



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL & LAND CASE 92 OF 2012

JOHN MUGWE KIARIE.....PLAINTIFF/APPLICANT

VERSUS

EVANSON KAHIRA KIARIE..... DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant hereinafter referred to as the applicant has filed a Notice of Motion dated 21st February 2012 under Order 40 Rule 1, 2, 3 and 4 of the Civil procedure rules and Section 3A and 63 (e) of the Civil Procedure Act Cap 21 of the Laws of Kenya and all other enabling provisions of the law, seeking the following orders;

1. That pending hearing and determination of this suit the defendant/respondent be restrained by himself, his servants and or agents from entering into and remaining upon with a view of undertaking construction works, selling, alienating and interfering with the parcel of land known as Dagoretti/Kangemi/631 situate in Kangemi, Nairobi.
2. That a mandatory injunction to issue directing the defendant to produce for inspection of the court and all parties herein the original transfer forms and all other supporting documents that he used to transfer of the suit property to himself.
3. That the O.C.S kangemi Police Station be served with a copy of the Order to supervise/ensure compliance.
4. That the costs of this application be awarded to the plaintiff.

The application is based on the following grounds.

- a) That the plaintiff is the owner of one half of the suit property Dagoretti/Kangemi/631.
- b) The plaintiff and the defendant jointly purchased the property known as Dagoretti/Kangemi 109 in 1976.
- c) The plaintiff and the respondent subdivide the aforementioned parcel of land into 3 parcels of land namely Dagoretti/Kangemi/630,631,632 and Dagoretti/Kangemi/631, the suit property was to be registered in their joint names.
- d) The plaintiff on 16th February 2004 discovered after conducting a search at the lands registry that the

respondent had registered the jointly owned piece of land Dagoretti/Kangemi 631 in his own name and that he had charged the property several times resting with the last charge to family bank for Kshs. 4,000,000/- despite demands the defendant has refused to explain the circumstance that led the jointly owned property Dagoretti/Kangemi/631 being registered in his name ignoring the plaintiff's entitlement to one half of the property.

- e) That the plaintiff has involved the clan elders of the area to try and adjudicate the matter as the defendant is his brother and they came up with verdict on the 6th January 2012 that the suite property is jointly owned and should be subdivided amongst them in the portions that they each reside upon.
- f) That the defendant despite the existence of the elders finding has proceeded to start construction works on the whole of the suite property and is currently constructing a perimeter fence and has dumped construction material on the suit property.
- g) That it is in the interest of justice that the orders herein are granted.

The plaintiff filed a supporting affidavit dated 21/2/2012 and he deposes as follows; that he is the owner of one half of the parcel of land known as Dagoretti/kangemi/631 situated in Kangemi, the suit property. That the respondent and him are brothers, while he was working with Railways in Tabora, Tanzania, he approached him and proposed that they jointly purchase a parcel of land more specifically known as Dagoretti/Kangemi/109 that was being sold for Kshs.15,000/- by a Mr. Kinyanjui in 1975. That he agreed to the proposal and in fulfillment of his obligation towards the settlement of the purchase price, he sent Kshs. 8000/- to the defendant in trust and since he was not readily available due to work engagements he entrusted him to handle the transaction on their behalf to completion. That upon payment of the purchase price to the vendor of Dagoretti/Kangemi/109 the same was wholly transferred to the defendant/respondent and he held his share in trust. That once they had completed the purchase of the said parcel of land they charged the parcel of land Dagoretti/Kangemi/109 to Kenya Commercial Bank for Kshs.20,000/- and they share the said amount borrowed equally. That when he returned in the country, sometime in the early 1980's subdivided the land into three parcels that is Dagoretti/Kangemi 630,631&632. That they submitted the subdivision plans and the mother title to the lands registry and they were issued with two titles as follows; Dagoretti/Kangemi 630 in the name of Evans Kahira Kiarie, Dagoretti/Kangemi 633 in the name of John Mugwe Kiarie. That they agreed that Dagoretti/Kangemi 631 was to be registered in the names of their wives but later on, they were not comfortable with the arrangement and they agreed to register the same in their names. That even before the issuance of the title and submission of the approved subdivision scheme to lands for issuance of the title, they had already locally subdivided the mother title into the three portions as aforementioned and settled on the same. That on the disputed parcel of land, each individual has constructed rental units on their respective half's and they have always managed and collected the rent due to them from their portions. That sometime in 2004 they engaged the services of a surveyor to subdivide the jointly owned portion equally amongst themselves and when he inquired for the title to Dagoretti/Kangemi 631, the same was not easily available from the defendant/respondent. That after conducting a search on the suit property it came to his attention that the defendant/respondent has registered the jointly owned parcel of land, that is Dagoretti/Kangemi 631, in his own name and that he had even charged the same few times without his knowledge. That on realizing this he approached the defendant/respondent to seek clarification on why he had registered the joint property in only his name and he said that he would rectify the situation as soon as he discharged the property. That he recently carried out a search and noted that he has currently charged the property to Family Bank Limited for the amount of Ksh. 4,000,000/- contrary to the earlier discussion that they had on the issue of rectifying the ownership situation. That soon thereafter he declined to speak to him even after he turned to involve the help of the local elders and area chief to settle the dispute as regards the issue of the ownership of the said parcel of land. That soon after both attended several meetings culminating in the meeting held on the 6th January 2012 where the elders sought to adjudicate on the dispute as to the ownership of Dagoretti/kangemi 631 where they both put forward their case and they later issued their verdict soon thereafter. That the defendant/respondent thereafter declared that the suit property belonged to him and that he had no claim to it as he did not appear anywhere in the title documents. That ever since the defendant/respondent has ignored all sort of communication and refused to attend all meetings intended to settling this matter. That recently, the defendant/respondent has

deposited construction material on the suit property and has even started the construction of a perimeter wall around the suit property and this will deny him access to his residence Dagoretti/Kangemi 633 which he access through his half of the suit property. That the defendant/respondent has also threatened to demolish the structures on his half of the property in complete disregard to his interest in one half of the property. That the acts of the defendant/respondent are unlawful, as he is the bonafide owner of one half of the said property. That he is at risk of losing his benefit of the said interest in the suit property as the defendant/respondent has charged the said property and intends to commence construction on the hole of the suite property.

The defendant filed a replying affidavit dated 20/3/2012. He deponed as follows in response the applicants affidavit; That he purchased the parcel of land Dagoretti/Kangemi/109 from Kinyanjui Gathegu in 1967 for Kshs. 11,000/- and not in 1976 for Ksh. 15,000/- as alleged by the applicant. He purchase the land using his savings without any contribution from the applicant, that the defendant never sent him Kshs. 8000/- or any other sum of money towards the purchase of Dagoretti/Kangemi 109 in trust for him, that he did not hold any share of the land in trust for the applicant, that the applicant needed money in 1976 and he agreed to give his land Dagoretti/Kangemi 109 as a security to Kenya Commercial Bank for a Loan of kshs.20,000/- advanced to the applicant. The applicant repaid the loan and the property was discharged in 1979, that in 1982 he subdivided his Dagoretti/Kangemi 109 into three plots namely Dagoretti/Kangemi 630,631 and 632. He sold Dagoretti/Kangemi 632 to the applicant and retained plots 630 and 631, that the plot Dagoretti/Kangemi 631 belongs to him solely and there was no agreement to registered the same in the names of their wives or in the joint names of the applicant and himself, that the applicant only moved into Dagoretti/Kangemi 632 after he transferred it to him and not before, that he is the sole occupant of Dagoretti/Kangemi 631 having built temporary structures for rental. The applicant built temporary structures for rental on the 12 meter access road to the three plots 630,631, and 632. This has forced him to access his two plots, 630 and 631 from the Waiyaki highway. The applicant has also been accessing this plot 632 from the Waiyaki highway, that he never, either singly or jointly with the applicant, engaged the services of a surveyor to sub-divide Dagoretti/Kangemi 631 in 2004 or at any other time, that the land Dagoretti/Kangemi 631 belongs solely to him, he has every right to register it in his names and to charge it as often as he can manage without reference to the applicant, that he never discussed the ownership or registration of Dagoretti/Kangemi 631 with the applicant, that since the year 2004 todate the applicant has been making claims of part ownership of Dagoretti/Kangemi 631. He has always told him that he was wrong and the land belongs to him. At first he started his claims as a border dispute in 2004 and progressed to part ownership in 2005. He has always dismissed his claims. That although he agreed to the intervention of the elders, he later realized they were biased and were not recording evidence correctly, and he stopped participating in their meetings, that in 2011 he applied to the Nairobi City Council for a change of user from absolute to commercial building of his two plots Dagoretti/Kangemi 630 and 631, that after approval of his change of use and building plants, he started constructing a block of flats and also a perimeter fence. He also had to demolish his temporary rental houses. The applicant accesses this plot through Waiyaki way and not through his plot Dagoretti/Kangemi 631.

Counsels made oral submissions in Court which I have considered together with the affidavits and the annexures attached and the cases cited by the applicant, Geilla vs. Cassaman Brown E.A 1972 and Yogendra Purshottam Patel vs. Mireille Baksh (nee Patel) & HCCC No. 617 of 1995 (2006 Eklr). The affidavits filed by the parties have given details of the case of each party. I do note that the parties in this matter are related. The respondent has completely denied what the applicant has averred. I have noted what has been deponed but at this stage am unable to determine between the two, the discussions they over the suit property. This is a matter that should proceed to full hearing so that via voce evidence is adduced to enable the court reach a just and fair verdict for their own benefit as brothers and parties in this suit. The case of Yogenda cited by the applicant will be of use only after the full hearing. To help maintain peace between the two I order that pending the hearing of this suit that none of the parties shall do anything detrimental to the property. There shall be no construction, sale or alienation of the suit property Dagorretti/ Kangemi/631. The parties in this suit shall comply with the provisions of Order 11 of the civil procedure rules within 30 days from the date of this ruling and thereafter take a date for pretrial conference for direction on the hearing.

Orders accordingly.

Dated, signed and delivered this **19th** Day of **July** 2012

R. OUGO

JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

Kabiru Court Clerk