



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 148 OF 2010

PAULINE WANGARI NYAMUI
GRACE MURAGE

.....PLAINTIFFS

VERSUS

PATRICK MURIITHI GATHUNGU DEFENDANT

RULING

Pursuant to the provisions of Order XXXIX rule 1 and 2 of the Civil Procedure Rules (now order 40 rules 1 and 2), Pauline Wangare Nyamu and Grace Murage, the 1st and 2nd Plaintiffs respectively took out the summons dated 26th October 2010 in which they sought for the following orders:

- 1. That this honourable court be pleased to grant temporary injunction against the defendant restraining him through himself, his agents and/or servants from transferring, selling, disposing, wasting charging and/or in any other way dealing with Land Parcel No. Mutira/Kirunda/702 until hearing and determination of the application herein.***
- 2. That this Honourable Court be pleased to grant temporary injunction against the defendant restraining him through himself, his agents and/or servants from transferring, selling, disposing, wasting charging and/or in any other way dealing with Land Parcel No. Mutira/Kirunda/702 until hearing and determination of the suit herein.***

The summons is supported by the affidavit of Grace Murage sworn on 26th October 2010. Patrick Muriithi Gathungu filed a replying affidavit he swore on 11th November 2010 and grounds of opposition to oppose the summons.

The Substantial suit is expressed in the plaint dated 26th October 2010 in which the Plaintiff's sought for judgment in the following terms:

- (a) A declaration that the defendant holds Land Parcel No. Mutira.Kirunda/702 in trust for himself and the plaintiffs.***
- (b) Determination of trust in Parcel No. Mutira/Kirunda/702 i.e. the land to be divided and registered into three equal portions in the names of the plaintiffs and the defendant.***
- (c) A permanent injunction against the defendant restraining him through himself, his agents and/or servants from transferring, selling, disposing, wasting charging and/or in any other way interfering with the plaintiffs' possession of Land Parcel No. Mutira.Kirunda/702 until hearing***

and determination of the suit herein.

(d) Costs and interest at court rates.

The Defendant is yet to file a defence to answer the aforesaid plaint. It is the averment of the Plaintiffs that L.R. No. Mutira/Kirunda/702 comprising of 8.5 acres was originally clan land and that the same was registered in the name of Gathungu Kibara (now deceased) after the land was demarcated. Plaintiffs further aver that Gathungu Kibara caused the land to be registered in the name of the Defendant in trust for himself and the Plaintiffs. The Plaintiffs further alleged that they have been cultivating 1 acre of the aforesaid land since 1965 until 2008 when the Defendant purported to stop them. They are now before this court seeking for a temporary order of injunction to restrain the Defendant from selling, transferring, disposing of, wasting charging and or dealing in any other way with the aforesaid parcel of land until the suit is heard and determined. The Plaintiffs further aver that they filed a complaint before the Kirinyaga District Land Disputes Tribunal vide Tribunal Case No. 37 of 2008. The Tribunal awarded them each 1½ acres but unfortunately the decision was quashed by this court vide Embu H.C. Misc. Application No. 7 of 2009. The Plaintiffs were then prompted to file this suit. The Plaintiffs have alleged that the Defendant is in the process of selling the land to innocent third parties while this suit is still pending. They aver that they will suffer irreparable loss if the Defendant is not restrained. On his part, the Defendant is of the view the application should be dismissed because the same does not meet the requirements for granting injunctions. He was of the opinion that the suit plus the application is resjudicata. The defendant claimed that the land was given to him by his late grandfather, Gathungu Kibara as a gift in 1982 hence the same was not registered in his name in trust for the Plaintiffs. The Defendant stated that his deceased grandfather did not intend to give the land to the Plaintiffs who were happily married. He denied intending to sell the land.

The principles to be considered when dealing with an application for injunction are three fold: First, an applicant must show that he has a prima facie case with a probability of success. Secondly, that an applicant show that he will suffer irreparable loss if the order is denied. Thirdly, that where the court is in doubt the court will determine that application on a balance of probabilities. The question is whether the application satisfies the above principles. In an attempt to show that he has a prima facie case, the Plaintiffs have alleged that there was a trust. They claim that the land is registered in the name of the defendant in trust for them. I have carefully looked at the annexure of the green card attached to the affidavit of Grace Murage. The annexure indicates that the suit land was registered in the name of the Defendant on 19th November 1985. The Defendant has annexed to his replying affidavit a copy of the green card in respect of L.R. No. Mutira/Kirunda/299 – which shows that the land was donated to him by the late Gathungu Kibara as a gift. The defendant avers that L.R. No. Mutira (Kirunda/702 was originally known as L.R. No. Mutira/Kirunda/299. There is no dispute that Gathungu Kibara deceased gave the Defendant the suit land while he was alive. The question as to whether or not there was a trust is a matter which can only be determined during the trial. The Defendant does not deny that he stopped the Plaintiffs from cultivating the land in 2008. He does not also deny that the duo have been cultivating the land since 1965. The Defendant has alleged that the Plaintiffs knew they had no claim over the land and that is why they did not lodge their claim during the deceased's lifetime. The issues can only be resolved during the trial. At this stage, it suffices to state that the Plaintiffs have shown a prima facie case with some chance of success. The other issue is whether or not the Plaintiffs would suffer irreparable loss if the order of injunction is denied? It is possible that the Defendant may be tempted to dispose of the land while this suit is pending hearing. That will obviously complicate the matter and it may require the Plaintiffs to enjoin the buyers as parties to this suit. This will burden the Plaintiffs with costs and may further delay the expeditious disposal of the matter. In my view the Plaintiffs have shown irreparable loss they would suffer if they are denied the order. The Defendant has stated that the application and the suit is resjudicata. There is no dispute that the Plaintiffs had filed a complaint before the Kirinyaga District Land Disputes Tribunal claiming they are entitled to the land. Unfortunately the Defendant did not supply this court with copies of the claim nor the proceedings. What I know is that the jurisdiction of the Land Disputes Tribunal is limited. The Tribunal has no jurisdiction to hear and determine a claim based on trust. The Plaintiffs' suit before this court is based on trust. The Defendant has not shown that his complaint before the Land Dispute's Tribunal was based on trust so that I can entertain the thought that the matter is resjudicata having been determined on merit by the Tribunal. I am afraid to state that even if

the Defendant had shown that his complaint before the Land Dispute's Tribunal was based on trust, I do not think I could have agreed with him because the principle of resjudicata cannot apply where the tribunal and or court had no jurisdiction to hear and determine the dispute. It is stated in Sarkar's Law of Civil Procedure, 8th Edition at page 89 as follow:

"A question relating to the jurisdiction of a court cannot be deemed to have been finally determined by an erroneous decision of the court. If by an erroneous interpretation of the statute the court holds that it has no jurisdiction or assumes jurisdiction which it does not possess the decision cannot operate as resjudicata between the same parties whether the cause of action in the subsequent litigation is the same or otherwise."

In the circumstances of this case it is clear that there is no evidence that the dispute before the Land Dispute's Tribunal was based on trust.

In the final analysis I am convinced the summons dated 26th October 2010 is well founded. It is allowed as prayed with costs.

Dated and delivered this 20th day of June 2011.

**J.K. SERGON
JUDGE**

In open court in the absence of the parties and learned counsels with notice issued by the registry.