



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 110 OF 2009

STACHYS NJAGI MUTURI1ST PLAINTIFF
ELIZABETH MUTITU MUTURI.....2ND PLAINTIFF

VERSUS

NICHOLUS NJAGI..... DEFENDANT

RULING

The Plaintiffs were husband and wife. The 1st Plaintiff died leaving the 2nd Plaintiff to pursue this claim. Her case is that by an agreement dated 27th July 1984 they bought land parcel No. KAGAARI/WERU/1564 (“the suit land”) from Stanley Rungu Karienyne for Ksh. 130,000/= which they paid and subsequently became the registered proprietors. They have title (“EMM3”). They wanted to grow grapes and mangoes for commercial purposes in the suit land, but later abandoned the idea. They allowed people to use the land as a way of protecting it. In 2008, however, the Defendant began making claim to the suit land. He got people to cultivate and use the land at a fee to him. He uprooted 610 gravelia trees which were growing on the land and also uprooted the boundary features. The Defendant also cautioned the title claiming a beneficial interest. The suit was brought to seek the lifting of the caution, the eviction of the Defendant and all those acting under him and for general damages for trespass.

Along with the suit was filed the present application under Order 39 rules 1, 2 3 and 9 of the Civil Procedure Rules and Sections 3A and 63 of the Civil Procedure Act for a temporary injunction and also for an order that the District Land Surveyor, Embu be directed to re-establish the boundaries of the suit land.

The response by the Defendant as contained in his replying affidavit was that the suit land was their family land that had been fraudulently acquired by the Plaintiffs. He stated that his late grandfather Chirigu Gakonja was the registered owner of land parcel No. KAGAARI/WERU/1388 which he was staying with his family. The land was subsequent to the death of Gakonja subdivided into two parcels, that is the suit land and parcel 1585. The Defendant states that this subdivision that happened on 14th September 1984 was fraudulent as Gakonja had passed on in 1974. The suit land became registered in the name of Stanley Rungu Karienyne who sold it to the Plaintiffs. He states that Gakonja had given parcel 1388 to one Joseph Njue M’thara as a gift and there is, therefore, no way the land would have been subdivided or sold to the Plaintiffs. Further, the Defendant states that his family and the larger Gakonja family have always lived on the land and therefore the purchase by the Plaintiffs and the subsequent registration were subject to this occupation and possession.

The 2nd Plaintiff swore a further affidavit to deny that the sub-division of parcel 1388 into parcels 1564 and 1565 was after Gakonja had died. She stated that the subdivision was in the 1970s and that the transfer to Stanley Rungu Kanrienye was in 1974.

When the application came for hearing Mr. Njeru for the Plaintiffs indicated that they were abandoning the prayer for a temporary injunction, but were pursuing only prayers 3, 4 and 5. Prayer 3 seeks a positive order as it seeks that the court orders that the District Land Surveyor, Embu should go to the suit land and re-establish its boundaries. The order is sought because the Defendant allegedly uprooted and damaged the features to the suit land. What is sought is therefore a mandatory injunction as the Plaintiffs want to undo what has already been done. (***EAST AFRICAN FINE SPINNERS LIMITED & OTHERS VS BEDI INVESTMENT, Civil Application No. 72 of 1994 at Nairobi***). Order 39 is in regard to a restraining order. It provides for a prohibitory injunction. What is sought in prayer 3 is a mandatory injunction which can only be granted under the inherent powers of the court under Section 3A of the Civil Procedure Act and the application for the same has to be by a motion. (***BELLE MAISON LTD VS YAYA TOWERS LTD HCCC 2225 of 1992 at Nairobi***).

In short the application is incompetent. Even if it is competent, the law is that a mandatory injunction can only be granted at this interlocutory stage where an applicant has an exceptionally clear and obvious case. I appreciate that the Plaintiffs have title to the suit land and that the registration in their name is protected by Sections 27 and 28 of the Registered Land Act (Cap 300). They have a *prima facie* absolute and indefeasible claim to the suit land. It is, however, alleged by the Defendant that their family is in occupation and possession and therefore the registration is subject to their claim. It is also alleged that the registration was fraudulent. I do not find that in the circumstances the Plaintiffs are shown to have an exceptionally strong case.

I dismiss the application with costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 28TH DAY OF JULY 2011.

**A.O. MUCHELULE
JUDGE**