



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 42 of 2005

BENSON MUCHIRI MUTHOKIA.....1ST
PLAINTIFF

ESTHER TAPNYABII SIGIKAI.....2ND
PLAINTIFF

VERSUS

KELLEN WAITHERERO GICHIMU (*Sued as the Legal*

Administrator of the estate of the late Elijah Thuku Muthokia and the legal

Guardian of Risper Wanjiku Thuku, Sussy

Wangechi Thuku, Samuel Muthokia

Njuguna).....DEFENDANT

RULING

This is an application made under **Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure rules** by the plaintiff seeking orders of interlocutory injunction against the defendant, Kellen Waitherero Gichimu (*who was substituted as the defendant in the place of Risper Wanjiku Thuku who had been wrongly sued*) to restrain herself, her servants and or agents from ploughing planting or in any way interfering with the all that parcel of land whose original title was **No. LR. Kabazi/Rugongo Block 1/7 (Morop)** (*hereinafter referred to as the suit land*) pending the hearing and determination of the suit filed herein. The grounds in support of the application are that the defendant had fraudulently caused the subdivision of the suit land into several parcels of land which have now been registered. The plaintiffs state that the defendant had since registered the said parcels of land in different names and had now resorted in provoking and harassing the 1st plaintiff with the assistance of the police. The application is supported by the annexed affidavit of Benson Muchiri, the 1st plaintiff.

The application is opposed. The defendant has filed grounds in opposition to the application. The former defendant, Risper Wanjiku Thuku swore a replying affidavit in opposition to the application. In summary the defendants state that part of the suit land which is being claimed by the plaintiffs was properly and legally subdivided by Elijah Thuku Muthokia, who was the late husband of the defendant (*hereinafter referred to as the deceased*). The defendant contends that the suit land belonged to the deceased who had purchased for value and then legally transferred it to the defendant and her children. The defendant urged this court to disallow the application for injunction with costs.

At the hearing of the application, Miss Njoroge, Learned Counsel for the plaintiffs submitted that the suit land belonged to the plaintiffs. The plaintiffs had agreed to have the suit land subdivided into two

portions measuring six acres and four acres respectively. The deceased husband of the defendant was left with the conveyancing papers so that he could effect the said subdivision and transfer. Instead of the deceased effecting transfer in accordance with the wishes of the plaintiffs, the deceased fraudulently transferred part of the suit land to himself, his wife and his children. Learned Counsel submitted that the deceased did not have authority to transfer part of the suit land to himself and his family. It was argued on behalf of the plaintiffs that the defendant had not established that the deceased purchased part of the said suit land from the plaintiffs. The plaintiffs submitted that they were being harassed by the defendant yet she (*the defendant*) obtained the suit land fraudulently and not lawfully.

The defendant, who was acting in person, submitted that she did not have the letters of administration to administer the deceased's estate. She submitted that she inherited the suit land from her deceased husband. She submitted that she was not aware of how the suit came to be transferred from the plaintiffs to the deceased and then to herself and her children. She however submitted that the plaintiffs signed the mutation forms subdividing the said suit land. In her view, the plaintiffs had filed the suit in order to achieve their objective of taking away the land from her because her husband had died. She further stated that she had only daughters and no son. She submitted that there was bad blood between herself and the 1st plaintiff because she had refused to be inherited as a wife by the said 1st plaintiff. She further submitted that there was a criminal case pending in court between the plaintiffs and the defendant on a charge of malicious damage to property related to the suit land. She submitted that she had no evidence to prove that the deceased has purchased the suit land. What she was certain is that part of the suit land was now registered in her name and that of her children. She further submitted that the 1st plaintiff had threatened her life and that she had reported the incident to the police for further action. She wondered why the plaintiffs have now made the decision to sue her, instead of suing her late husband when he was alive. She urged the court to dismiss the application with costs.

In response Miss Njoroge submitted that the part of suit land was transferred to the defendant and her children after the death of the deceased. This was done in spite of the fact that the defendant had not obtained letters of administration to administer the said deceased's estate. Learned Counsel submitted that for this reason alone, the plaintiffs' had established a *prima facie* case with a likelihood of success and therefore should be granted the order of injunction sought.

I have read the pleadings filed by the parties to this suit. I have also carefully considered the submissions made before me in court by the plaintiffs and the defendant. The issue for determination by this court is whether the plaintiffs have established a *prima facie* case to enable this court grant the application for interlocutory injunction sought. The facts of this case are not seriously disputed. The plaintiffs were the registered owners of the suit land known as ***Kabazi/Rugongo Block 1/7 (Morop)*** measuring 6.923 Hectares or thereabout. The plaintiffs made a decision to subdivide the said parcel of land into six acres and four acres respectively so that each of them could have a title to his or her own portion. The suit land was duly surveyed and demarcated as per the wishes of the plaintiffs. The consent of the Land Control Board was sought and obtained. The subdivision was duly registered. The two portions of land were registered as ***Kabazi/Rugongo Block 1/62 (Morop) and Kabazi/Rugongo Block 1/63 (Morop)***. What transpired thereafter is the actual dispute between the plaintiffs and the defendant herein.

According to the 1st plaintiff, the surveying and the subdivision of the said parcel of land was entrusted to Elijah Thuku Muthokia (*the deceased*) who is the brother of the 1st plaintiff and husband to the defendant. Instead of following the plaintiffs' instructions, the deceased had parcel number ***Kabazi/Rugongo Block 1/63 (Morop)*** measuring 2.436 Hectares fraudulently transferred to his name and that of his wife and minor children. From the certificate of search which are annexed to the plaintiffs' application, it appears that the said parcel of land was further subdivided into three other portions and transferred to the defendant and her children. The defendant insists that the said transfer of the suit land to herself and her children was legal. She however concedes that she was not aware of how the said parcel of land was transferred from the plaintiffs to the deceased and thereafter to herself and her children. She has submitted that the suit filed by the plaintiffs herein was meant to deprive her, a widow, of the suit land. She further argues that the plaintiffs intend to dispossess her of the suit land because she was not blessed with any sons.

Having carefully evaluated the facts of this case and in the light of the principles applicable for the grant of interlocutory injunction, I do find that the plaintiffs have established a prima facie case that part of the suit land was transferred to the defendant and her children under very suspicious circumstances. The plaintiffs entrusted the mutation forms to the deceased, who instead of following their instructions decided to have a portion of the said parcel of land registered in his name and that of his children. The defendant has failed to prove that the said parcel of land was lawfully transferred to her and her children. She cannot explain how the suit land ended up being transferred to her name and that of her children. There is no agreement exhibited to prove that the plaintiffs had sold or legally transferred the suit land to the deceased and later to the defendant and her children. The plaintiffs have denied that they transferred the said suit land to the defendant and her children. They state that the said suit land was fraudulently transferred to the defendant and her children. The defendant did not rebut this strong evidence of the suspicious circumstances that the said transfer was effected.

I do hold that the plaintiffs have established a *prima facie* case with a high likelihood of success during the main hearing of the suit. If the defendant is not restrained the plaintiffs would suffer irreparable damage by losing their land, which damage is not likely to be compensated by an award of damages (*See **Giella –vs- Cassman Brown [1973] E.A. 358***). In the premises, the plaintiffs' application succeeds. The defendant by herself, her servants or agents are hereby restrained from ploughing, planting, transferring or in any way interfering with the suit land (*and all the titles that have been subdivided therefrom*) pending the hearing and determination of the main suit. The plaintiffs shall have the costs of the application.

DATED at NAKURU this 21st day of September 2005.

L. KIMARU

JUDGE