



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU Civil Case 83 of 2009

CHARLES NYAGA 1ST PLAINTIFF

NICHOLAS MWITI 2ND PLAINTIFF

VERSUS

CHARLES NJAGI M'KANGA 1ST DEFENDANT

MARIKO KAMUNDI 2ND DEFENDANT

RULING

Both plaintiffs are the sons of the first defendant. They have sued both defendants seeking a declaration that the first defendant holds parcel number *Muthambi/Lower-Karimba/1604* in trust for them. In their plaint, they also seek an order of injunction to restrain the defendants from disposing that property. The plaintiffs alleged that the first defendant sold the property to the 2nd defendant but the transfer has not been effected. They filed an interlocutory application by way of Chamber Summons dated 1st July 2009. That application is brought under XXXIX Rules 1, 2 and 2A of the Civil Procedure Rules. At this stage, I wish to dissuade the counsel for the defendants in his argument that the plaintiff's application was based on Order XXXIX Rule 12. It is clear that the heading of the plaintiff's application shows that there is a space between 1 and 2. That space in my view denotes that the plaintiff relies on Rule 1 and 2 rather than Rule 12. By that application, the plaintiffs seek an order of injunction to restrain both defendants from entering remaining or transferring the suit property. They also seek an order of inhibition to issue against the suit property. In the affidavit in support of that application, the first plaintiff deponed that the suit property is family land. That the family land was gathered during the adjudication process by their uncle Miriti. It was registered in their father's name, the first defendant to hold in trust for them. The first defendant secretly sold it to the 2nd defendant. The transfer had been signed but when it was presented to the adjudication officer the records had already been sent to the chief land registrar for registration. A title thereafter came out in the name of the 1st defendant. The plaintiff stated in their affidavit that if the orders they seek are not granted, the defendants would transfer the land to the 2nd defendant to their detriment. It was deponed that the 2nd defendant had attempted to evict the plaintiffs and yet the plaintiffs have no other land to go to. The first defendant swore the affidavit in reply. He denied the contents of the affidavit of the plaintiff. He stated that there had been long standing family dispute with Miriti and for that reason, the family sat and agreed to sell the suit property. The property had been sold to the 2nd defendant although transfer had not been effected. First defendant said that he had already vacated the suit property and had given possession to the 2nd defendant. The plaintiffs responded to that replying affidavit by

denying being involved in a family meeting where decision was made to sell the suit property. Interestingly in that further affidavit, they stated thus:-

“That we only came to know about the sale of the above parcel when the 2nd defendant entered the said land and maliciously damaged bananas which were planted therein.”

It seems clear to me from that deposition that the plaintiffs do accept that the 2nd defendant is in possession. With that in mind, I will consider the principles of granting an injunction. They are well set out in the case of **Giella Vs. Cassman Brown & Co. Ltd** [1973] E.A. Those principles are:-

“An applicant must show a prima facie case with a probability of success: an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: when the court is in doubt it will decide the application on the balance of convenience.”

In respect of the first principle, I find myself in difficulty at this stage to determine whether the applicants/plaintiffs have shown a *prima facie* case with probability of success. That in my view, can only be determined when the court receives evidence in support of the plaintiff's case. In respect of the 2nd principle, the plaintiffs argued that if the 1st defendant does transfer the suit property to the 2nd defendant they will suffer irreparable loss. It ought to also be remembered that the plaintiffs have in the application before court sought an order for inhibition. That order if granted would ensure that the property is not transferred. In respect of the 3rd principle, having considered the evidence adduced in the affidavits, I find that the balance of convenience does not support the granting of an injunction. This is because the 2nd defendant is said to be in possession of the suit property. That was confirmed as shown above in this ruling. Accordingly, the prayer for injunction is not merited but I am of the view that the prayer for inhibition is necessary to ensure that the property is not transferred before this case is heard. I therefore grant the following orders:-

- 1. I order that an order of inhibition be issued and be registered against parcel number Muthambi/Lower-Karimba/1604 until further orders of this court.***
- 2. The costs of the Chamber Summons dated 1st July 2009 shall be in the cause.***

Dated and delivered at Meru this 28th day of May 2010.

MARY KASANGO
JUDGE