



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC NO. E015 OF 2021**

JOHN KAHWAI KABUCHO.....1<sup>ST</sup> PLAINTIFF

ALICE NJOKI KARANJA.....2<sup>ND</sup> PLAINTIFF

ESTHER WANJIRU KARANJA.....3<sup>RD</sup> PLAINTIFF

CHARLES KARANJA.....4<sup>TH</sup> PLAINTIFF

**VERSUS**

EDWARD MUIGAI..... DEFENDANT

**JUDGMENT**

**A. INTRODUCTION**

1. By a plaint dated 21<sup>st</sup> June, 2021 and filed on 28<sup>th</sup> June, 2021, the Plaintiffs sought the following reliefs against the Defendants:

- (i) A declaration that the Plaintiffs and the Defendant herein are the registered owners of the land Parcel **LR. No. Nyahururu/Municipality Block No. 6585/1015** to hold as tenants in common in equal shares.
- (ii) A declaration that the Plaintiffs and the Defendant have equal rights over **LR. No. Nyahururu/Municipality Block No. 6585/1015**, the developments thereon and income generated therefrom and are thus entitled to enjoy equal benefits as tenants in common.
- (iii) Mense profits from December, 2019 to June, 2021 at the rate of Kshs 600,000/= per month together with the interest at court rates, from December, 2019, until payment in full.
- (iv) Loss of user of the suit property.
- (v) An order of injunction compelling the Defendant by himself, his agents, servants, employees and or/or workers to forthwith vacate the suit property.
- (vi) An order compelling the Defendant to render account for all rent incomes collected from **LR. No. Nyahururu/Municipality Block No. 6585/1015** for the period between December, 2019 and June, 2021.
- (vii) An order of permanent injunction restraining the Defendant by himself, his agents, servants, employees and or /or workers from collecting rent, income, remaining on, entering or renting, leasing, charging, carrying on any developments and/or in any way dealing with **LR. No. Nyahururu/Municipality Block No. 6585/1015**.
- (viii) An order of eviction, evicting the Defendant from the land parcel **LR. No. Nyahururu/Municipality Block No. 6585/1015** and for demolition and/or removal of any structures constructed and/or erected thereon by the Defendant without the consent of the Plaintiffs.
- (ix) Costs

(x) Any other or further relief as may deem fit to this honourable court grant

2. The Plaintiffs pleaded that the suit property originally belonged to their late father Kabucho Isaac Karanja who died in 1976 and that upon confirmation of grant, the same was transferred to their mother Salome Wangari (*Salome*), the Plaintiffs and the Defendants as tenants in common in equal shares. The Plaintiffs further pleaded that when Salome became sickly, they allowed the Defendant to continue running their family business on the suit property for the benefit of all the owners but that the Defendant had taken exclusive control of the suit property and converted the family business into a sole proprietorship to the detriment of the Plaintiffs. The Plaintiffs thus accused the Defendant of breach of trust for exclusively utilizing the income generated from the family business and failing to render an account to the rest of the co-owners hence the suit.

3. The Defendant filed a defence dated 19<sup>th</sup> July, 2021 denying liability for the Plaintiffs' claim. He contended that upon confirmation of grant, Salome was registered as trustee of the suit property and that he and the Plaintiffs were merely beneficiaries under the trust. He further contended that the Plaintiffs had no *locus standi* to file the instant suit against him. The Defendant further pleaded that he was managing the family business on the instructions of Salome and that he was answerable to her only.

#### **B. THE PLAINTIFFS' APPLICATION**

4. Simultaneously with the filing of the suit, the Plaintiffs filed a notice of motion dated 21<sup>st</sup> June, 2021 grounded upon **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21), Order 40 rule 1, Order 51 rule 1 of the Civil Procedure Rules, 2010 (the Rules), and all other enabling provisions of the law** seeking the following orders:

(a) ...spent

(b) ...spent

(c) *That pending hearing and determination of the suit, the Defendant/Respondent be restrained by way of an injunction by himself, his agents, employees, servants and/or officers working through him from collecting rent, remaining on, entering or renting, leasing, charging, carrying on any developments and/or in any way dealing with LR. No. Nyahururu/Municipality block No 6585/1015*

(d) *That pending hearing and determination of this suit, the Defendant/Respondent be compelled by way of injunction to render account for all rent income collected from LR. No. Nyahururu/Municipality Block No 6585/1015 for the period between December, 2019 and June, 2021.*

(e) *That pending hearing and determination of this suit, this honourable court be pleased to issue an order of mandatory injunction compelling the Defendant/Respondent to relinquish physical control, possession and occupation of the suit premises to the Plaintiffs/Applicants.*

(f) *That the cost of this application be provided for.*

5. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by John Kahwai Kabucho on 21<sup>st</sup> June, 2021 and the exhibits thereto. The Plaintiffs reiterated essentially the same matters set out in the plaint that they had been wrongfully excluded from the management of the suit property whereas they were co-owners as tenants in common in equal shares.

#### **C. THE DEFENDANT'S RESPONSE**

6. The Defendant filed a replying affidavit sworn on 19<sup>th</sup> July, 2021 in opposition to the application on several grounds. First, he contended that the Plaintiffs had no *locus standi* to file suit over the suit property and that the right to sue was vested only in the trustee, Salome. Second, that he took over management of the suit property on the express instructions of Salome hence he was merely a manager. Third, that in any event, the Plaintiffs had failed to satisfy the principles for the grant of an injunction and the rest of the orders sought in the application for interim orders. The Defendant also filed a notice of preliminary objection dated 19<sup>th</sup> October, 2021 disputing the Plaintiffs *locus standi* to file suit by asserting that only Salome could file suit as a trustee of the suit property.

#### **D. THE PLAINTIFFS'REJOINDER**

7. The Plaintiffs filed a supplementary affidavit sworn by John Kahwai Kabucho on 29<sup>th</sup> September, 2021 disputing the contents of the Defendant's replying affidavit. The affidavit simply disputed the contents of the replying affidavit and questioned the Defendant's capacity to adjudge Salome as mentally unfit.

#### **E. DIRECTIONS ON SUBMISSIONS**

8. When the application was slated for *inter partes* hearing, it was directed that the same shall be canvassed through written submissions. It was also directed that that the Defendant's preliminary objection shall be canvassed together with the application for interim orders. The record shows that the Plaintiffs filed their submissions on 19<sup>th</sup> October, 2021 whereas the Defendant filed his on 3<sup>rd</sup> November, 2021.

#### **E. THE ISSUES FOR DETERMINATION**

9. The court has perused the Plaintiffs' application, the replying affidavit in response thereto, the Plaintiffs' supplementary 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 Plaintiffs have *locus standi* to file suit.**

(b) **Whether the Plaintiffs have made out a case for the grant of an interim injunction.**

(c) **Whether the Plaintiffs have made out a case for the grant of an order for an account and a mandatory injunction.**

#### **F. ANALYSIS AND DETERMINATION**

(a) **Whether the Plaintiffs have *locus standi* to file the instant suit**

10. The court has considered the material and submissions on record on this issue. The Defendant disputed the Plaintiffs' claim that he and the Plaintiffs were tenants in common in equal shares of the suit property and asserted that Salome was the sole trustee of the suit property on behalf of all the beneficiaries and that she was the only one entitled to sue under the trust. The Defendant relied upon the citation on the face of the grant of the suit property to support the existence of a trust.

11. The Plaintiffs, on the other hand, asserted that as tenants in common with the rest of the co-owners, they were entitled to file suit to protect their legal interest in the suit property. They disputed that Salome was the trustee of the suit property and contended that she was merely one of the tenants in common. The Plaintiffs also doubted the genuineness or authenticity of the alteration to the grant which introduced the term "trust" between the lines. They cited various authorities in a bid to demonstrate that a tenant in common had *locus standi* to file suit.

12. The court is of the opinion that the preliminary objection raised by the Defendant cannot be fairly and completely adjudicated upon without ascertaining some facts touching on the legal relations amongst the parties. Whereas the Plaintiffs hold the position that all the parties shown in the grant are tenants in common in equal shares, the Defendant contends that Salome is a trustee whereas the rest of the parties are merely beneficiaries under a trust. The authenticity of the insertion of the term "trust" between the lines in the grant is also yet to be established. The court is thus of the opinion that it would be premature for the court to determine the legal relations at this stage without a full investigation of the disputed matters. The Defendant's preliminary objection has not been properly taken hence the same is overruled.

13. As was held in the case of **Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696:**

**" A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.."**

(b) **Whether the Plaintiffs have made out a case for the grant of an Interim injunction**

14. The court has considered the material and submissions on record on this issue. Whereas the Plaintiffs submitted that they had satisfied the requirements for the grant of an injunction as set in the case of **Giella v Cassman Brown & Co Ltd [1973] EA 358**, the Defendant contended otherwise. In particular, the Defendant submitted that the Plaintiffs had failed to demonstrate the element of irreparable loss and that in fact they had pleaded specific financial loss which they contemplated may be suffered.

15. The court is satisfied from the material on record that the suit property was originally the property of the deceased father of the parties herein. The court is further satisfied that upon confirmation of grant, the parties named in the grant (*IR No. 52290*) were to inherit the suit property in equal shares. The Defendant was not entitled to hold and enjoy the entire suit property as if it were his sole property to the exclusion of the other tenants in common. The court is not persuaded that the Defendant should be allowed to disinherit his siblings by hiding behind Salome whom he claimed was mentally incapacitated. The court is thus satisfied that the Plaintiffs have made out a *prima facie* case with a probability of success at the trial.

16. What about the requirement of irreparable loss? The Plaintiffs submitted that a violation of their proprietary rights over the suit property cannot be adequately compensated by an award of damages. The court is of the opinion that such violation can only result into a financial loss since the Defendant has been managing what the Plaintiffs called a family business on the suit property. One of the Plaintiffs' grievances was that the Defendant was solely enjoying the income generated from the business without rendering an account to the rest of the tenants in common. The court is not satisfied that such loss is not quantifiable and there is no allegation on record to demonstrate that the Defendant shall not be able to meet an award of damages upon conclusion of the suit. Accordingly, the court finds and holds that the Plaintiffs have failed to satisfy the second principle for the grant of an interim injunction. In the premises, it shall not be necessary to consider the third principle on balance of convenience.

(c) **Whether the Plaintiffs have made out a case for the grant of an order for an account and a mandatory injunction**

17. It is evident from the pleadings that one of the final reliefs sought by the Plaintiffs in the plaint is an order compelling the Defendant to render an account of the rental income collected from the suit property. By seeking such an order, the Plaintiffs must have intended that the same should be granted upon trial of the action. The court is thus of the opinion that the Plaintiffs are not entitled to obtain such an order on an interim basis pending the hearing and determination of the suit. The court is of the opinion that an order for accounts is a final relief which should await the trial of the action.

18. It is also evident from the plaint that the Plaintiffs have sought an order for the eviction or removal of the Defendant from the suit property. Again, the Plaintiffs must have intended that the same should be granted upon trial of the action. The court is of the opinion that an eviction order should ordinarily be granted upon conclusion of the suit unless there are special or exceptional circumstances warranting the granting of such an order.

19. The mere fact that the Plaintiffs have framed the eviction order as a “mandatory injunction” does not change the applicable principles. It is an order which should be granted with great caution and circumspection and only where it is evident that the Applicants are bound to succeed at the trial. See **Nation Media Group & 2 Others v John Harun Mwau [2014] eKLR**. The court is thus not satisfied that the Plaintiffs have made a case for the grant of an order for account or a mandatory injunction at the interlocutory stage. Accordingly, the court is not inclined to grant the same

**G. CONCLUSION AND DISPOSAL**

20. The upshot of the foregoing is that the court is not satisfied that the Plaintiffs have made out a case for the grant of any of the interim orders sought in the application. The court therefore makes the following orders for disposal of the application:

(a) **The Plaintiffs’ notice of motion dated 21<sup>st</sup> June, 2021 is hereby dismissed in its entirety.**

(b) **The suit shall be mentioned on for 24<sup>th</sup> March, 2022 pre trial directions.**

**RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 3RD DAY OF MARCH, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**IN THE PRESENCE OF:**

**MR. OUMA FOR THE PLAINTIFF**

**MS. KIAMA HOLDING BRIEF FOR MR. GITHUI**

**CA - CAROL**

.....

**Y. M. ANGIMA**

**JUDGE**