



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 109 OF 2013

NANCY WANGUI WAKABA.....1ST PLAINTIFF

MARGARET WANGUI WAKABA.....2ND PLAINTIFF

PETER KIBUTHU GICHUKI.....3RD PLAINTIFF

VERSUS

PETER NDERI WAKABA.....DEFENDANT

RULING

1. By a notice of motion dated 31st January, 2013 the plaintiffs, Nancy Wangui Wakaba, Margaret Wangui Wakaba, Peter Kibuthu Gichuki, brought this application against the defendant Peter Nderi Wakaba seeking among other orders, that pending the hearing and determination of this suit, a temporary injunction be issued to restrain the respondent and or his agents and servants from subdividing, leasing, selling and or in any way interfering with land parcel No Nyandarua/South Kinangop/828("suit Land") and that the Registrar

Nyandarua be directed to place a restriction on the suit land pending the hearing and determination of this application.

2. The application is supported by the affidavit of Nancy Wangui Wakaba sworn on 31st January, 2013 and is premised on the grounds on the face of the application. She depones that she and the 3rd applicant are daughters of Wakaba Nderi Muchiri; that the 2nd applicant is their mother and the respondent is their brother and they are in occupation of the suit land; that their father was the registered owner of the suit land until 2011 when the respondent fraudulently and illegally transferred the suit land to himself: That their father has been sick since 2009 suffering from senile dementia, has never recovered from that condition and therefore does not and did not have the capacity to give any form of consent: That the defendant has now threatened to evict all the family members and sell the suit land disinheriting other family members in the process: that unless the orders sought are granted the respondent will continue intimidating the other family members and evict them while each is entitled to a share.

3. On 1st February, 2013 the application was heard *ex parte* and interim orders as aforementioned stated, granted pending the hearing and determination of this application.

4. The application is opposed through a replying affidavit sworn by Peter Nderi Wakaba on 7th March, 2013. He depones that his father was initially the owner of the suit land but also owns plots no.1178 measuring 3 acres at Gita Mbushi and no.7594 measuring three acres which he has categorically stated

may be inherited by the other siblings : that it is not true that his father suffers from senile dementia but rather has been suffering from high blood pressure since 2011 and is in total control of his mental faculties: that his father transferred the suit land to him in love and affection and without any undue influence at which time the applicants were not residing on the suit land during the execution of the transfer: That he is the only son of his father and has taken care of him since 1989 after the 2nd applicant deserted the matrimonial home only to resurface in 2012: that it is in dispute that the 2nd applicant is his biological mother or the 1st and 3rd applicants, his biological sisters and the medical report exhibited by them is a forgery and suspect: That only the 2nd respondent is in occupation of the suit land since October, 2012 and who has a life interest in the suit land, while the 1st and 3rd respondents reside in their own homes away from the suit land. That the suit land has been registered in his name since 2011 where he lives with his wife and children and denies subdividing the suit land or using it for any other purpose other than for their livelihood and alleges that he has no intention of evicting the 2nd applicant.

5. On 17th May, 2013 Counsels took directions that the application be disposed of by way of written submissions. The applicants filed their written submissions on 17th May, 2013 but the respondent did not file any despite being given an opportunity to do so.

6. Counsel for the applicant chose to solely rely on his submissions which pleadings and submissions I have considered.

7. The application herein being for a temporary injunction, the burden is on the applicants to satisfy the conditions set down in ***Giella v Cassman Brown & Co. Ltd. (1973) EA 358***, namely that they have a *prima facie* case with a probability of success, that unless an injunction is granted, they might otherwise suffer injury which cannot adequately be compensated by an award of damages; and should the court be in doubt, it will determine the matter on a balance of convenience.

8. In his submissions, Counsel for the applicants rehearsed what was stated in their grounds and supporting affidavit of the 1st applicant. He added that the applicants had fulfilled the conditions set out in the *Giella* case and relied on the case of ***Waithaka v Industrial and Commercial Development Corporation*** but did not avail the authority for the court to consider.

9. It is common ground that the suit land initially belonged to Wakaba Nderi Muchiri who is the father of the 1st and 3rd applicants, the respondent and a husband to the 2nd applicant. It is also common ground that the suit land is now registered in the name of the respondent and that the 2nd applicant and respondent reside on the suit land.

10. The applicants have exhibited a letter from a Medical Doctor in Gilgil District Hospital dated 21st January, 2013 stating that Wakaba Nderi Muchiri was taken to the said hospital on 20th July, 2009 and was diagnosed as suffering from senile dementia and put on treatment. Although the respondent has disputed that his father suffers from senile dementia, he has not adduced any evidence to contravene this allegation nor has he provided any medical records to support his claim that his father suffers from High blood pressure despite alleging that he is the one who has been taking care of his father since 1989.

11. The applicants have also exhibited a letter from the Chief Mamumu Location addressed to the Registrar of Lands Nyandarua dated 5th November, 2012 asking him to place a caution on the suit land because the land had been transferred to the respondent without the consent of the family.

12. Whereas Article 40 of the Constitution of Kenya guarantees the right to own property to every person in Kenya, Article 40(6) excludes those who have acquired the land unlawfully. See the case of ***Mapis Investments (K) Limited v Kenya Railways corporation (2005) 2 KLR 410***

13. In the instant case, the applicants allege that the respondent transferred the suit land fraudulently. At the trial it will be incumbent upon the applicants to prove the allegations.

14. Looking at the affidavit evidence vis a vis, the applicable law without going into the merits of the

case, have the applicants demonstrated that they have a prima facie case? I think so. They have demonstrated that they are family members of Wakaba Nderi Muchiri and that the 2nd applicant resides in the suit land alongside the respondent. They have further exhibited a doctor's letter showing that Wakaba Nderi Muchiri, their father and husband suffers from senile dementia. The subject matter of the suit property been land, I am persuaded that the applicants might suffer irreparable injury unless the respondent is restrained from entertaining any dealings in respect of the suit property. Although the respondent is the registered owner of the suit land, I also find and hold that the respondent's ownership of the suit land is subject to the applicants beneficial ownership thereon. See Section 30 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) and section 28 of the Land Registration Act, 2012.

15. Pursuant to the powers conferred on the court under Order 40(1) of the Civil Procedure Rules 2010, for the purpose of preserving the suit land, this court grants an order of temporary injunction and restrains the respondent from subdividing, leasing, selling and or in any other way interfering with the suit land pending the hearing and determination of this suit. The applicants may also register this court order against the title.

16. The upshot of the foregoing is that the plaintiff's application dated 31st January, 2013 is allowed with costs.

Dated and Signed at Nakuru this 20th day of December, 2013.

L N WAITHAKA

JUDGE

PRESENT

Mr Otieno for plaintiff/Applicants

Mr Mureithi holding brief for Mr Munene for the Defendant/Respondent

Emmanuel Maelo : Court Assistant

L N WAITHAKA

JUDGE