



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 105 of 2012

RAHAB NGINA KIMARI.....1ST PLAINTIFF/APPLICANT

MARY WANGECHI KIMARI.....2ND PLAINTIFF/APPLICANT

ANNE NJOKI KIMARI.....3RD PLAINTIFF/APPLICANT

MARTIN MBURU KIMARI.....4TH PLAINTIFF/APPLICANT

MOSES CHEGE KIMARI.....5TH PLAINTIFF/APPLICANT

GEORGE NDUNGU KIMARI.....6TH PLAINTIFF/APPLICANT

VERSUS

SAMUEL MUGWE KIMARI.....1ST DEFENDANT/RESPONDENT

MARY WANGECHI MUGWE.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiffs filed a Notice of Motion dated 28th February 2012 seeking an order of inhibition to issue inhibiting the registration of any dealings with the properties known as title numbers Githunguri/Gathangari/1299 (hereinafter referred to as “the first suit property”), and Gatamaiyu/Kagaa/694 (hereinafter referred to as “the second suit property”), pending the hearing and determination of the suit herein.

The application is premised on the grounds that the Plaintiffs are persons respectively entitled to the suit premises under respective trusts. Further, that the 2nd Defendant with the connivance of the 1st Defendant intends to dispose of the said parcels of land in an orchestrated scheme to defeat the Plaintiffs’ interests over them. The Plaintiffs aver that in the absence of an inhibition against the said properties, they shall suffer immense and irreparable loss and damage which will be immeasurable and an award of damages will not be sufficient recompense. The Plaintiffs contend that they have a good and arguable case with a probability of success and that the balance of convenience tilts in their favour. Further, that the Defendants shall not suffer any prejudice of the order sought herein is granted.

The application is supported by an affidavit sworn by the 1st Plaintiff on 28th February 2012 wherein she deponed that she has been the wife of the 1st Defendant under Kikuyu Customary Law since 1977, the mother of the 2nd - 6th Plaintiffs, and daughter in law of the 2nd Defendant. She deponed that the first suit

property forms part of their marital property and was acquired through equal contribution in 1985 during the existence of her marriage, and the same was registered under the name of the 1st Defendant. With respect to the second suit property the 1st Plaintiff deponed that the same was purchased by the 1st Defendant and that he declared that the same would be for his children, the 2nd – 6th Plaintiffs. Further, that the same was registered under the name of the 1st Defendant on 17/12/98 who was holding it in a fiduciary capacity in trust for the Plaintiffs. However, that the said trust was not registered in view of the trust the Plaintiffs bestowed upon the 1st Defendant.

The 1st Plaintiff further deponed that she and the 1st Defendant had marital problems which led to a separation, and that in an attempt to subvert justice the 1st Defendant transferred the first and second suit properties to the 2nd Defendant on 28/6/2004 and 16/6/2004 respectively. The 1st Plaintiff further deponed that she lodged a caution over the first suit property sometimes in 1998, which caution was lifted on 28/6/2004 pursuant to a court order in Misc. Civil Application No. 24/2004, which proceedings she had no knowledge of. Further, that she sought the intervention of the Provincial Administration when the 2nd Defendant threatened to dispose of the first suit property where her matrimonial home is built.

The application was opposed. The 2nd Defendant filed a Replying Affidavit sworn on 4th April 2012 wherein she deponed that she is the registered proprietor of the suit properties, and that pursuant to the Registered Land Act (Cap 300) the said properties are free from all interests and claims except all those shown in the register together with overriding interests. It was her disposition that the Plaintiffs' suit was founded on an allegation of trust purportedly created between the 1st Plaintiff and the 1st Defendant which she claims she was not aware of, and that the said claims have not been registered as an encumbrance on any of the suit properties. The 2nd Defendant denied that she tried to sell the suit properties as alleged by the 1st Plaintiff, but reiterated that as the registered owner of the same she has the right to deal with them in any manner including sale if the need arises.

The 1st Defendant also filed a Replying Affidavit sworn on 25th July 2012 in opposition to the application. He deponed that the 2nd Defendant is the registered proprietor of the suit properties and therefore the lawful owner. It was his disposition that he was not married to the 1st Plaintiff under Kikuyu Customary Law, but that theirs is a presumed marriage from long cohabitation declared by the High Court in Civil Appeal No. 1/2007. He admitted that the 2nd – 6th Plaintiffs were his children whom he had solely educated, and that they were all adults living in different parts of the world. The 1st Defendant denied that the 1st Plaintiff ever contributed to the purchase of the suit properties and stated that it was in fact his contribution and that of the 2nd Defendant that was used to purchase the first suit property, and that he purchased the second suit property where he put up a house and relocated the 2nd Defendant. Further, that subsequently on his own volition he transferred the suit properties to the 2nd Defendant as gifts in 2004. The 1st Defendant denied that the said transfers were effected to subvert justice.

The application was canvassed by way of submissions. The Plaintiffs' Counsel filed written submissions dated 30/10/2012 wherein he reiterated the contents of their application and submitted that the conduct of the Defendants is a conspiracy to defeat the ends of justice and that once the suit premises are disposed of, the substratum of the case shall crumble. Consequently, it would be just that an order of inhibition does issue pending the hearing and determination of the suit.

The Defendants' Counsel filed submissions dated 20/11/2012 wherein he reiterated the contents of their affidavits. In respect to the issue of trust, the Defendants submitted that the requirements of section 126 of the Registered Land Act was that when a trust was intended to be created, that intention ought to be indicated in the instrument of acquisition, and such instrument declaring a trust was required to be deposited with the registrar. Further, the Respondents submitted that an existence of trust was an aspect that must be proven by evidence. The Defendants relied in this respect on decisions in the case of **Muiruri v Kimemia, (2002) 2 KLR 677, Mumo v Makau, (2004) 1 KLR and Gichuki v Gichuki, (1982) KLR 285**. It was the Defendants' submission that in view of the fact that there was no such

intention of a trust, the 2nd Defendant was an absolute registered owner of the suit properties pursuant to the provisions of the section 27 of the Registered Land Act, and that the claims in this suit are not shown in the register nor are they overriding interests by any measure.

I have carefully read and considered the pleadings and submissions filed by the parties. This application was brought under the provisions of section 128 of the Registered Land Act (since repealed) , which provided as follows:

“(1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge.

(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected thereby, shall be sent to the Registrar, who shall register it in the appropriate register, and no inhibition shall bind or affect the land, lease or charge until it has been registered.”

Similar provisions are now provided in section 68(1) of the Land Registration Act (Cap 3 of 2012), to the effect that the court may make an order referred to as an inhibition, inhibiting the registration of any dealing with any land, lease or charge for a particular time, or until the occurrence of a particular event. It is clear from these provisions that the powers granted to the court are discretionary, and are to be exercised when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period.

I have perused the Plaint filed herein and note that the Plaintiffs are seeking a declaration that the transfer to the 2nd Defendant from the 1st Defendant is illegal, fraudulent and unlawful; and an order directing the District Lands Registrar to cancel the register relating to the suit parcels and the register the parcels of land jointly in the name of the of the Plaintiffs and 1st Defendant. Their prayers are grounded on their claim that the suit properties were purchased by the 1st Defendant, who held them in a fiduciary capacity for the Plaintiffs. The family relationship between the Plaintiffs and the Defendants that is said to give rise to that fiduciary relationship has not been denied by the Defendants, and in my opinion, the Plaintiffs have an arguable case to warrant the grant of an order of inhibition, so as to preserve the suit properties pending the determination of the suit.

I therefore hereby grant an order of inhibition inhibiting the registration of any dealings with the properties known as Githunguri/Gathangari/1299 and Gatamaiyu/Kagaa/694, pending the hearing and determination of the suit herein or until further orders.

The costs of this application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____13th____ day of ____December____, 2012.

P. NYAMWEYA

JUDGE