



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Case 115 of 2005**

**HILLARY MUCHEMI KINGORI**

**RUFINA MUTHONI KINGORI**

**CATHERINE KAYAI KINGORI**

**FLORENCE TIRINDI KINGORI .....**

**PLAINTIFFS**

**VERSUS**

**MARY KINGORI**

**BERNARD KINGORI**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION .....**

**DEFENDANTS**

**RULING**

1. Before me is a Chamber Summons under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and the substantive prayer is prayer 2 thereof in which the Applicants seek an injunction to restrain the Defendants from selling, alienating, disposing or in any way interfering with land parcel No.L.R.No.Nanyuki/Marura/Block 11/196 until the suit is heard and determined.
2. I have seen the grounds on the face of the Application and the supporting Affidavit sworn on 19.12.2005 by the 1<sup>st</sup> Plaintiff/Applicant, Hillary Muchemi Kingori. The facts simply are that the land in question was initially due to be registered in the names of one Joseph King'ori M'Twamwari but he died before registration and his widow, Mary Kingori, 1<sup>st</sup> Defendant and son, Bernard Kingori 2<sup>nd</sup> Defendant were instead registered as his successors. The Applicants are all children of the deceased and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their mother and brother respectively.
3. The Applicant's only serious contention is that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants ought to have had the land Nanyuki/Marura/Block 11/196 registered in their names as heirs and trustees for the Applicants in terms of a letter dated 10.9.1003 addressed to the District Land Registrar, Laikipia by the Public Trustee who was administering the estate of their deceased father. That contrary to

these instructions, the 1<sup>st</sup> and 2<sup>nd</sup> defendants charged the land as security for a loan advanced to them by the 3<sup>rd</sup> Defendant and when they defaulted in payment, the 3<sup>rd</sup> Defendant attempted to sell their security but were stopped by an order of this court(Lady Justice Sitati) issued on 20.12.2005. That it is their case that the charge was a nullity since it was made in breach of trust and without the prior consent of the Plaintiffs who were minors at the time the charge was created.

4. The Applicants have gone on to contend that no statutory notice was issued and the intended sale would cause them irreparable loss and damage since the land is family land and they were not party to the charge and they stand disinherited through an illegality committed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
5. Apparently the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not interested in the Application and have filed no response to it but the 3<sup>rd</sup> Defendant for obvious reasons is opposed to the grant of any orders to the Applicants and filed a detailed list of grounds in opposition as well as a Replying Affidavit sworn on 5.1.2006 by one Grace Magunga, Senior Legal Officer of the 3<sup>rd</sup> Defendant Corporation. The gist of its case is that the 1<sup>st</sup> Defendant applied for a loan of Kshs.1, 000,000/- on 12.7.1995 as working capital for her business and the loan was secured by charges over Nanyuki/Marura Block/196 and Giaki/Kiburine/156. The 2<sup>nd</sup> Defendant gave a personal guarantee in which he undertook to pay the advanced amount plus interest accrued thereon in the event of default. Thereafter the necessary consent of the Land Control Board was obtained and the charge registered prior to the loan amount being advanced.
6. The 3<sup>rd</sup> Defendant later commenced recovery proceedings when the 1<sup>st</sup> Defendant defaulted in repayment of the loan and issued the requisite statutory notices before attempting sale of the land. That the Applicants are unknown to the 3<sup>rd</sup> Defendant and had no notice of any trust vested in the 1<sup>st</sup> Defendant and in any event, the trusteeship, if at all does not bar the recovery of the security properly given by the 1<sup>st</sup> Defendant.
7. Lengthy and useful submissions were made by both Mr. Kariuki for the Applicants as well as Mr. Mulwa for the 3<sup>rd</sup> Defendant and I am grateful for the authorities cited. The only question that I deem important to address is this: - are the 1<sup>st</sup> and 2<sup>nd</sup> Defendants vested with trusteeship over land parcel number Nanyuki/Marura Block 11/196 and if so, did they abuse or breach that trust by charging the land in favour of the 3<sup>rd</sup> Defendant? I have framed this question because the only other serious issue raised in submissions by Mr. Kariuki is with regard to the statutory notices issued to the 1<sup>st</sup> Defendant; that in fact no notice was issued under S.77 (6) of the Registered Land Act and S.74 of that Act was also not complied with. Both these Sections relate to the remedies of a chargee and a chargee's power of sale. To my mind these matters are raised without substance by persons who claim no knowledge or participation in the entire process leading to the intended sale of the charged land. The Applicants cannot on one hand make that claim and on the other depone to matters which ought to be in the specific knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> defendants who have chosen not to respond to the matters raised by the Applicants. The Applicants cannot purport to be aggrieved by the conduct of their mother and brother and yet act if they are all colluding to stop the 3<sup>rd</sup> Defendant from realizing its security. They can only do so if the suit and Application are actuated by bad faith.
8. Returning to the pertinent matter before me, the only evidence of the alleged trust is that letter

earlier referred to, written by the Public Trustee and dated 10.9.1993. In that letter, one R.M.C Mahiri on behalf of the Public Trustee writes as follows: -

**“The District Land Registrar**

**Laikipia District**

P. O. NANYUKI

**RE: JOSEPH KINGORI M'TWAMWARI – DECEASED**

**ADMINISTRATION CAUSE NO.325 OF 1977**

**LAND PARCEL NANYUKI/MARURA/BLOCK 11(KARIUNGA)**

**I am administering the estate of the above named deceased who died on 4<sup>th</sup> April, 1975(copy of letters of Administration (P&A 439/78) attached).**

**The deceased was a member of Kariunga Farmers Company. The company has been dissolved after sub-dividing the farm and transferring individual land parcels and plots to the owners.**

**I understand that land Parcel Ref. No.Nanyuki/Marura Block 11 Kariunga/198 belongs to the deceased named above.**

**According to the GREEN CARD issued by you on 9<sup>th</sup> August,1993 the said parcel was transferred to the Government of Kenya. Perhaps you did not know that I am administering this estate. The widow has been to your office and tells me that you are willing to transfer it to her name, if you get a letter from me to that effect.**

**This is to confirm that you should transfer the said land parcel “TO MARY WANGUI KINGORI and BERNARD MUCHERU KINGORI the widow and son of the deceased respectively both of P. O. Box 1970, Meru in their own right as heirs and in trust for FLORENCE THIRINDI KINGORI, RUFFINA MUTHONI KINGORI, CATHERINE KAYAI KINGORI and HILLARY MUCHEMI KINGORI children of the deceased as tenants – in common”.**

**The registration fees and other charges will be paid by the bearer Mrs. Mary Wangui Kingori, the said widow.**

**Please confirm that you have acted on this letter, to enable me to close the matter.**

**(R. M. C.MAHIRI)**

**FOR: PUBLIC TRUSTEE**

**CC:**

**The Chief Land Registrar**

**P. O. Box 30089**

**NAIROBI**

**Mrs. Mary Wangui Kingori & Oths**

**P. O. Box 1970**

MERU".

9. It is clear from this letter that the land was transferred to the Government of Kenya and the Public Trustee was merely proposing that the land should be registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their right as heirs and in trust for the Applicants. The Public Trustee also sought a confirmation that his proposal had been acted on but no such confirmation has been shown. More seriously I think, the Applicants ought to have exhibited an extract of a legal instrument to show that they are indeed entitled to the suit land as beneficiaries under a trust. That they have not done so completely throws their case through the window as that would have been the conclusive proof of that alleged trust. But suppose the Applicants had prima facie shown evidence of an existing trust, would it affect the right of the 3<sup>rd</sup> Defendant to exercise its statutory power of sale? S.126 of the Registered Land Act is helpful in this regard and it provides as follows:

"126(1) A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words" as trustee", but the Registrar shall not enter particulars of any trust in the register.

- 2. An instrument which declares or is deemed to declare any trust, or a certified copy thereof, may be deposited with the Registrar for safe custody; but such instrument or copy shall not form part of the register or be deemed to be registered.**
- 3. Where the Proprietor of land, a lease or a charge is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trust, but for the purpose of any registered dealings he shall be deemed to the absolute proprietor thereof, and no person dealing with the land, a lease of a charge so registered shall be deemed to have notice of the trust, nor shall any breach of the trust create any right to indemnity under this Act."**

10.S.126 (3) is therefore clear that a Trustee is deemed an absolute Proprietor of the land in spite of trust and a person in the position of the 3<sup>rd</sup> Defendant as Chargee and because of S.126(1) above is deemed to have no notice of the trust. This being the case, it is immaterial at the time of creating the charge at the time of redemption that there in fact exists a trust.

11.I have said that there is no document showing a legally created trust and I have said that even if there was, the charge remains unaffected. That being the case the main complaint by the Applicants has no legs to stand on and must be declared to be unmerited. No prima facie case with a probability of success has been made out, and I see no irreparable loss that the Applicants will suffer and in any event any loss can clearly be quantified if the land is sold and damages an adequate remedy. From what I have said above, the balance of convenience must favour the 3<sup>rd</sup> Defendant who is backed in its factual position by statute. If the Applicants are happy with the conduct of their mother and brother, an attack on the statutory right of the 3<sup>rd</sup> Defendant cannot make them happy.

12.The conclusion is that I do not see that a good case has been made out for grant of an interlocutory injunction and the Application dated 19.2.2005 must be dismissed with costs to the 3<sup>rd</sup> Defendant only.

13.Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 26<sup>th</sup> Day OF SEPTEMBER, 2006.

**ISAAC LENAOLA**

JUDGE

*In the presence of:-*

Mr. Okwaro H/B for Mr. Kariuki Advocate for the Applicant

N/A for Advocate for Respondents

I. LENAOLA

JUDGE