



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 335 of 2009

CECILIA NJOKI NJENGA.....1ST APPLICANT/PLAINTIFF
ELIZABETH NJERI NYOIKE.....2ND APPLICANT/PLAINTIFF
IDA WAIRIMU OTIENO.....3RD APPLICANT/PLAINTIFF
JOHN KIARIE KINUTHIA.....4TH APPLICANT/PLAINTIFF

VERSUS

JAMES MBURU NDUU.....1ST RESPONDENT/DEFENDANT
CATHERINE W. KINUTHIA.....2ND RESPONDENT/DEFENDANT

RULING

Simultaneous with the plaint in this matter, the applicants have brought chamber summons dated 1st December, 2009 for restraining orders against the respondents from:

“entering, encroaching on, obstructing, trespassing on or transferring, charging, selling, alienating or in any other way whatsoever from interfering with Land Reference Number Nakuru Municipality 2/276 or any portion thereof pending the *interpartes* hearing and determination of the suit herein.”

The four applicants are the children of the 2nd respondent, **Catherine Wanjiru Kinuthia** with the deceased **Augustine Kinuthia**. The 2nd respondent and one of her sons, **Paul Julius Murathi** (who is for some strange reason is not a party) obtained a grant of representation to administer the estate of the deceased. The

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grant was specific that the 2nd respondent had a life interest on specified parcels of land to hold in trust for all the named children of the deceased.

It is contended by the applicants that in violation of that trust their brother **Paul Julius Murathi** misled the 2nd respondent to transfer the property to the 1st respondent, James Mburu Nduu; that the 1st respondent now intend to sub-divide the property with a view to selling it, hence this application to restrain him from further interfering with the suit property.

Apart from denying any fraudulent dealings in the transfer of the suit property, the 1st respondent argues that the suit is bad in law for the reason of misjoinder of causes of action, namely breach of trust and tracing. That while a claim for breach of trust can only be instituted by an originating summons, that of tracing can be brought by a plaint. It is further argued that the action for breach of trust can only be maintained against the 2nd respondent. An action for tracing against the 1st respondent is not available as the applicants have not demonstrated that they have exhausted the remedies against the 2nd respondent and Paul Julius Murathi.

I have considered these arguments, as well as authorities cited. It must be remembered that this being an interlocutory application, no definite findings on the points of law or facts are permitted. Indeed the court is at this stage merely expected to consider if a *prima*

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facie case as defined in the case of **Mrao Ltd. Vs. First American Bank Limited & 2 others** (2003) KLR 125 has been established by the

applicants.

It must also be borne in mind that an interlocutory injunction will normally not issue unless the applicants are likely to suffer substantial loss not capable of compensation by an award of damages. But if the court is in doubt it must decide the dispute on a balance of convenience. See Giella Vs. Cassman Brown & Co. Ltd. (1973) EA 358.

I start with the procedural point raised both in the replying affidavit and in the notice of preliminary objection.

Clearly, the applicants' claim, which no doubt is directed to the 2nd respondent, is based on trust. By dint of **Order 36 rule 1** of the **Civil Procedure Rules** such a claim is required to be by way of originating summons. This suit has been brought by a plaintiff. The 1st respondent has argued that that is fatal to the entire suit, relying on the cases of Githurai Ting'ang'a Co. Limited Vs. Moki Savings Co-operative Society Limited & Hannah Mukami Kiruhi, Civil Appeal No.NAI. 286 of 1999 and Maina Njuguna Vs. Paul Njuguna Mwangi, Civil Appeal No.151 of 1999. Although these cases relate to the question of adverse possession the point being made by the applicants is that where the procedure prescribed is originating summons, any other procedure will be incompetent.

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In the case of Maina Njuguna (supra) the Court of Appeal stated that:

“In view of the foregoing, the claim based on trust may proceed to hearing but the claim based on adverse possession can only be brought by way of originating summons in a separate suit.”

This position was reiterated in the Githurai Ting'ang'a case (supra) as follows:

**“If it had, the appropriate procedure would have been by an originating summons as directed by Order 36 rule 30 of the Civil Procedure Rules.....
As I said, there appears to be no authority or provision for the reverse procedure, that it to say for an action begun by plaintiff to be continued as an originating summons.the applicant is faced with the difficulty that, under Order 36 rule 30 of the Civil Procedure Rules, a claim based on adverse possession under the Limitation of Actions Act must mandatorily be commenced by an originating summons.”**

As will shortly be demonstrated there is no unanimity on this issue even in the Court of Appeal itself. In recent decisions, there is a clear departure from the earlier decisions.

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In Mariba Vs. Mariba & Another (2007) 1EA175 the court explained thus:

“While it is true that the suit was commenced by plaintiff instead of by the procedure of originating summons, we do not consider the error to be fatal in view of the provisions of Order 36 rule 10 of the Civil Procedure Rules.....”

In a suit based on trust and brought by a plaintiff the court said:

“We have considered the authorities cited by M/s Kilonzo in urging us to fault the procedure adopted by the plaintiff in this matter, but we are satisfied that it was not fatal to the claim. Indeed the suit in Kanyi Vs. Muthiora (supra) was commenced by way of a plaintiff. As correctly submitted by learned counsel for the Respondent, Mr. Kimani, the defendant was under no illusion as to what case he was to answer.”

The trend of looking at the substance and considering if there would be prejudice to any party has culminated in the enactment of **Sections 1A and 1B** of the **Civil Procedure Act** introducing the concept of overriding objective of the **Civil Procedure Act**. The courts, by those provisions are conferred with considerable latitude in the interpretation of the law and giving effect to the rules at the same time.

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In concluding this point, the argument raised on the procedure adopted in this matter is not fatal as it has not been shown to be prejudicial to the 1st respondent. That holding should also take care of the issue of joinder of causes of action.

Turning to the question of *prima facie* case, again without delving in the merit, there is no denying that the grant of representation

created a trust. The 2nd respondent and Paul Julius Murathi became trustees of the applicants. One of the properties forming the estate of the deceased was sold by the trustees to the 1st respondent for valuable consideration. The 1st respondent has maintained that he only committed himself after he was satisfied that the duo had a grant of letters of administration and an order from the court authorizing the sale. It has turned out that the purported order of the court may be a forgery. The property in question is registered under the **Registered Land Act**. By **section 39(2)** thereof a *bona fide* purchaser for valuable consideration from a trustee is protected even where the transaction may amount to breach of trust. The key words in the provision are *bona fide* and for valuable consideration. The applicants have pleaded fraud and given particulars suggesting *mala fides*. Similarly the question of tracing depends on the knowledge that the title may be defeasible in favour of an interested party. Again the plaint suggests that the 1st respondent was culpable. For these reasons, I find that a *prima facie* has been made out.

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The subject matter being land in which almost nine dependants depend, an award of damages will not adequately compensate the applicants. The balance of convenience is in favour of the maintenance of *status quo* to avoid loss, in view of the uncontroverted averment that the 1st respondent is about to dispose of the suit property.

In the result, there will be injunction restraining the respondents (Particularly the 1st respondent) from transferring, charging, selling or alienating Nakuru Municipality 2/276 pending the hearing and determination of this suit. Costs will be in the cause.

Dated, Signed and Delivered at Nakuru this 9th day of June, 2010.

W. OUKO
JUDGE