintiffs *ex parte* cannot form the basis for the Plaintiffs to lay claim on the suit properties. The Defendant submitted that in the event the court allows the application, an order be made that the income received from the suit properties be put in a joint interest earning account to ensure that there is no loss or wastage.

I have read and carefully considered the said pleadings and annexed evidence. What I am required to do at this stage is to determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and particularly whether the Plaintiffs have met the said requirements.

The first question I must answer is whether the Plaintiffs have established a *prima facie* case. The Plaintiffs have provided evidence of the letter of allotments to the original allottees of the two suit properties, of the sale agreements between the said allottees and the Deceased with respect to the suit properties and the power of attorney given by the said allottees to the Deceased. The Plaintiffs also provided evidence of letters of allocation to the Defendant dated 16th December 2002, upon transfer of the said properties to her by the Deceased. The documents produced in evidence show that it is the Defendant who is presently conferred with an interest in the suit properties, and it is therefore not evident that the Plaintiffs have established a *prima facie* case.

This finding notwithstanding I note that the Defendant's entitlement and title to the suit properties is contested, and that the Plaintiffs claim is that the said property is held in trust for them by the Defendant as it forms part of the 1st Plaintiff's matrimonial property, and also part of the estate of the Deceased of which they are beneficiaries.

In addition, the 1st Plaintiff had filed a suit against the Deceased to determine her matrimonial property rights in the suit properties in Nairobi HCCC 42 of 2011 (OS), and the Plaintiffs have also filed a succession cause in Nakuru H.C. Succession Cause No. 433 of 2012 in which they claim that the suit properties are part of the deceased's estate. The Deceased having died since the filing of Nairobi HCCC 42 OF 2011 (OS), it appears to me that the said suit has been overtaken by events and the 1st Plaintiff and the other Plaintiffs have decided to canvass their entitlement to the suit properties in the present suit before the succession suit can be determined.

The parties herein have made very detailed arguments and relied on various judicial and legal authorities as to their respective entitlements to the suit properties in this respect, which I am of the view should be made and considered at the full hearing and not at this stage. In light of these circumstances, I will decide the application before me on the basis of a balance of convenience.

The facts of the 1st Plaintiffs marriage to the Deceased and of the 2nd -4th Plaintiffs being children of the Deceased are not contested. It is also not disputed by the parties in this respect that the Deceased was in possession of and collected rent from the suit properties until the time of his death. Therefore none of the parties herein can be said to have been in possession of, or to have been collecting rent from the suit properties. The parties also do not dispute that Lavender Properties Ltd was managing the suit properties and collecting rents upon appointment by the Deceased.

I have perused the property management contract Lavender Properties Ltd entered into with the Deceased dated 17th June 2006 and which was attached to the affidavit sworn by Beatrice Wandeti Njoka on 17th September 2013 as annexure "BWN 1". I am of the opinion that the terms therein are sufficient to facilitate the preservation of the suit properties pending the determination of the suit herein, save for the

term on the letting fees which this court is of the view is oppressive, and the need to amend other terms in light of the prevailing circumstances.

This court accordingly orders that the *status quo* to be maintained with regard to the suit properties pending the hearing and determination of the suit herein or until further orders shall be as follows:

1. Lavender Properties Limited shall continue to manage the properties known as Umoja Inner Core-Sector V Plot No. 231 and Umoja Inner Core-Sector V Plot No. 230 on the terms of the Property Management Contract entered into with Benson Kamau Kariuki (Deceased) on 17th June 2006 save for an amendment to the term on the letting fees that is now amended by this order to be 25% of the annual gross rent instead of 50%, the term on the Landlords who for the purposes of the said agreement shall now be the 1st Plaintiff and Defendant, and the term on the period of the agreement that is amended by the provisions of this order on the subsistence of the *status quo*.
2. Lavender Properties Limited shall collect the rents from the said properties namely Umoja Inner Core-Sector V Plot No. 231 and Umoja Inner Core-Sector V Plot No. 230, and shall after deduction of their allowable fees as provided for in the terms of the said Property Management Contract as hereby amended, deposit the balance in a joint interest earning account that the 1st Plaintiff and Defendant shall open in their names with effect from the month of October 2013.
3. Neither the Plaintiffs nor the Defendant shall sell, transfer, charge, mortgage or otherwise alienate the properties known as Umoja Inner Core-Sector V Plot No. 231 and Umoja Inner Core-Sector V Plot No. 230
4. Neither the Plaintiffs nor the Defendant shall enter upon, remain on, possess, and/or manage the properties known as Umoja Inner Core-Sector V Plot No. 231 and Umoja Inner Core-Sector V Plot No. 230 save as provided for in the terms of the property management agreement as amended by orders 1 and 2 hereinabove .
5. The Plaintiffs shall serve this order personally on the Directors of Lavender Property Limited.
6. The costs of the Plaintiffs Notice of Motion dated 5th July 2012 shall be in the cause.
7. The parties shall be at liberty to apply.

Dated, signed and delivered in open court at Nairobi this ____18th ___ day of ____September____, 2013.

P. NYAMWEYA

JUDGE