



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL CASE 30 OF 2012

MADALINA WAMBUI MARETE.....1ST APPLICANT/PLAINTIFF

JOSEPH MUCIJIA2ND APPLICANT/PLAINTIFF

VERSUS

JULIUS KIGUTU.....RESPONDENT/DEFENDANT

R U L I N G

The applicants in an application dated 15th March, 2012 brought under Section 1,1A,3 and 3A of Civil Procedure Act, Section 28 of the Registered Land Act and Order 40 Rule 1 (a) and (4) of Civil Procedure Rules seeks the following orders:-

1. That the order of inhibition do issue prohibiting all dealings in the title number Nyaki/Kithoka/685 till the hearing and final determination of this case.

2. That the costs of this application be provided for.

The application is based on the following grounds:-

i. The title Number Nyaki/Kithoka/685 the dealing in which is sought to be inhibited herein is the subject of the applicant's plaintiff's claim in this suit.

ii. Such title is registered in the name of the respondent herein and the defendant in the main suit.

iii. The applicant's claim is for beneficial ownership of such title.

iv. The respondent herein has in the past dealt with the said title as it was his own exclusively in total disregard of the applicant's claim and interest in the same.

v. The applicant therefore have reasonable apprehension that the respondent may deal with the title to alienate the same and or to jeopardize the applicant's interest.

The application is supported by affidavit of 2nd applicant who has stated as follows: That the applicants

main claim in the main suit is for the beneficial ownership of part of the title number Nyaki/Kithoka/685. That Nyaki/Kithoka/685 is registered in the name of the respondent under the Registered Land Act. That such registration however has failed to show that the respondent is so registered as a trustee for himself and the applicants. That in the past the respondent had dealt with the said title as if it was his own exclusively by charging the same to a bank in complete disregard of the applicant's interest and risking the alienation of the title. The applicants in support of their fears annexed copy of title Nyaki/Kithoka/685 marked "JMI" showing all details complained of. The applicants further states the filing of this claim in court may cause the respondent to alienate the said title before the suit is heard so as to defeat their claim. The applicants states that they live on the suit land where they have their homes and on the suit land is source of their livelihood. That the respondent may deal with suit land if it is not restrained by an order of this court in a manner that may be detrimental to the applicants and cause the same to be alienated and make the suit nugatory and as such render the applicants and their families homeless and destitute. The applicants concluded by stating that they make this affidavit in support of their application for order of inhibition prohibiting all dealings in the title Nyaki/Kithoka/685 till this suit is heard and finally determined.

The respondent filed a replying affidavit dated 20th April, 2012 opposing this application. The respondent in his replying affidavit stated as follows: That Nyaki/Kithoka/685 is his private property and that he acquired the same from Igweta Ikiara on 22nd April, 1974 hence he denied that the said land has ever been ancestral and/or family land as alleged by the applicants.

That the applicants have no beneficial or any other kind of proprietary interest over the suit land but are mere licencees on the respondent's land. The respondent further stated that at no time was he registered to hold the said land in trust for the plaintiffs or their father M'MARETE M'TUERANDU, who is since deceased.

The respondent admitted that in 1976 he charged the suit land with AFC for Kshs.3900/-. That cash on 22nd January, 1985 the charge was discharged as per annexure "JMI". The respondent further states even if the applicants occupy a very small portion of the suit land, they are on his land as his licencees and without any other right whatsoever. The respondent further stated that he has no intention of selling the suit land but that does not mean that the applicants have any right whatsoever to inhibit his land. The respondent stated that he is old and sickly man, and he lives alone and the applicants have made it difficult for him to enjoy his land peacefully; such that whenever he rears his livestock, the same mysteriously dies and he suspects the applicants.

The respondent averred that the applicants' application is devoid of merits as they are not suing as legal representatives of M'MARETE M'TUERANDU and that the claim is contradictory and self-defeating in that the body of the plaint does not support their prayers.

During the hearing of the application the learned Counsel for the applicants Mr. Karuti, on his part relied on the grounds on the face of the application and supportive affidavit thereto together with the annexures to the affidavit. He argued that the application ought to be granted as the respondent having previously exposed the suit property to the risk of alienation and as such there is reasonable apprehension on the part of the applicants that the respondent may do so again especially now his legal ownership is challenged. He argued that the applicants have a claim which may be threatened if orders sought are not granted. He submitted that as court recognized the applicants claim when it granted interim orders, the same ought to be protected till this suit is heard and determined.

The learned Counsel for the applicant submitted that as the respondent on his replying affidavit under paragraph 8 had indicated he has no intention of selling the suit land there was no difficulty in the court granting or confirming the earlier orders. He submitted that the law is that no one knows the mind of a man and as such one can change tomorrow or at any moment.

Mr. Mwirigi, the learned Counsel for the respondent on his part, he opposed the notice of motion and in doing so he relied on respondent's replying affidavit dated 20th April, 2012 and the annexure thereto. He submitted that the respondent purchased the suit land in 1974 and that the applicants' claim is based on

trust which can be determined by way of evidence. He further submitted that there is no threat of the land being alienated as the land was discharged in 1985 and that no other encumbrance has since been registered. He also argued that the applicants have not demonstrated any apprehension of the suit land being exposed to any alienation. He also submitted for applicants' application to be granted they ought to have demonstrated that there is real danger of alienation. He stated that the law safeguards the sanctity of title and that it is not automatic once a suit is brought up against any title it be inhibited.

He submitted that since 1974 the applicants have never cautioned the land or brought up a claim against the respondent yet all the time they had been aware the respondent was the registered proprietor.

He urged the court to dismiss the application adding that the respondent's affidavit has not been controverted. The learned counsel for the applicants Mr. Karuti in brief reply, pointed out that under annexure "JMI" in the applicants affidavit dated 15th March, 2002 under entry No.7 it is clear that the applicant's father cautioned the suit land on 7/7/2010. He submitted that the applicants' father purchased the land and had it registered in the name of the respondent. He argued the issue as to who purchased the land in 1974 is an issue to be determined by the court. He further argued the primary consideration is whether one there are serious issues for determination by court. He argued paragraph 9 of the plaint it refers to plaintiffs' share of the land as the land was to be shared into 3 equal portions and transfer to be effected accordingly.

The issue for determination in this application is whether the applicants raised serious issues for consideration and for justification in granting orders of inhibition prohibiting all dealings in the title number Nyaki/Kithoka/685.

The suit land is registered in the name of the respondent. The registration do not show that the respondent is registered as a trustee for the applicants. The applicants claim the respondent is registered as a trustee for the plaintiffs/applicants. That both applicants and the respondent admit that the applicants live on the suit land. The applicants and their families homes are at the suit premises. The applicants have stated that they depend on the suit premises together with their families for their livelihood. The respondent in his affidavit averred that the applicants occupy a very small portion of suit land as his licencees and have no other right.

In the applicants/plaintiffs' plaint under paragraph 6, the applicants claim to be entitled to suit land as beneficial owner to a third share, whereas under Paragraph 7 the applicants claim the original land to have been owned by their father through purchase and under paragraph 8 the applicants aver the land was registered in respondents name to hold the same in trust for the applicants. Under Paragraph 9 it is averred the respondent was to hold the land in trust for the applicants who were by then minors.

Paragraphs 6,7, and 8 and9 of the amended plaint states as follows:-

"6. At all material times including on the date hereof the plaintiffs were entitled as beneficial owners to a third share interest each in the title known as NYAKI/KITHOKA/685 situate in Meru Municipality and measuring two(2) acres of thereabouts and registered in the Imenti North District Land Registry in the name of the defendant herein.

7. That the said parcel of land was originally owned by the plaintiff's father one M'Tuerandu M'anampiu(now deceased) who had purchased the same from the previously registered proprietor.

8. That in or about the year 1974 the said M'Tuerandu M'Anampiu caused the title to the said parcel of land to be registered in the name of the defendant so that the said defendant could hold the same in trust for himself and for the plaintiff's herein.

9. That it was verbally agreed by and between the said M'Tuerandu M'anampiu and the defendant that the defendant would hold the title to the said parcel of land while the plaintiffs were minors and that the defendant would sub-divide the said parcel into three(3) equal titles and or portions and the defendant would transfer the title for each one third to each plaintiffs as beneficial owners when the

plaintiffs attained the age of majority and or at the request of the plaintiffs.”

The respondent at one time used the title of the suit land to secure a loan. The same was later discharged. There is evidence that the father to the applicants cautioned the suit land on 7/7/2010.

It is therefore clear from the foregoing the applicants suit raises serious issues for consideration by the court. The applicants have demonstrated they have interest over the suit land. The applicants and their families have been settled and still are settled on the suit land. According to the applicants they are beneficial owners whereas according to the respondent they are licensees.

The applicants have therefore demonstrated they have right over the suit land whether one says they are beneficial owners or licensees, they have right to be on the land pending hearing and determination of the suit. The applicants rights ought to be protected pending hearing and determination of this suit.

In this case though the respondent is registered as proprietor, the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust existing in the land. See **Muthuita – V-Wanoe(1982) 166** in which Court of Appeal held:-

“The Resident Magistrate considered sections 27, 28 and 30 of the Registered Land Act and concluded that the rights of a registered proprietor could not be defeated except by interests shown on the register or by overriding interests detailed in s 30. In this he was wrong. He failed to note that s 28 is subject to a proviso. Thus:

“28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject ... Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

Furthermore, s 126(1) of the Registered Land Act provides:“126(1). A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words “as trustee”, but the Registrar shall not enter particulars of any trust in the register.

Where the proprietor of land, a lease or a charge is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trust...”

In Gatimu Kinguru v Muya Gathangi [1976] KLR 253, Madan J (as he then was) held that the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of S.126 (1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive. (The underlining is mine). That decision has been followed and in my respectful opinion it is correct.

Besides the above in the case **of Mwangi & Another – Vs- Mwangi (1986) KLR 328:-**

Hon. Shah CA, as he then was held:-

2. From the evidence, the court was satisfied that the original intention of the parties’ father was that all of them were to hold the land in equal shares. Kikuyu customary law and the Registered Land Act (cap 300), under which the land fell, recognized the law of trusts.

In accordance with the provisions of the Registered Land Act sections 28 and 30, the defendant’s

registered interest in the suit land was subject to the overriding interests of the plaintiffs as persons in possession and occupation of the land without legal title. The plaintiff's equitable rights were binding on the land and the land was subject to those rights when it was registered in the defendant's name.

The absence of any reference to the existence of a trust in the title documents did not affect the enforceability of the trust since the provisions of section 126(1) of the Registered Land Act as to the reference of a trustee are merely permissive and not mandatory.

Also see **Kanyi –VS-Muthiora(1984) KLR 12** in which case Court of Appeal held:-

“Registered land, however, by section 163 of the Act is subject to “the common law of England, as modified by equity” which brings in the equitable doctrines of implied constructive and resulting trusts arising out of the facts set out in the answer to the previous issue. And the appellant as proprietor by this first or any subsequent registration is not relieved by anything in section 28 from any duty or obligation to which she is subject as a trustee as its proviso declares.

Furthermore, the respondent under the trust which arose between her and the appellant in the circumstances of this case had rights against the appellant stemming from her possession and occupation of part of Muthiora's land though it was registered in the name of the appellant. This is an overriding interest which is not required to be noted on the register and the appellant's proprietorship is subject to it. Section 30 (g). The consequence, in my view, is that the respondent is entitled to a share of her father's land at Komothai and the learned judge was right to so find, albeit for different reasons, and to limit it to 3 acres.”

In view of the foregoing, the applicant's interest ought to be protected pending hearing and determination of this suit. I find the applicants' have demonstrated that the suit property is exposed to risk of alienation. I find the applicants' apprehension to be reasonable. I also find that there is real danger of alienation of suit property as submitted by applicants counsel that the law is no one knows the mind of man and considering the respondents averments that it is difficult for him to enjoy the land peacefully as the applicants have been a thorn in his flesh. Consequently the application is allowed and I proceed to make the following orders:-

1. THAT an order of injunction be and is hereby issued prohibiting all dealings in the title No.Nyaki/Kithoka/685 till the hearing and final determination of this suit.

2. That a copy of the inhibition under the seal of the court, with particulars of the land affected thereby be sent to the District Land Registrar, Meru to register the same in the appropriate register.

3. Costs be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 31ST DAY OF MAY, 2012.

**J. A. MAKAU
JUDGE**

DELIVERED IN OPEN COURT IN PRESENCE OF:

- 1. Mr. Karuti for applicant(absent)**
- 2. Mr. Mwirigi for the respondent(absent)**

**J. A. MAKAU
JUDGE**