



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Application 4 of 2009

J N N (A minor suing through

S W.J. N as a next friend).....1ST APPLICANT

J G N (A Minor suing through

S W.J. N as a next friend).....2ND APPLICANT

VERSUS

J N GRESPONDENT

R U L I N G

1. The application before court is the Applicants' Chambers Summons dated 17/08/2009 as amended pursuant to the orders of the court made on 21/10/2009. The application is bought under Order 39 rule 1(1)(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Section 116(6) of the Government Lands Act, Cap 280 Laws of Kenya.
2. The Applicants who are minors are suing through their mother as their next friend and seek orders of temporary injunction to restrain the Respondent, who is the Applicants' biological father from interfering, transferring or and/or alienating property known as LR No. 21/1/38 pending the hearing and determination of the Originating Summons herein. The Applicants say the said property is registered in the name of the Respondent.
3. The application is premised on the grounds that are set out on the face thereon and in particular that the Applicants have lodged a caveat on LR No. 21/1/38 (the suit property) in their capacity as children of the Respondent claiming a beneficial interest in the suit property. The application is also grounded on the supporting affidavit sworn by **S W. N** in which she says that she is the mother of the two minor Applicants. She also says that there is a real danger that the Respondent is likely to dispose of the suit property unless restrained by the court and that if such an eventuality happens, the Applicants will be greatly prejudiced and they will not have any other way of securing their beneficial interest in the suit property.
4. The application is opposed. There is a Replying Affidavit dated 28/08/2009 filed in court on 31/08/2009. The same is sworn by **J N G**, the Respondent herein. The Respondent denies that the next friend of the Applicants is his wife, though he admits that he had a short lived relationship with the Applicants' next friend from around 1992. The Respondent says that there are Childrens' Cases Nos. 21 and 22 of 2008 in which the Applicants' next friend has sued the Respondent for maintenance of the two minor Applicants. Admittedly the cases are still ongoing. The Respondent also admits that the Childrens' Court has made orders against him for the maintenance of the Applicants.
5. The application proceeded by way of written submissions. The Applicants' submissions were filed on 20/11/2009. It is the Applicants' case, as put forth by their advocates, M/s Sichangi & Co. that the Respondent's allegation that the suit property herein is obsolete is unsupported by evidence. The Applicants urged the court to strike out paragraph 8 of the Respondent's Replying Affidavit on grounds that the said paragraph contravenes the provisions of Order 18 Rule 3 of the Civil Procedure Rules. Counsel relied on the case of **Muimara Properties Ltd. -vs- Elphas Indika Makobe & 6 Others [2006]e KLR** where it was held by the court that

“where an affidavit is made on information, it should not be acted upon by any court unless the sources and grounds of the information is specified.”

6. In addition to the above, counsel submitted that as at 11/01/2008 when the Applicants’ caveat was registered on the suit property, the suit property was still in existence and therefore that the Respondent’s allegations of the suit property having been subdivided before the said date cannot be correct. That if any such subdivision took place, then the same was in contravention of section 116 of the GLA.
7. Secondly, counsel for the Applicants also argue that the caveat, which was registered against the suit property and which caveat is now threatened to be removed, was meant to preserve and protect the interests of the Applicants who are children of the Respondent. Counsel contend that the Respondent has parental responsibility over the minor Applicants, and that in the circumstances, the Registrar cannot proceed to remove the caveat unless the beneficial interests of the Applicants are first extinguished.
8. It is also submitted on behalf of the Applicants that since the Applicants are children of the Respondent, the Respondent is duly bound to provide for them and accordingly that the two Applicants are entitled to a share of the Respondent’s property in accordance with section 25(2) of the Childrens’ Act (Act Number 8 of 2001, Laws of Kenya) which reads:-

“25(2) Where a child’s father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of child.”
9. Counsel for the Applicants argue that it is the Respondent’s default/refusal and/or neglect of his parental responsibility which has given to the Applicants a beneficial interest in the suit property.
10. Regarding the notice of the Registrar for removal of the caveat, counsel for the Applicants contend that the caveat was absolute in accordance with section 116 of Cap 280 and that because the Registrar concedes that the caveat could be extended by an order of the court, the notice ought to be extended until this suit is heard and determined.
11. In urging the court to allow the application as prayed, counsel for the Applicants referred the court to the case of **Captain Eric Wanjau v Francis Mbugua Mwilhia [2005]e KLR**. The facts in that regarding the notice to remove caveat were very similar to the facts in the instant case. Ochieng J made an order preserving the suit property pending the hearing and determination of the suit.
12. The Respondent filed his submissions dated 4/12/2009 on the same date. The Respondent’s arguments are that the Applicants and the next friend have no beneficial interest in the suit property and therefore had no right to lodge a caveat on the same unless they can show that they are either the proprietors or other persons claiming the land. See **Mwamunga –vs- Njendu [2002] KLR 791**.
13. It is also contended on behalf of the Respondent that the Applicants have no beneficial interest in the suit land and that for as long as the Respondent lives, neither his wives nor children can claim any portion of the Respondents property. See **Marigi –vs- Muriuki & 2 Others [2008] KLR 1073**. The Respondent contends further that the Applicant’s application is misconceived and is brought to court merely to mislead this honourable court.
14. Regarding the application for registration of the caveat, counsel for the Respondent says that the next friend made the application more than a year before the maintenance order for the children was issued. For this reason, counsel for the Respondent argues that the next friend was not, by that application, pursuing the interests of the Applicants but her own interests. Counsel for the Respondent also submits that the next friend’s claims that she is a spouse of the Respondent are defeated by the fact that at the material time, the Respondent was in a legally binding spousal relationship with **C N N**, and that the next friend has not availed any substantive evidence to the court that would establish a marriage between her and the Respondent either by reputation or cohabitation. See **Nairobi HCCC No. 2 of 2007 (O.S) – Esther Njeri Gichuru –vs- Samuel Kimuchu Gichuru** (unreported).
15. I have now considered the application together with the submissions made by both counsel. I have also considered the law and in particular I have taken into account the provisions of the Childrens’ Act (Act Number 8 of 2001). I note that the issue here is not whether or not the next friend was married to the Respondent. The issue in this case is the interest of the minor Applicants and

whether by the fact that the Respondent has defaulted/refused and/or ignored the maintenance orders made against him by the Childrens' Court in Children Cases Numbers 21 and 22 of 2008 entitles the Applicants to bring this application. I also note that though the Respondent does not expressly admit that he sired the two minor Applicants, he admits that he had what he calls "*a short lived relationship with the Applicants next friend from around 1992.*" The Respondent does not say when that short lived relationship ended, but in 2008, the Applicants' next friend sued the Respondent for the Applicants' maintenance.

16. After taking everything into account including the fact that there is every likelihood that the Respondent sired the minor Applicants; and the additional fact that there is a subsisting maintenance order against the Respondent in respect of the minor Applicants, I am persuaded that the Applicants have a cause of action against the Respondent in respect of the suit property. I am also persuaded that there is need to preserve the suit property until this suit is heard and determined.
17. Accordingly, I allow the Applicants' Chamber Summons application dated 17/08/2009 in terms of prayers 3, 4 and 5 with costs to the Applicants.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of March, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Nyikuli (present) For the Plaintiff/Applicant

Mr. Nduhiu for Mbigi (present) For the Defendant/Respondent

Weche – court clerk