



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 570 OF 2011

MUTHONI KIMANI RINGU1ST PLAINTIFF

**PETER GICHIRI KIMANI2ND
PLAINTIFF**

VERSUS

**FRANCIS KIMANI WARUINGI.....1ST
DEFENDANT**

JOSEPHAT NJENGA NJUGUNA2ND DEFENDANT

RULING

The application dated 19th October 2011 is brought before this court by the Plaintiffs, who are the wife and one of the sons of the 1st Defendant. The Plaintiffs in the said application are seeking for orders that an inhibition issue to the Land Registrar inhibiting registration of any dealing with land parcel KIAMBAA/WAGUTHU/1207 (herein after referred to as the suit property), pending hearing and determination of this application, and that the 2nd Defendant be restrained by way of an interim injunction from alienating, selling, disposing and or in any respect interfering with the title to the suit property pending hearing and determination of this suit.

The Application is brought pursuant to the provisions of Section 128 (1) of the Registered Land Act (Cap 300), Order 40 Rules 1,2, and 51(1) of the Civil Procedure Rules of 2010, section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) and all other enabling provisions of the law.

The 1st Plaintiff swore a Supporting Affidavit on 19th October 2011 on behalf of the Plaintiffs, wherein she states that the late Waruingi Gichuri was the father to the 1st Defendant, and the first registered owner of the suit property. The 1st Plaintiff further states that suit property was transferred and registered in the name of the 1st Defendant in trust for his family in line with Kikuyu Customary Law. The Plaintiffs aver that they have occupied and lived on the suit property all their lives, and the 1st Defendant having been registered as proprietor of the suit property in trust for his family including the Plaintiffs, was not and has never been the sole owner of the interest in the suit property then registered in his name.

It is the Plaintiffs’ averment that the 1st Defendant on or about 20th June 2011 fraudulently, irregularly

and illegally transferred title to the suit property to the 2nd Defendant. The Plaintiffs state that that they have as a result been deprived of their rightful title and interest in the suit property because the 1st Defendant was in breach of trust when he illegally purported to sell and transfer the suit property to the 2nd Defendant.

The 1st Plaintiff also states that the 1st Defendant had previously tried to sell the suit property, and that she had thereupon taken possession of the original title deed for safe custody, which title deed she is still in possession of to date. The 1st Plaintiff also further stated that the 1st Respondent subsequently demolished her dwelling house that was on the suit property, forcing her to seek alternative accommodation. Evidence provided by the Plaintiffs included a copy of the title deed to the suit property, copies of extracts from the register of the suit property showing cautions by the 1st Plaintiff and the transactions registered on the suit property, and photographs showing the Plaintiffs' dwelling houses built on the suit property.

The Defendants oppose the application on the grounds that the application is incompetent for seeking orders against the Commissioner of Lands without enjoining it, that there is no nexus between the alleged rights of the Plaintiffs and the 2nd Defendant and that the Plaintiffs have not disclosed a cause of action as against the Defendants. The Defendants also state that the suit is an abuse of the process and fatally flawed in that it not a representative suit as envisaged by the Civil Procedure Act and Rules, and is filed without authority of the 2nd Plaintiff.

The 1st Defendant in a Replying Affidavit sworn on 31st October 2011 states that he was the sole legally registered proprietor of the suit property until he disposed of it lawfully on 20th June, 2011, and that the Plaintiffs have no legal claim to the suit property as he was not their trustee when he inherited the said land from his deceased father. He further states that this is not a cause for maintenance nor is it a succession cause, hence the prayers sought by the Plaintiffs both in the Plaint and the interlocutory prayers are not available to them. The 1st Defendant has annexed evidence showing the loss and the issue to him of a new title deed to the suit property, his application for and letter of consent to transfer the suit property to the 2nd Defendant, and the transfer form that transferred the suit property to the 2nd Defendant.

The 2nd Defendant in his replying Affidavit sworn on 31st October 2012 states that he purchased the suit property from the 1st Defendant after conducting a search and visiting the land, and that that there was no indication on the title that the 1st Defendant was a trustee for 1st and 2nd Plaintiffs. The 2nd Defendant further stated that he was also not aware of the irregularities in the documents used to procure the transfer to him of the suit property.

The Defendants' Counsel submitted at the hearing of the application on that the suit is fatally flawed as it is not a representative suit as envisaged by the Civil Procedure Act and Rules, since an application had not been made by the Plaintiffs to sue on behalf of the other parties, and that Kenneth Wagatu Kimani, Susan Waceke and Teresia Wanjiku are not proper Plaintiffs in this suit hence their names ought to be struck out of the proceedings. Counsel also submitted that the Plaint was also fatally flawed as it has no pleadings on the particulars of fraud alleged by the Plaintiffs, as required in the civil procedure rules.

The Plaintiffs' Counsel made exhaustive submissions in reply and took the court through an examination of the extracts from the applicable register showing the transactions made on the suit property. Counsel in this regard submitted that the transfer effected on 20th June, 2011 to the 2nd Defendant was undertaken after the removal of a caution placed by the 1st Plaintiff from the register on 6th April, 2011, and which event the 1st Plaintiff had no notification of. Both the Plaintiffs' and Defendants' Counsel addressed in detail the various processes and documents leading to the issuance of a new title and the letter of consent to transfer to the 1st Defendant, and of the actual transfer of the suit property to the 2nd Defendant in support of their clients various positions.

Finally, the Plaintiffs' Counsel also cited various authorities showing that the concept of customary trust claimed by the Plaintiffs was an interest recognized in law, even when not registered, notably **David Mbugua Mbogo & 3 others –vs- Justus Mugweru Mbogo HCCC (Nairobi) No. 116 of 1994** and **Godfrey Kagia Githua –vs- George Nduchu Kagai & others, HCCC (Nakuru) N0 95 of 2005**. The Plaintiffs' Counsel also submitted that the suit was properly instituted under Order 1 Rule 8 of the Civil Procedure Rules and no application for representation needs to be made by the Plaintiffs under that rule.

After consideration of the pleadings, evidence, submissions made and authorities cited by the parties, I will proceed with an examination of the substantive issues raised for determination at this interlocutory stage. I will at the outset state that despite having heard detailed submissions from both parties Counsel on the circumstances under which the suit property was transferred to the 2nd Defendant, this is an issue that can only be determined after a full trial of the main suit, and will not be dealt with at this stage.

The first issue raised by the Defendants' Counsel is that of the procedural technicalities that needed to be followed by the Plaintiffs in the filing of the suit herein. Order 1 Rule 8 of the Civil Procedure Rules of 2010 requires the Plaintiffs in a representative suit to give notice either by way of personal service or advertisement to the persons so represented, and if this was not done, I find it to be a procedural technicality that is not fatal to the Plaintiffs' suit and application. This finding also applies to the Defendants' submissions on the form of the Plaint, as this is a defect that can be cured by amendment. Finally on this issue there is also on record an authority filed dated 19th October 2011 given by the 2nd Plaintiff and five other persons on behalf of whom the Plaintiffs have sued the Defendants, which authority is filed pursuant to the provisions of Order 4 Rule 1(3) of the Civil Procedure Rules of 2010. I therefore find the suit filed herein to be properly before this Court, and whatever procedures not followed if any can be cured by amendment and are not fatal to the application under consideration.

The second issue before the court is whether the Plaintiffs have demonstrated a *prima facie* case to entitle them to the orders of inhibition and injunction sought. The Plaintiffs have provided evidence of the transactions on the suit property, and particularly the cautions placed by the 1st Plaintiff on the register of the suit property which indicate an attempt secure their beneficial interest in the said property. The 1st Respondent has also admitted that the 1st Plaintiff caused a "restriction" to be registered against the said parcel by the District Criminal Investigation Officer on 14/7/2011.

What is also evident and is not denied by the 1st Respondent is that he was registered as owner of the suit property as a result of inheriting the suit property from his deceased father and he has also not denied his relationship with the Plaintiffs. There is therefore a possibility that the land may have been transferred to the 1st Respondent to hold in trust. Obviously this will be an issue to be determined with finality at the main hearing, but if the suit land is disposed off before the suit is finalized, the Plaintiffs may be prejudiced should they succeed in the suit. I therefore find it appropriate to issue an order of inhibition, inhibiting any dealings on the suit land until this suit is heard and disposed off, and that the suit property be preserved pending the hearing and determination of the suit herein.

Accordingly, I allow the Plaintiffs application dated 19th October 2011. I am aware and have noted that the Plaintiffs prayer 1 in the said application was for inhibition orders to issue until the hearing and determination of this application. I therefore order, *suo moto*, pursuant to section 1A, 1B and 63 (e) of the Civil Procedure Act and section 128 of the Registered Land Act, that an inhibition order shall issue forthwith prohibiting the registration of any dealing with the suit property, namely land title No. KIAMBAA/WAGUTHU/1207, until the suit filed herein is heard and determined, or until further orders. A copy of the inhibition order shall be served on the Land Registrar of Kiambu District Land Registry who shall register it in the appropriate register immediately. Prayer 4 of the Plaintiffs' application dated 19th October 2011 is granted on the terms stated therein.

The costs of the application shall be costs in the cause.

Dated, signed and delivered in open court at Nairobi this ____18th____ day of ____January____, 2011.

P. NYAMWEYA

JUDGE