REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Suit 77 of 2005

DANIEL MUTHURI…….....…….1ST PLAINTIFF

BENSON KINOTI…….....…….2ND PLAINTIFF

V E R S U S

M'IKIARA KARIGI…….....….…….DEFENDANT

RULING

1. That plaintiffs in this matter are son and grandson of the Defendant respectively. In their Amended Plaint they claim that parcel numbers Abothuguchi/Kithirune/2582, 2583 and 2584 all sub-divisions of original title number Abothuguchi/Kithirune/124 is held in trust for themselves and "other family members of the defendant". They specifically pray that a declaration be issued transferring 7 acres and 2 acres out of the original parcel of land to each of them.

2. In the meantime and before the hearing of the suit, the plaintiffs filed a Chamber Summons Application under S. 128 of the Registered Land Act Cap 300 and s.3 and s.3A of the Civil Procedure Act seeking orders that an order of inhibition do issue against any registration of any dealings with land Parcel Nos. Abothuguchi/Kithirune/2582,2583 and 2584 until the hearing and determination of this suit.

3. The only ground in support of the Application is that the Defendant has sub-divided the suit land and unless the order of inhibition is issued the land will be alienated and the suit rendered nugatory. In the supporting Affidavit of Daniel Muthuri M'Ikiara sworn on 25.2.2005 the same assertion is repeated save that there is the additional point that the sub-division of the original parcel of land was effected with the sole intention of defeating the Plaintiff's claim.

4. In his Replying Affidavit sworn on 11.4.2005 the Defendant depones that he is a polygamous man with two wives and nine(9) children. That his first wife had two(2) children, the 1st plaintiff and his sister while the second wife had six(6) daughters and one son and that four of the daughters are unmarried and live with him on the land.

5. The Defendant goes on to depone that as the registered proprietor of the suit land, he decided to sub-divide his land so that each of his two sons gets 4 acres while the remaining 6 acres would be left to himself and his 4 unmarried daughters. He adds that the 1st plaintiff is selfishly claiming 7 acres to himself solely to the exclusion of his siblings and that the 2nd plaintiff is his grandson by his married daughter and his claim to the Defendant's land is unjustified.

6. In support of the Plaintiff's position Mr. Ringera Advocate relied on the famous case of Mbui

Mukangu vs Gerald Mbui C.A. 281/2000 to argue that his clients claims are sustainable.

7. Mr. Omayo for the Defendant argued on the other hand that the suit as filed is frivolous and the Application even more so as the plaintiffs are seeking to inherit the Defendant while alive and that the Mukangu case is distinguishable as it related to ancestral land which is not the case here.

8. My understanding of S.128 of the Registered Land Act is that an inhibition can only be granted by courts when there is disclosed a sufficient reason to do so. In the instant case, it is argued that a suit exists in which the Plaintiffs allege that the Defendant holds the suit land in trust for hem and if the land is subdivided then the suit would be rendered nugatory. I see that the particulars of trust given include the fact that the land is ancestral land and that the Defendant was registered as proprietor thereof to hold the same in trust for the benefit of his family, the Plaintiffs included.

9. I have seen the extract of title to the suit land and I note that the Defendant was registered as proprietor of the land on 3.4.1963. Other entries thereafter relate to cautions and inhibitions registered thereon including through CMCC 527/1993. Thereafter I note that the original title register was closed on 7.1.2005 upon sub-division. This suit was filed on 23.9.2004. It is admitted that three separate titles now exist and I see that the family of the Defendant met before their local chief on 27.8.2004 and agreed then and later on 30.8.2004 on how the Defendant would sub-divide his land. The plaintiffs boycotted the meeting at which it was agreed that the 1st plaintiff would be given 4 acres by his father.

10.Do the plaintiffs in the face of all these matters deserve an inhibition? Before answering the question, I should advert to the Mbui Mukangu case (supra). In that case, a father and his son were embroiled in a dispute as to land registered in the name of the father, a portion of which the son wanted transferred to him and which he occupied. The father admitted that the land was ancestral land and he had no intention of evicting the son and had offered him ½ acre of one plot to cultivate but denied use of another because it had been purchased by him. The matter eventually landed in the court of Appeal for the determination of one question.

"Do section 27 and 28 of the Registered Land Act confer on such rights on Mbui as will entitle him to evict his son, Gerald from the occupation and possession of the land?"

11. The court of Appeal having considered submissions made in that case and making reference to Nyeri C.A. 189/96 Muriuki Marigi vs Richard Marigi Muriuki and 2 others, Esiroyo vs Esiroyo [1973] E.A. 388 and the effect of s.27 and s.28 aforesaid concluded as follows:-

12."**We have also examined other authorities and we think it cannot be argued too strongly that the proper view of the qualification or proviso to s.28 is that trust arising from customary law claims are not excluded in the proviso"**

further that:

"**It is significant, we think that unlike the Muriuki Marigi case (supra) where the father had his own land and could therefore do whatever he wished with it, the Land registered in the name of Mbui was ancestral land that devolved to him on the death of his father. It was unregistered land held under custom but the tenure charged during the land Consolidation process and subsequent registration under the Act. It is a concept of intergenerational equity where land is held by one generation for the benefit of the succeeding generations."**

What I gather is that the court was saying that a son can actually inspite of s.27 and s.28 of the Act properly claim land from his father while the father is alive if he can show that the land was ancestral land and ought to pass from father to son throughout the succeeding generations. If that be so then the claim by the 1st plaintiff is not spurious but that by the 2nd plaintiff is clearly unfounded, he being a son by a married daughter and therefore of the second generation. That is not the point however. At this stage, I am satisfied in holding that there is good reason to say that the Defendant has passed the test of inter-generational equity. He has given the 1st Defendant 4 acres of land and has given his only other son 4

acres too. He has left for himself and daughters 6 acres. In the event of death, the 1st plaintiff and his brother can still get their fathers share of that land over and on top of what land has now been given to them. I see no basis for the 7 acres of land claimed by the 1st plaintiff and I have said that the 2nd plaintiff has no basis at all for claiming 2 acres I say all these things guardedly as the suit is unheard and these statements are made only to show that I do not see any reason whatsoever to grant the inhibition. They should not be taken and cannot be conclusive of the suit itself. That is for the trial court. If the plaintiff should succeed in their suit they still have other remedies to get what they consider they are entitled to. If the Defendant had tried to evict the 1st plaintiff or refused to acknowledge his rights over the land, an inhibition may have been proper pending hearing of the suit. In this case none of these situations obtain.

13. The Application dated 25.2.2006 is hereby dismissed with costs.

14. Orders accordingly.

Dated, signed and delivered in open court at Meru this 3rd day of May 2006

ISAAC LENAOLA

JUDGE