



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 398 OF 2011

ELLEN WANGARI
MBURU.....PLAINTIFF

VERSUS

PATRICK KINUTHIA
KIIGA.....DEFENDANT

RULING

The Application that is before this Court for consideration is one dated 1st December 2011 and is filed by the Plaintiff. The order sought is for a temporary injunction restraining the Defendant by himself, his agents and/or servants from alienating, selling and/or interfering with the existing fences and boundaries of L.R. No. NDARUGU/GAKOE/344 (hereinafter referred to as the suit property), pending the hearing and determination of this suit. The grounds for the application are that the Plaintiff has been living on the suit property since 1963 and that despite the pendency of this suit, the Defendant has applied for consent from the Land Control Board to sub-divide the suit property. Further, that if the said sub-division proceeds, the foundation of the suit and application herein will be destroyed, as the land reference numbers will change and the Defendant is likely to sell the land after sub-division.

The Plaintiff in her supporting affidavit sworn on 1st December 2011 states that she and her children are entitled to half of the suit property which the Defendant holds in trust for them. Further, that the dispute between himself and the Defendant had earlier been heard and decided by elders, but it was found that the elders did not have jurisdiction. However, that on 30th November, 2011 the Plaintiff discovered that the Defendant has applied for consent to sub-divide the suit property, and is apprehensive that if the Defendant gets the Land Control Board consent he will sell the suit property which will render the suit herein nugatory. The Plaintiff has annexed a copy of the proceedings and award of the elders dated 11th June 2004, and a copy of the application for consent by the Land Control Board dated 13th October 2011.

The Defendant in his replying affidavit sworn on 6th December 2011 states that he is the registered owner of the suit property, and that the Plaintiff has not exhibited any documentary evidence to establish her claim to part of the suit property. Further, that the Plaintiff's claim that the Defendant holds part of the suit property in trust for the Plaintiff's family is baseless since the suit property is not ancestral land, and he purchased the same for valuable consideration from the estate of one Kimani Muigai, and the said property was transferred to him by the Administrators of the said estate once he completed paying the

purchase price. The Defendant has annexed copies of his title deed, and of the said agreement for sale and Certificate for confirmation of grant.

The Plaintiff's and Defendant's Advocates filed written submissions dated 1st March 2012 and 13th March 2012 respectively. The Plaintiff's Advocate submits that the Plaintiff has demonstrated that she has been in possession of and living on the suit property since 1963, and the balance of convenience is clearly in her favour. Further, that the Plaintiff's case therefore meets the threshold in **Giella v Cassman Brown & Co Ltd, (1973) EA 358.**

The Defendant's Advocate argued in his submissions that the Defendant has been able to demonstrate that the suit land is not ancestral land but was acquired by him through purchase from a third party, and has exhibited the title deed and sale agreement to support his position. Further, that the Plaintiff has not rebutted these averments and has not produced any evidence in support of her allegations, and has therefore failed to demonstrate a *prima facie* case. The Defendant's Advocate also submitted that the evidence produced by the Defendant also tilts the balance of convenience in his favour.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. I will proceed with the determination of the application on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358.** The main issue therefore is whether the Plaintiff has shown a *prima facie* case to entitle her to the injunction sought. The Plaintiff's claim in the Plaintiff dated 2nd August 2011 is for a declaration that the Defendant, who is the brother of her late husband, holds the suit property in trust for the Plaintiff and himself in equal shares.

The Plaintiff's averment of possession of the suit property since 1963 has not been controverted by the Defendant, who states that the claim is immaterial as he purchased the suit property, and the same is not ancestral land. This is an issue that can only be determined after full trial and not at this stage. The sale agreement produced in evidence by the Defendant is also not written in a language of the Court, and no translation has been provided of the same. This Court cannot therefore rely on the said agreement. In addition, the Defendant does not dispute the family relationship between himself and the Plaintiff. It is therefore the finding of this Court that the Plaintiff has established a *prima facie* case, and since the suit property is the land on which her family resides, damages will not be an adequate remedy.

In light of the reasons given in the foregoing, I hereby grant a temporary injunction restraining the Defendant by himself, his agents and/or servants from alienating, selling and/or interfering with the existing fences and boundaries of the land parcel known as L.R. No. NDARUGU/GAKOE/344 pending the hearing and determination of the suit filed herein.

The costs of the application dated 1st December 2011 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____22nd ____ day of ____May____, 2012.

P. NYAMWEYA

JUDGE