



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1220 of 2006

HANNAH WANJIKU GATOTO
BENSON NJOROGE GATOTO
STEPHEN KARANJA APPLICANTS

AND

MOSES GATOTO KARANJA RESPONDENT

RULING

The parties in this suit are members of a polygamous household in which the 1st Plaintiff/Applicant is the 1st wife of the Defendant and mother of the 2nd and 3rd Plaintiffs/Applicants.

The Plaintiff/Applicants having filed a plaint dated 20th March, 2006 seeking orders, inter alia, to compel the Defendant to subdivide his land in accordance with their own desires and design and to restrain him from certain dealings with the land, have now moved the court under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules, section 34 and 63 of the Civil Procedure Act seeking orders as follows:

- (a) THAT service of (the) application be dispensed with and the application be heard ex parte in the first instance.
- (b) THAT the Defendant, by and/or his servants be restrained by a temporary injunction from subdividing and/or alienating with (*sic*) Land Parcel No.GITHUNGURI/NYAGA/1418 and/or L.R.NO.GITHUNGURI/NYAGA/1424 -1432 until the hearing and determination of the main suit herein.
- (c) THAT costs be provided for.

The first prayer was granted on 20th November, 2006 when the applicants appeared in court ex parte the Respondents. The court also granted the Applicants interim injunction for 14 days purely on a balance of convenience the Learned Justice Kihara clearly stating that he was “***not entirely satisfied that the Plaintiffs have made out a prima facie case for the granting of interim orders pending the hearing of the application inter partes***”

In addition to submissions made by the Applicants, the Learned Judge relied on a decree annexed as exhibit “HWG III” to the supporting affidavit and other documents which clearly show that there is a dispute over the suit land. At the inter partes hearing it became apparent that the said decree which was an adoption of a decision of the Githunguri Land Disputes Tribunal of 14th February, 2003 which was rendered inoperative by the quashing of that decision by the High Court on 8th November, 2005 in a Judicial Review proceeding, Miscellaneous Application No.283 of 2003, filed by the Defendant/Respondent herein. The Ruling of the court is annexed to the Respondent’s Replying Affidavit of 6th December 2006 and marked “MGK/1”. For this reason alone and without going further into other issues arising herein, it is obviously clear that the exparte orders herein were issued in circumstances which clearly demonstrate material non-disclosure by the Applicants as submitted by the Respondents during the inter partes hearing, a fact which is not even countered by the Applicants themselves. The interim orders ought not to have been granted given the true facts of the case and the quashing order of 8th February, 2006.

Having considered the arguments by both sides as supported by the various documents presented at the inter partes hearing, it is quite clear the Applicants have not met the essentials for the granting of interlocutory orders as stated in the celebrated case of **GIELLA –VS – CASMAN BROWN LTD (1973) E.A. 358** for the following reasons:

1. The Defendant /Respondent is the legal owner of the land in dispute as is clear from his Replying Affidavit and annexures thereto and more so as admitted clearly in paragraph 4 of the plaintiff/Applicant’s plaint dated 20 in March, 2006 and the annexure “HWG I” of the Affidavit filed in support of the present application.
2. The Applicants have not demonstrated any equitable interest in the suit land on the basis of which an injunction can issue to restrain the registered owner from dealing with the same as he pleases. That they are his sons and wife and that they have lived on the land as such does not confer upon them any right of proprietorship as would make his ownership thereof impeachable or defeasible. They have no right whatsoever to stop him from dealing with the property as he pleases. He is not obliged to negotiate with them or consult them on how the land should be subdivided, alienated or transferred, since his ownership of the same is absolute. As rightly put in paragraph 8 of the Replying affidavit the quashed order would have had the effect of “*disinheriting him*” of the same during his lifetime.
3. Even if the Applicants have developed the land as shown in the annexures produced with a view to proving the Defendant/Respondents’ permission or authority to do so, [in this connection I refer to annexure HWG II of the supporting Affidavit], the permission purportedly granted is only a license revocable at the will of the giver. My scrutiny of the same, even in the absence of handwriting examiner’s evidence suggests that the same probably was not written or signed by the Defendant/Respondent who in the Replying Affidavit has used a thumbprint when swearing the same, thus suggesting he would probably be illiterate. If that be the case then the possibility is that the alleged authority to develop the land was probably not given voluntarily. Being that in law, a license passes no proprietary right or interest and is always revocable, the development of the parcel of land by the applicants would be of no consequence in deciding whether substantial loss would follow from the denial of the injunctive orders sought herein. Furthermore, the alleged value of the developments has not been proven in the submissions made before me or by any documentary evidence at all.
4. Given the circumstances of the case and all the factors now made clear to the court at the inter partes stage, the balance of convenience cannot but tilt in favour of the Defendant/Respondent, it being quite clear that the Applicants have not only misled the court but have also, by filing this suit and application when it is clear (from paragraphs 15 and 16 of the Replying Affidavit) that the Defendant/Respondents actions are in the interest of all his children, the 2nd and 3rd Defendants included, gravely abused the process of this court.

I therefore find that the Applicants have not demonstrated that they have a prima facie case against the Respondent with a probability of success, have not shown that they risk incurring any irreparable loss not

capable of compensation in damages and that the balance of convenience squarely falls in favour of the Respondent not the applicants. The truth being that what the Defendant intends to do is to subdivide the land to cater for both his households, the applicants' action seems to be actuated by greed and selfishness, factors which could lead an aggrieved parent to disinherit them all together.

The injunction application is unmerited. Being a gross abuse of the court process the same must fail. I hereby disallow the same, refuse to grant the orders sought and dismiss the same with costs to the Respondent. In doing so I have considered the authorities submitted by the applicants' which I regret do not support the Applicants case at all, given the facts and circumstances thereof.

Application dismissed with costs.

Dated and delivered at Nairobi this 10th day of January, 2007.

M.G. MUGO

JUDGE

RULING delivered in the presence of

For the Plaintiff: No appearance

For the Respondent: Ngaru holding brief for Nga'ng'a

M.G. MUGO

JUDGE