



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 9 OF 2020**

**MERCY WAMBUI MURIITHI.....PLAINTIFF**

**-VERSUS-**

**SIMON KARURI.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**THE DIRECTOR OF SURVEYS.....3<sup>RD</sup> DEFENDANT**

**THE LAND CONTROL BOARD, NYERI.....4<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. By a plaint dated 27<sup>th</sup> February, 2020 the Plaintiff sought recovery of various suit properties from the 1<sup>st</sup> Defendant, damages for breach of fiduciary duties, an order for account, and order of permanent injunction among other reliefs. The Plaintiff pleaded that she was the only child of the late James Muriithi Kiumi (*the deceased*) who died intestate on 2<sup>nd</sup> July, 2013 leaving behind various parcels of land including the suit properties.

2. It was further pleaded that the 1<sup>st</sup> Defendant had in collusion with the rest of the Defendants fraudulently and illegally caused some of the properties to be transferred into his name. The Plaintiff further pleaded that as a result of the 1<sup>st</sup> Defendant's said conduct, he was arrested and charged with various criminal offences relating to fraudulent acquisition of the suit properties. The 1<sup>st</sup> Defendant was said to have been released on a bond of KShs.2,000,000/- pending trial.

**B. THE PLAINTIFF'S APPLICATION**

3. Simultaneously with the filing of the suit the Plaintiff filed a notice of motion of even date expressed to be based upon **Article 159(2)(d) of the Constitution of Kenya, 2010, Section 3A of the Civil Procedure Act (Cap. 21) and Order 40 Rule 1 of the Civil Procedure Rules** seeking the following orders:

(a) spent.

(b) spent.

(c) Pending the hearing and determination of the suit, an injunction be issued, restraining the 1<sup>st</sup> Defendant by himself, his agents, proxies, employees, associates, accomplices, or any person claiming under him from leasing, claiming, entering, alienating, allotting, granting, disposing, attaching, subdividing, planning, charging, meddling with, beaconing, surveying, trespassing, or prejudicially dealing with parcels of land known as Title number Ruguru/Karuthi/29, Title number Ruguru/Karuthi/33, title number Ruguru/Karuthi/34 and Title number Nya/Rurii Block 1/Mugathika/76.

(d) Costs of this application be borne by the Defendants.

(e) Any other and further order/s that this court may deem fit and just to grant to preserve the subject matters of this suit.

4. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 27<sup>th</sup> February, 2020 and the annexures thereto. The grounds were essentially the same grounds set out in the plaint. The Plaintiff was apprehensive that unless the interim orders sought were granted, the 1<sup>st</sup> Defendant would alienate or otherwise deal with the suit properties to the detriment of the estate of the deceased which eventuality shall render the suit nugatory.

#### **C. THE DEFENDANTS' RESPONSE**

5. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on 21<sup>st</sup> July, 2020 disputing the Plaintiff's claim. He stated that he was the lawful and absolute owner of the suit properties. The 1<sup>st</sup> Defendant contended that he was gifted the suit properties by the deceased who was also his father. He disputed that the Plaintiff was the only child of the deceased and asserted that he was also a child of the deceased.

6. The 1<sup>st</sup> Defendant further stated that the suit properties were gifted to him by the deceased during his lifetime and that the deceased followed due process including obtaining the consent of Mathira Land Control Board for the transactions. The 1<sup>st</sup> Defendant further contended that the deceased had also gifted some parcels to the Plaintiff and her children but the Plaintiff had declined to take up her portion. The court was consequently urged to dismiss the application.

#### **D. THE PLAINTIFF'S FURTHER AND SUPPLEMENTARY AFFIDAVITS**

7. The Plaintiff filed a supplementary affidavit sworn on 6<sup>th</sup> August, 2020 and a further affidavit sworn on 31<sup>st</sup> August, 2020 in response to the 1<sup>st</sup> Defendant's replying affidavit sworn on 21<sup>st</sup> July, 2020. The Plaintiff denied that the 1<sup>st</sup> Defendant was a son of the deceased and that he only held out himself to be a son for the purpose of fraudulent acquisition of the suit properties. She stated that the 1<sup>st</sup> Defendant's father was one William Ngotho. She denied having been invited to attend any Land Control Board meeting for the purpose of being gifted any land and she disputed the existence of any genuine minutes at which the 1<sup>st</sup> Defendant was gifted the suit properties.

#### **E. THE 1<sup>ST</sup> DEFENDANT'S FURTHER REPLYING AFFIDAVIT**

8. The 1<sup>st</sup> Defendant filed a further replying affidavit sworn on 15<sup>th</sup> October, 2020 in response to the Plaintiff's further and supplementary affidavits. The 1<sup>st</sup> Defendant disputed the contents of the Plaintiff's further and supplementary affidavits. The 1<sup>st</sup> Defendant contended that he had been adopted by the deceased as his son and that the Plaintiff had no *locus standi* to challenge such adoption.

9. The 1<sup>st</sup> Defendant did not dispute the existence of criminal charges against him with regard to the acquisition of the suit property but he contended that the criminal case was still pending and that the charges were yet to be proved beyond reasonable doubt as required by law.

#### **F. THE PLAINTIFF'S REJOINDER**

10. The Plaintiff filed a further affidavit sworn on 8<sup>th</sup> February, 2021 pursuant to leave granted on 26<sup>th</sup> January, 2021. The Plaintiff contended that the 1<sup>st</sup> Defendant's parents William Ngotho Kogi and Mary Nyambura Ngotho had never given up the 1<sup>st</sup> Defendant for adoption by her parents. It was further contended that the deceased was an educated person who was a headteacher of a primary school and that if he desired to adopt a child he could have done so openly and procedurally.

11. The Plaintiff further stated that the 1<sup>st</sup> Defendant had since sub-divided Title No. Nyandarua/Rurii/Block 1 (Mugathika)/76 into three parcels namely Nyandarua/Rurii/Block 1 (Mugathika)/115, 116 and 117 hence the court should take note of this development.

#### **G. DIRECTIONS ON SUBMISSIONS**

12. When the application was listed for directions on 22<sup>nd</sup> July, 2020 it was directed that the same shall be canvassed through written submissions. The parties were granted 21 days each to file their respective submissions. The record, however, shows that the Plaintiff filed her submissions on 16<sup>th</sup> October, 2020 whereas the 1<sup>st</sup> Defendant filed his on 21<sup>st</sup> October, 2020.

13. There is no indication on record of the 2<sup>nd</sup> – 5<sup>th</sup> Defendants having filed any submissions in response to the application.

#### **H. THE ISSUES FOR DETERMINATION**

14. The court has considered the Plaintiff's notice of motion dated 27<sup>th</sup> February, 2020 together with the supporting affidavit and the various supplementary and further affidavits, the 1<sup>st</sup> Defendant's replying affidavit and further replying affidavit, as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:-

(a) Whether the Plaintiff has made out a case for the grant of the injunction sought.

(b) Who shall bear costs of the application.

#### **I. ANALYSIS AND DETERMINATION**

**(a) Whether the Plaintiff has made out a case for the grant of an injunction**

15. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff submitted that she had satisfied the legal requirements for the grant of an interim injunction, the 1<sup>st</sup> Defendant contended otherwise. Incidentally, both parties relied upon the case of **Giella v Cassman Brown & Company Limited [1973] EA 358** in support of their respective submissions.

16. There is no doubt that the principles laid down in the said case have stood the test of time. The principles enunciated in the said case were as follows:-

(a) First, an applicant must demonstrate a *prima facie* case with a probability of success at the trial.

(b) Second, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss which cannot be adequately compensated by an award of damages.

(c) Third, if the court is in doubt on the second principle it shall decide the matter on a balance of convenience.

17. There is no doubt from the material on record that the deceased was the registered owner of the suit properties prior to the 1<sup>st</sup> Defendant's acquisition thereof. What is in dispute are the circumstances under which the ownership of the suit properties passed from the deceased to the 1<sup>st</sup> Defendant. Whereas the 1<sup>st</sup> Defendant contended that he acquired the properties as a gift from the deceased by virtue of being his adopted son, the Plaintiff contended that there was no such gift and that the 1<sup>st</sup> Defendant had acquired the suit properties through fraudulent and unlawful means.

18. The court is aware that at this interlocutory stage, it is not required to make any definitive findings on the matters in dispute. It would not be in order to determine the issue of fraud and illegality before the trial of the action. The court shall also refrain from making any findings on the issue of the alleged adoption. However, it is pertinent to note that the 1<sup>st</sup> Defendant is currently facing various criminal charges including conspiracy to defraud, forgery, uttering false documents and making documents without lawful authority in connection with his acquisition of the suit properties.

19. The court has also noted that the concerned Mathira Land Control Board is unable to trace any minutes of the meetings at which the deceased obtained consent to transfer the suit properties to the 1<sup>st</sup> Defendant. There is a letter on record from the Deputy County Commissioner of Mathira East Sub-county to that effect. On the basis of the material on record the court is satisfied that the Plaintiff has made out a *prima facie* case with a probability of success at the trial.

20. The next question for consideration is whether or not the Plaintiff has demonstrated the risk of irreparable loss which cannot be adequately compensated by an award of monetary damages. The material on record indicates that the Plaintiff is seeking to recover the suit properties on behalf of the **estate** of the deceased who was her late father. She contends that the suit properties rightfully form part of the estate of the deceased and that they were fraudulently acquired by the 1<sup>st</sup> defendant.

21. The court is of the opinion that damages may not be an adequate remedy where a suit seeks preservation or recovery of assets which are said to belong to the estate of a deceased person. Some of the properties may be of sentimental value and attachment to the family of the deceased hence it may be prudent to preserve them pending the hearing and determination of a pending suit. Accordingly, the court is satisfied on the basis of the material on record that the Plaintiff has satisfied the second requirement for the grant of an interim injunction pending trial. Accordingly, it shall not be necessary to consider the third principle on balance of convenience. In the premises, the court is inclined to grant the Plaintiff the order of interlocutory injunction pending the hearing the hearing and determination of the suit.

**(b) Who shall bear costs of the application**

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court has, however, noted that the Plaintiff and the 1<sup>st</sup> Defendant appear to be relatives. The Plaintiff contended that they are cousins whereas the 1<sup>st</sup> Defendant contended that they were siblings. Whichever way one looks at it, they appear to be close relatives. The court is thus of the opinion that costs of the application should be in the cause.

**I. CONCLUSION AND DISPOSAL**

23. The upshot of the foregoing is that the court find merit in the Plaintiff's notice of motion dated 27<sup>th</sup> February, 2020. Accordingly, the court makes the following orders for disposal thereof:

(a) *An order of temporary injunction be and is hereby granted restraining the 1<sup>st</sup> Defendant by himself, his agents, servants, proxies or any person claiming under him from leasing, alienating, allotting, granting, disposing, attaching, sub-dividing, charging, beaconing, surveying or prejudicially dealing with Title Nos. Ruguru/Karuthi/29, Ruguru/Karuthi/33, Ruguru/Karuthi/34, Nyandarua/Rurii/ Block(Mugathika)/115, 116 and 117 pending the hearing and determination of the suit.*

(b) *Costs of the application shall be in the cause.*

Orders accordingly.

**RULING DATED AND SIGNED IN CHAMBERS AT NYERI THIS 10TH DAY OF MARCH, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM IN THE PRESENCE OF MS. MUNYUA FOR THE PLAINTIFF, MR. MAKURA FOR THE 1ST DEFENDANT AND IN THE ABSENCE OF THE ATTORNEY GENERAL FOR THE 2ND – 5TH DEFENDANTS.**

**HON. Y. M. ANGIMA**

**JUDGE**