



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Civil Suit 459 of 2011**

**ERIC MUNDIA WANENE.....PLAINTIFF**

**VERSUS**

**ANN WANJIKU NDUNGU.....DEFENDANT**

**RULING**

The Plaintiff has filed an application dated 2<sup>nd</sup> September 2011 seeking orders for an injunction restraining the Defendant from dealing in any manner whatsoever with the property known as DAGORETTI/KINOO/2168 (hereinafter referred to as the suit property), or in any other way interfering with the Plaintiff's ownership and quiet enjoyment of the same pending the hearing and determination of this suit.

The Plaintiff states that by virtue of a grant of letters of administration issued by this Court on 26/7/1999 in Succession Cause No. 923 of 1999 (In the matter of Estate of James Ndungu Mwangi), one John Mwangi (hereinafter called the former Administrator) together with one Francis Kinunu were appointed as the administrators of the estate of James Ndungu Mwangi (Deceased) who died on 15/4/1999, and the said letters of administration were confirmed on 18/5/2000. It was provided in the said Certificate of Confirmation that the former Administrator was to hold *inter alia* the properties known as DAGORETTI/KINOO/2167 and DAGORETTI/KINOO/2168 (the suit property), as trustee for the Deceased's then minor children by the first marriage, namely, the Defendant herein and her siblings Beth Wanjiru Nd'ungu, Anthony Mwangi Ndungu and Finnie Mwangi Ndungu.

The Plaintiff claims that the suit property was sold to him by the former Administrator by way of an agreement dated 23/12/2006. The said sale was for the purchase price of Kshs.1,500,000/= which the Plaintiff states he duly paid in full, and receipt whereof was duly acknowledged by the former Administrator on behalf of the estate. Further, that the former Administrator obtained the consent of the Kikuyu Land Control Board to transfer the suit property to the Plaintiff and also gave vacant possession of the same to the Plaintiff

The suit property was however was not transferred into the Plaintiff's name. The Plaintiff states that the former Administrators were substituted by the Defendant as the administrator of the Deceased's estate

after the parties entered into a written consent agreement dated 31/7/2007 in the aforesaid Succession cause No. 923 of 1999. The Plaintiff alleges that the Defendant has since caused the subject property to be registered in her name instead of transferring it to him, and caused a restriction to be registered against the property on 7/5/2007. Further that the Defendant has also been threatening to sell the suit property, and that unless she is restrained by this Court she may proceed to alienate the said property.

It is also averred by the Plaintiff that the former Administrator did inform him that he utilized the proceeds of sale of the suit property to purchase a motor vehicle registration number KAM 585N, and some four (4) plots at Ruiru for the benefit of the said children of the deceased. Further, that the Defendant having taken over the administration of the estate of the Deceased from the former Administrator, she is bound by his actions, and that the Deceased's estate having received the proceeds of sale of the properties from the Plaintiff, cannot at the same time retain the property as that amounts to unjust enrichment.

The foregoing averments are contained in a supporting and a supplementary affidavit sworn on 2<sup>nd</sup> September 2011 and 26<sup>th</sup> October 2011 respectively by the Plaintiff's mother, Jane Wanjiru Wanene. The Deponent states that the Plaintiff is currently out of the country pursuing further studies and working in the United States of America. The Deponent further states that she was duly appointed as the Plaintiff's lawful attorney vide a power of attorney donated by the said Plaintiff dated 6/1/2005, and is duly authorized to swear the affidavits on his behalf. She has annexed a copy of the said power of attorney as evidence. Also annexed is a copy of the said grant of Letters of Administration to the former Administrators, a copy of the Certificate of Confirmation of the said Grant, copies of acknowledgement of the purchase price by the former Administrator, and copies of the consents referred to in the foregoing.

The Defendant in her replying affidavit sworn on 14<sup>th</sup> September 2011 admits that prior to her appointment as an administrator of her deceased father, the former Administrator, who is also her paternal uncle, together with one Francis Kariga Kinunu had obtained letters of Administration with respect to the Deceased's estate. The Defendant states that the former administrators were tasked with the responsibility of holding in trust all those properties including the suit property, that had been allocated to the Deceased's children by his 1<sup>st</sup> wife until each of them attained the age of majority.

The Defendant avers that on or about 13<sup>th</sup> February 2001, the former Administrator filed an application in Court seeking to be allowed to sell one of the trust properties, and that the said application was never prosecuted or granted. The Defendant also avers that the former Administrator then proceeded to sell land parcel No. Dagoretti/Kinoo/2167 to the Plaintiff, without the Defendant's and her sibling's knowledge or involvement. Further that the former Administrator also attempted to dispose of the suit property which he alleges to have been paid Kshs.1,500,000/=. The Defendant denies that proceeds from the sale of the properties were used for the benefit of the deceased's children, and that the same were used by the former Administrator for his own benefit and to further his interests. The Defendant has given particulars and evidence of hardship incurred by herself and her siblings at institutions run by charitable organizations, where they had been taken by their grandmother who was unable to educate or take care for them .

The Defendant states that she made concerted efforts to stop the sale of the properties through the chiefs of Magumu Location, the District Officer Kiambu District and Land Registrar Kiambu, including visiting the Plaintiff's mother's house and cautioning her not to buy the property . This last averment is however denied by the Plaintiff in the supplementary affidavit sworn on 26<sup>th</sup> October 2011. The Defendant further states that she as a result lodged a caveat at the district lands office in Kiambu District, and prosecuted an application to have the grant to the former Administrator revoked. This prayer was purportedly granted by the Honourable Lady Justice Aluoch(as she then was). The Defendant denies that the said order was granted pursuant to a written consent as alleged by the Plaintiff, as the said consent was never endorsed by the Court either partially or at all.

The Defendant contends that the Plaintiff has not come to court with clean hands and cannot seek equity from this Court, and that the sale of suit properties herein was fraudulent and illegal, as the suit properties were sold by the former Administrator in breach of trust bestowed in him by the said Grant. Further, that the said sale was also done without the consent of the Court or that of the beneficiaries contrary to section 82 of Law of Succession Act (Cap 160) which is a mandatory requirement. The Defendant has annexed as evidence copies of letters from the chief of Magumu Location dated 17<sup>th</sup> November 2003, and the District Officer, Kikuyu Division dated 13<sup>th</sup> February 2007. Although it is stated in the Defendant's affidavit that an application dated 4<sup>th</sup> July, 2007 seeking to restrain the former Administrator from disposing of the properties was annexed, I could not find the said application upon perusal of the said affidavit, nor was there any court decree annexed.

At the hearing of the present application on 1<sup>st</sup> December 2012, the Advocates for both the Plaintiff and Defendant submitted that they would rely wholly on the pleadings filed and sought a ruling date on the same. I have read and carefully considered the pleadings and evidence tendered by the respective parties to this application. The main issue is whether the Plaintiff has brought himself within the ambit of the principles for granting an interlocutory injunction as set out in the case of **Giella v Cassman Brown & Co Ltd (1973) EA 358**. These are:-

- (a) *A demonstration that the applicant has a prima facie case with a probability of success.*
- (b) *A demonstration that if an injunction is not granted, the applicant will suffer irreparable loss which cannot be compensated for in monetary terms.*
- (c) *Where the court, is in doubt about ingredient (a) – (b) it will decide the matter on a balance of convenience to both parties.*

On the first requirement of a *prima facie* case, the Plaintiff in the suit filed herein on 2<sup>nd</sup> September 2011 avers that having purchased the suit property for valuable consideration, he is the legal owner thereof and that any title held by the Defendant is held in trust for him. He is therefore seeking relief in terms of a permanent injunction restraining the Defendant from dealing with the suit property, a declaration that he is the legal owner of the suit property and a mandatory injunction compelling the Defendant to transfer the suit property to him.

The Plaintiff in this respect has provided evidence of a sale agreement with respect to the suit property signed between the Plaintiff and the former Administrator on 23<sup>rd</sup> December 2006. This agreement was entered into before the purported application to revoke the grant of administration to the former Administrator, claimed by the Defendant to have been made on 4<sup>th</sup> July, 2007. There is also evidence of payment made pursuant to this agreement, the final balance having been paid on 13<sup>th</sup> April 2007, before the said application for revocation. In addition the Defendant has not provided any evidence of title to the suit property. These facts in my opinion are sufficient to establish a *prima facie* case for the Plaintiff. I cannot at this stage make any finding as to the issue of propriety of the said sale, or as to whether the former Administrators was in breach of trust, as this can only be decided with finality at the trial of the suit herein.

The Defendant has also neither pleaded nor shown that they will be able to compensate the Plaintiff in damages if he proves to be successful in his suit, and I will therefore not make any finding on the adequacy of damages.

For the reasons given in the foregoing, I hereby grant an injunction with pursuant to the application dated 2<sup>nd</sup> September 2011 restraining the Defendant by herself, or through her agents, servants or employees from charging, leasing, selling, transferring or otherwise disposing of the property known as DAGORETTI/KINOO/2168, or in any other way interfering with the Plaintiff's quiet enjoyment of the same, pending the hearing and determination of the suit filed by the Plaintiff.

The costs of this application shall be costs in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_15<sup>th</sup>\_\_\_\_ day of \_\_\_\_February\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**