



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC CASE NO. 581 OF 2011

**KINYANJUI KIBI GICHAMBA.....PLAINTIFF
VERSUS
JOHN GICHAMBA & 2 OTHERS.....DEFENDANT**

RULING

1. The Plaintiff/Applicant states that he obtained from his aged father as a gift, amongst other parcels of land, that parcel of land known as **Dagoretti/Kangemi/1209** (Suitland). The defendants who are his brothers, according to the applicant have conspired to take away from him the above parcel of land and give it to the first defendant on the basis that that was their father's wish that each of his sons do get two parcels of land as gifts from their father. The Plaintiff/Applicant did not agree with his brothers and hence this suit.
2. Simultaneously filed with the plaint was a Chamber Summons brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In it the applicant prays that the defendants and anyone acting for them be restrained from interfering in any way whatsoever with the Applicant's possession, control, occupation right and/or interest in or over, amongst others, the suit land. In the supporting affidavit the applicant swore that his father transferred the suit lands to him during 1996 in full knowledge of his brothers the defendants herein who also got their own portions. The Applicant had the suit lands registered into his name and in respect of Dagoretti/Kangemi/1209 registration was on 24/6/1999. The applicant therefore is of the view that the defendants are driven by an agenda to cause division in the family by using their aged father to support their agenda even though their father does not fully comprehend the flowing current. He adds that he is in the process of developing the suit land with funds from a financial institution yet that is the one property he is being asked to surrender to the 1st defendants. He prays as earlier stated.
3. The defendants filed Replying Affidavits in opposition to the application. They stated that the developments on the suit land being 14 rental houses were built by their father and that the Plaintiff/Applicant obtained the suit land by contravening the wishes of their father and secretly transferred to himself a plot more that the other brothers who are the defendants herein. The defendants acknowledged that the Plaintiff/Applicant was carrying out certain developments on the suit land. The applicant filed a further affidavit in rebuttal of what was stated in the Replying Affidavits.
4. Learned Counsel on both sides made written submissions in support of their rival positions and left it to court to arrive at a determination.
5. The applicant has to prove that he has made out a prima facie case with a probability of success at trial and that if the order sought is not granted he would suffer loss not capable of being adequately compensated by an award of damages. If the court be in doubt then it would decide the case on a balance

of convenience see– **GIELLA –VS- CASSMAN BROWN (1968) E.A. 368.**

6. The applicant admits that the suit lands, save for the one he bought from his father and to which no claim is laid, were received from his father. Clearly those were gifts inter vivos and for which no consideration passed. His own father and to whom the entire suit lands belonged before he gifted his sons with the same states in his statement that his intention was that each of his sons do get as a gift two parcels. He adds further that having been blind for well over twenty years, he might easily have signed a transfer he did not intend to. What he makes clear is that his intention was that each of his sons gets two parcels of land. Now, in those circumstances is a prima facie case made out? In the case of **MRAO LIMITED –VS – FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as,

“ a prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

7. In the circumstances of this case and bearing in mind paragraph 6 above, I would hesitate to find that the applicant has made out a prima facie case with a probability of success at trial. The financial assistance given to the applicant is acknowledged by the defendants as it is indeed evident from the annexures to the application. That loan notwithstanding I do not find that any loss the applicant might suffer cannot be compensated by an award of damages. I am in no doubt as to the decision I have arrived at and I therefore need not consider the balance of convenience principle but even if I were to consider the same, I would find that the same rests on not granting the orders sought.

In the result I refuse the application and dismiss it with costs.

This being a family matter and in the interest of justice and due to the advanced age of the parties’ father I order that parties prepare the suit for hearing by complying with Order 11 in the immediate future. **The hearing of the case is therefore fixed for the 15.05.2012.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2012.

P.M. MWILU
JUDGE

In the presence of:-

Njogu H/B for Gakaria Advocate for Plaintiff/Applicant
Oyugi H/B for Kagwe Advocate for Defendant/Respondent
Amos Njoroge – Court Clerk

P.M. MWILU
JUDGE