



PETER NGANGA MBUGUA.....APPLICANT/PLAINTIFF

VERSUS

LOISE MUGURE KIARIE.....1ST RESPONDENT/DEFENDANT

THE NAKURU DISTRICT LAND REGISTRAR.....2ND RESPONDENT/DEFENDANT

RULING

Parcels of land Ref. Nos. NAKURU MUNICIPALITY BLOCK 23/379 and NAKURU/LANGALANGA BLOCK 1/200 are registered in the name of Eunice Wangui Muigai a resident of Australia, who has donated a Power of Attorney to her uncle Peter Nganga Mbugua, the applicant over the two properties. The registered owner's daughter, Loise Mugure Kiarie has registered restrictions on both properties, which the applicant seeks in this application to be removed.

It is contended by the applicant that the respondents have no legal or equitable interest in the suit properties; that the 2nd respondent has ruled against the removal of the restrictions. The applicant has also deposed that he is unable to carry out the instructions of the legal owner of the properties, to sell them due to the restrictions in question.

In reply, the 1st respondent has averred that she was justified in registering restrictions on the two properties as she and her brother Clement Njau have interest on the two properties which ought to be protected by the court. The 1st respondent has explained that since their mother, the registered owner of the two properties relocated to Australia, the 1st respondent and her brother Clement have been living in one of the houses comprised in the suit properties; that they use the rent proceeds from the other houses for food, education and to pay their bills; that the reasons given for the removal of the restrictions are not persuasive; that because 1st respondent and Clement Njau are entitled to a share of the two properties, should the court grant the orders sought, then it ought also to order that the proceeds of sale be shared between, their mother, the applicant and Clement Njau as to deny them this they stand to be disinherited.

I have considered those submissions and the three authorities cited by learned counsel for the applicant. There is no doubt that the two properties are registered in the name of Eunice Wangui, who is the mother of the respondent. Eunice Wangui has donated Power of Attorney to her uncle, the applicant with regard to the suit properties, which are registered under the **Registered Land Act**. In terms of **Section 138** of the Act, the Registrar heard the applicant's application for removal of the restrictions and dismissed it saying in pertinent part that:

“The children also have a right to claim for consultation before any action is taken on the suit properties since they have grown up to know the properties as their source of livelihood. There was no reason therefore for the mother to appoint a P.A. (I suppose, Power of Attorney) when the children are there to deal with the properties. This means that she has decided to disown the children.

ORDER:

The restriction to be sustained until an amicable solution is found.”

Section 138(2) provides that:

“(2) Upon the application of any proprietor affected by a restriction and upon notice thereof to the Registrar, the court may order a restriction to be removed or varied, or make such other order as it thinks fit, and may make an order as to costs.”

By its very nature, the motion dated 7th July, 2011 is a mandatory injunction as it seeks to direct the 2nd respondent to remove the restrictions on the two properties. Those are the same orders the main suit is seeking. It follows that if the application is allowed at this stage, there will be no issue left for determination at the trial. It is now established principle of law that a mandatory injunction can be granted at an interlocutory stage only in very exceptional circumstances and only where the matter is clear beyond doubt and unusually strong.

See Megarry, J (as he then was) in the English case of **Shepherd Homes Limited V. Shandahu** (1971) 1 Ch.34, which has been followed in a long line of local decision. The judge said:

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.”

See also **Kenya Airports Authority V. Paul Njogu Muigai & 2 others**, Civil Application No. NAI.29/97.

I reiterate that it is uncontroverted that the properties belong to Eunice Wangui, who in terms of **Section 32(1)** of the **Registered Lands Act** has an indefeasible and absolute title. It has been deposed without rebuttal that the said Eunice Wangui has donated to the applicant the power of attorney with specific instructions to sell the properties and use the proceeds of such sale to purchase other properties in Nairobi.

Other than being a daughter of Eunice Wangui, the respondent has not shown any interest in the properties. She has not denied the averment that she is married and lives with her husband in his house. It has been held that the rights of children of a land owner accrue only upon the death of the landowner. Otherwise the rights remain inchoate and are not legally enforceable in any court of law. See **Muriuki Marigi V. Richard Marigi & others**, Civil Appeal No.189 of 1996.

In view of all these facts, it is my view that this is a suitable case to grant at an interlocutory stage a mandatory injunction. The Registrar, (2nd defendant) took into consideration extraneous matters and ultimately arrived at a wrong decision. Pursuant to **Section 138(2)** of the **Registered Land Act**, the restrictions on the two properties are ordered removed as prayed forthwith.

There will be costs to the applicant.

Dated, Signed and Delivered at Nakuru this 2nd day of May, 2012.

W. OUKO
JUDGE