



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.168 OF 2018

ALICE MUTHONI KINYANJUL.....1ST PLAINTIFF/APPLICANT

ANASTASIA NYOKABI NGUGI.....2ND PLAINTIFF/APPLICANT

(Suing as the Administrators of the

Estate of KAGURU KAMWETI alias JOHN KAMWETI KAGURU (Deceased)

-VERSUS-

SIMON KAMWETI KAGURU.....1ST DEFENDANT/RESPONDENT

LAND REGISTRAR, GATUNDU.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiffs/Applicants filed this *Notice of Motion* application dated 24th May 2018 and sought for the following orders:-

3).That this Honourable Court be and is hereby pleased to issue a temporary injunction to restrain the 1st Defendant/ Respondent either through himself, his servants and/or agents from denying the Plaintiffs and the other beneficiaries of the estate of Kaguru Kamweti alias John Kamweti Kaguru (deceased) free ingress and egress to the suit property subject matter of the suit herein, committing acts of trespass, alienating, transferring, charging, mortgaging, constructing, dealing with Ngenda/Kahuguni/ 61 or in any other manner whatsoever dealing with the said plot, pending the hearing and determination of the suit herein.

4). That this Honourable Court be and is hereby pleased to issue such further orders that it may deem just and fit to grant.

5). That the Defendants/Respondents bear the cost of the application.

The application was premised on the following grounds:-

a) The Plaintiffs are the legal representatives of the estate of Kaguru Kamweti alias John Kamweti Kaguru (deceased) [hereinafter referred to as 'the deceased'].

b) The deceased was/is the registered proprietor of land parcel known as Ngenda/Kahuguni/61 [herein referred to as the 'suit property'] prior to the Defendants' fraudulent transfer of the same purportedly on 6th February 1996.

c) The 2nd Defendant/Respondent colluded with the 1st Defendant/Respondent to transfer the deceased's said suit property by means of fraud to the 1st Defendant/Respondent.

e) The Plaintiffs/Applicants being the legal representatives of the Estate of Kaguru Kamweti alias John Kamweti Kaguru (deceased) were not parties to the fraudulent process of transfer to the 1st Defendant/Respondent.

f) The 1st Defendant/Respondent has acquired title illegally and he claims that he is the rightful owner and has threatened to evict the beneficiaries of the Estate of Kaguru Kamweti alias John Kamweti Kaguru (deceased) from the property.

h) That the Plaintiffs are apprehensive and rightfully so that the Defendants intend to disinherit the beneficiaries of the

deceased's estate unless restrained from doing so by this Honourable Court.

The said application is also supported by the *Affidavits* of *Alice Muthoni Kinyanjui* and *Anastasia Nyokabi Ngugi*, the legal representatives of the Estate of the late *Kaguru Kamweti alias John Kamweti Kaguru(deceased)*. They averred that the late *Kaguru Kamweti* was the registered owner of *Ngenda/Kahuguni/61* having been registered so on **21st September 1976**. They contended that *Kaguru Kamweti* died on **19th May 1997** and they were issued with *Limited Grant* on **25th August 2017** marked **AMKI-A**.

It was also contended that the 1st Defendant who is a son of the deceased fraudulently transferred the suit property to himself without the consent of the other beneficiaries and in collusion with the 2nd Defendant, the said illegal transfer was backdated to **6th February 1996**. Further that the deceased beneficiaries have developed and/or cultivated the suit property and they stand to suffer irreparable loss and damage if the Defendants herein are not restrained from further dealing with the suit property.

The application is opposed by the 1st Defendant/Respondent *Simon Kamweti Kaguru*, who filed a *Replying Affidavit* dated **28th June 2018** and averred that he is the legal and registered owner of the suit property *LR.No.Ngenda/Kahuguni/61*, situated at *Ngenda* in *Gatundu*. Further that the said suit property was transferred to him by his late father *Kamweti Kaguru* in **1996**, and Title deed was issued on **6th February 1996**. That all the other siblings were given different parcels of land and that since the death of their father, he has been in occupation of the suit property uninterrupted. However sometime in **October 2017**, the 1st Defendant invaded the suit property and started to lay a foundation for construction of permanent structures. He contended that the Plaintiffs/Applicants have no claim of right on *LR.No.Ngenda/Kahuguni/*

61, and their purported interest is illegal and malicious. He contended that his late father provided for all his siblings by allocating each one of them a piece of land. He urged the Court to disallow the instant application.

In her *Supplementary Affidavit*, *Alice Muthoni Kinyanjui* reiterated that the 1st Defendant fraudulently transferred the suit land to himself and purported to back date it to **1996** and that is why he has not attached the documents that were used to effect the said unlawful transfer to himself. She contended that the deceased did not allocate the suit property to the 1st Defendant but subdivided it into four distinct portions which he allocated to his four sons and each of them occupy a distinct portion on the ground and each son has fenced his portion. She also contended that *LR.No.Ngenda/Kahuguni/61*, is an ancestral land which the deceased inherited from his father and all the sons of late *Kamweti Kaguru* were allocated a share of the said land during his lifetime wherein each of the son has constructed a house thereon; they cultivate on their portions with clear boundaries and the said sons were not allocated land elsewhere. She denied having invaded the suit land in **October 2017**, but contended that the said portion was allocated to her late husband who was also a son to the late *Kamweti Kaguru* and she has been using the land since she was married. She urged the Court to allow their prayers.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the annexures thereto and renders itself as follows:-

There is no doubt that the suit property was initially registered in favour of *Kaguru Kamweti* on **21st September 1976**. It is also evident from the *Certificate of Death* that the said *Kaguru Kamweti alias John Kamweti* died on **19th May 1997**.

Further that the Plaintiffs took out *Limited Grant of Letters of Administration Ad Litem (AMKI-A)* on **25th August 2017** for purposes of filing, prosecuting and defending until further representation is granted. Therefore the *Limited Grant* was taken for the purpose of filing this suit. It is also evident that the 1st Defendant has a title deed in respect of the suit property issued on **6th September 1996 SK-1**. The Plaintiffs have averred that the said title deed was acquired *fraudulently* and *backdated* to **1996**, since the suit land is an ancestral land wherein the late *Kaguru Kamweti* had allocated it to his four sons.

However, the 1st Defendant has averred that the suit land was allocated to him by his late father and he is the legal and registered owner and urged the Court to dismiss this instant application.

It is trite that at this interlocutory stage, the Court is not supposed to issue definitive orders especially on disputed facts or issues wherein the said issues are only pleaded through affidavits. See the case of *Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002*, where the court held that:

“In an Interlocutory application, the Court is not required to

determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The applicants has averred that the 1st Defendant committed fraud in collusion with the 2nd Defendant and caused the suit property to be registered in favour of 1st Defendant. However the 1st Defendant averred that he rightfully got registered as the owner of the suit property during the lifetime of his late father in **1996**. The allegation of fraud is a serious issue which cannot be determined on affidavit's evidence but through calling of evidence at the main trial. See the case of *Agip (K) Ltd...Vs...*

Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999, where the Court held that:-

“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

Therefore the Court finds that the issue raised by the Plaintiffs cannot be determined now but at a later date after calling of evidence in the main trial.

However, the Court finds that the suit property needs to be preserved before the calling of evidence in the main trial. The 1st Defendant/

Respondent holds a title deed which *prima-faciely* is evidence of ownership of the said parcel of land. However the same can be challenged if acquired

fraudulently. See Section 26(1) of Land Registration Act:-

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party: or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The 1st Defendant/Respondent being the registered owner, the court finds that the suit property can only be preserved by restraining the Defendants especially 1st Defendant from carrying out activities that are detrimental to whatever outcome the court may give at the end of the main trial.

For the above reasons, the Court finds that given that the 1st Defendant is having a Certificate of title then, it would not be prudent to issue orders relating to **ingress** and **ingress** on the suit property. For the above reasons, the Court declines to issue any orders allowing the Plaintiffs free **ingress** and **ingress** to the suit property as the suit property is registered in the name of the 1st Defendant. However, the 1st Defendant is restrained from **alienating, disposing, transferring, charging, mortgaging** and/or **dealing** with the suit property in whatever manner that would be prejudicial or detrimental to the preservation of the said suit property until the suit is heard and determined.

Further the Plaintiffs to take out **Summons to Enter Appearance**

and serve them upon the Defendants within a period of 14 days from the date hereof.

The Defendants to file and serve their Defences 14 days after service and Plaintiffs have 7 days thereafter to file a Reply to the Defence.

Thereafter close of pleadings, parties have 30 days to comply with Order 11 and Pre-trial directions on **17th September 2019** before the Deputy Registrar of this Court.

It is so ordered.

Dated, Signed and Delivered at Thika this 1st day of July 2019.

L. GACHERU

JUDGE

1/7/2019

In the presence of

M/S Kwamboka holding brief for Ogendu for the Plaintiffs/Applicants

Mr. Omari for 1st Defendant/Respondent

No appearance for 2nd Defendant

Lucy - Court clerk

L. GACHERU

JUDGE

1/7/2019