



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 994 OF 2002

DAVID WANJOHI KABUGU PLAINTIFF

VERSUS

JOSEPH KAMAU KAGURU DEFENDANT

RULING

The Chamber Summons dated 11. 06. 2002 is taken out by the Plaintiff in the main suit seeking an Injunction and an Inhibition in the following terms:

“b. That an order of temporary prohibitory injunction do issue to restrain the defendant by himself, his servants or agents or any other person claiming through or under him from sub-dividing, transferring, selling, disposing, alienating or otherwise dealing in the piece or parcel of land known as title number Loc. 19/ KIAMBOGO/273 or any part thereof or at all until the hearing and final determination of the suit herein. c. That an order do issue upon the District land Registrar Murang’a District inhibiting the registration of any dealing in land title number Loc 19/KIAMBOGO/273 or any part thereof or at all until the hearing and final determination of this suit or further orders of this Honourable Court.”

Order 39 Rule 1,2 and 3 Civil Procedure Rules are invoked. In issue in the main suit is a parcel of land known as Loc 19/KIAMBOGO/273 measuring approximately 14.173 Acres. It has some history according to the Plaintiff, going back some 67 years, and since its Registration some 40 years. He says there were two portions of Land which were consolidated before such Registration: that is a portion of 2 Acres inherited from the great-grandfather of both the Plaintiff and the Defendant; and a portion of 12.175 Acres inherited from their great-grandmother. It is the Plaintiff’s case that the land was registered in the name of the defendant’s father in 1962 as trustee and the defendant inherited the same trust upon his father’s death in 1966. The registration was in 1974 through a Succession Cause. His own mother died in 1987 and his father died in July 2000 and both were buried on the piece of land. There was an agreement reached that the defendant would transfer 1 acre of the land to the Plaintiff but he reneged on that agreement. He has since evinced the intention to subdivide the land and allocate it to his children, in which event the plaintiff and his father’s estate will suffer irreparably. He wants half of the whole land.

The defendant admits no part of those averments. He wondered why it had taken so long to institute these court proceedings and averred that the suit was time-barred. As the registered absolute proprietor of the land through succession proceedings since 1974, he contended that there was no express or implied trust in the Title. The entire land was bought by his father from various sellers and his father was registered as proprietor upon consolidation that two family members of the plaintiff were buried on a small portion pf the land gave no rise to propriety rights and it was a magnanimous gesture of the defendant to agree to the ceding of 1 acre of his land around the two graves. He has every intention to subdivide the whole land and distribute it to his grown up sons. There is no lawful claim by the plaintiff.

The two parties narrate completely different stories on the genesis of the suit land or even their relationship. The only agreed fact is that the defendant holds the land certificate which was issued to him on 17. 6. 1974. Before then it was held by the defendant's father since 1962.

The principles for the grant of a temporary injunction are settled. The Applicant must show that there is a prima-facie case with a probability of success; that he will suffer irreparable loss which is not capable of compensation in damages; and if the court is in doubt the matter will be decided on a balance of convenience. See *Giella vs Cassman Brown & Co. Ltd.* (1973) EA 358. In considering the first principle, the Court cannot make conclusive findings of fact as these will be tested in cross-examination at the main hearing. The most glaring feature of this case however is the time it has taken the plaintiff to lay his claim over the suit land. Much of the historical origin of the land as narrated by the Plaintiff appears to be hearsay. It relates the acquisition by the Plaintiff's great-grandfather and great-grandmothers. There was however a definite and documented event in 1962 when the land was registered in the name of the defendant's father. The father of the Plaintiff said nothing about it then and for the next 4 years until the father of the defendant died in 1966. There was another event in 1974 when in succession proceedings no claims were made to the estate of the deceased and consequently the defendant was registered as the proprietor of the suit land. Until then the father of the plaintiff had said nothing for a period of 8 years and was to say nothing for another period of 26 years until he died in 2000. It was upon his death that his son, the plaintiff, started agitating for a share of the land. The plaintiff does not reside on the land and does not claim adverse possession. But he lays a stake on the land because his parents were buried there and the defendant had agreed to give out 1 acre for the grave yard.

True it is that the concept of Kikuyu customary law on land tenure recognizes, and judicial notice is taken by the courts, that a trust over land may be created either expressly or impliedly, as a resulting or constructive Trust. In both cases however there must be credible evidence, even at the prima facie level as this, to establish such allegations. Again the concept must not be abused by being raised years or several generations after the event. There must be an end to litigation.

It seems to me in this matter that the gravamen of the plaintiff's case is the burial of his parents on a small portion of the suit land and an agreement by the defendant to cede 1 acre of the land, which the plaintiff accepted. Why he now seeks more land is not clear. While however I can understand the pleading of the agreement, I am in no doubt that the mere burying of a dead person does not per se give rise to a proprietary interest in the land. It is a popular belief which has caused many a burial dispute in courts but it has to be debunked. There is no property in a dead body. I express my doubts on the likelihood of the plaintiff's case succeeding. There is no likelihood of the plaintiff suffering irreparable loss as he is not landless. He does not admittedly reside on the suit land. I would not in the circumstances restrain the defendant from dealing with land that admittedly belongs to him absolutely. I only on a balance of convenience give an opportunity to the plaintiff to urge his case on one Acre of that land which surrounds the graveyard of his parents and to that end I issue a temporary injunction affecting that portion only. Costs will be in the cause.

Dated this 24th day of October, 2002.

P. N. WAKI

JUDGE

24. 10. 2002

Waki J.

Cerere for Applicant

Nyachite h/b Wairagu for Respondent

CC: Mulinge

Ruling delivered dated and signed in Chambers.

P. N. WAKI

JUDGE