



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC (O.S.) CASE NO. 13 OF 2020

AGGREY MURAGA ETHANGATHA.....1ST PLAINTIFF

SARAH MWATHERA.....2ND PLAINTIFF

VERSUS

ERIC KINOTI ETHANGATHA.....1ST DEFENDANT

MOSES NDEREBA ETHANGATHA.....2ND DEFENDANT

WILLIAM NKUBUKU ETHANGATHA.....3RD DEFENDANT

HUMPREY KIRAMANA.....4TH DEFENDANT

RULING

1. The defendants have brought an application dated **12.6.2021** seeking for review of the orders made on **10.5.2021** and issued on **19.5.2021** on the reasons the orders have brought undue hardship to them, the orders were obtained through material non-disclosure since they live on the land and the orders would be tantamount to evicting them and lastly it is in the interest of justice to have the orders discharged.

2. The notice of motion is supported by an affidavit of **Eric Kinoti Ethang'atha** the 1st defendant who claims to have been sick in hospital hence could not instruct counsel to respond to the notice of motion dated 22.4.2020.

3. The motion is opposed through a replying affidavit sworn on 28.6.2021 by the 1st plaintiff on the grounds that the orders granted were fair and just; there was enough notice to respond to the notice of motion dated 22.4.2020 and that the failure had nothing to do with the sickness almost a year later; the date had been taken by consent; the other defendants were still available to instruct counsel yet they have not given any reasons for not opposing the motion. Further it is averred there was no-appearance of counsel on 10.5.2021 and no explanation has been offered; and that there have been criminal cases between the parties over the land dispute; similarly the respondent maintains there are other parcels beside **Parcel No. Tigania West/Uringu/644** but the respondents have only intruded the latter by force and lastly the order sought to be reviewed has not been extracted.

4. By an originating summons brought under **Order 37 rule 1 of Civil Procedure Rules** dated **22.8.2020** the plaintiffs sued the defendant alleging the 1st applicant, 1st respondent and 2nd respondent were the registered owners of **Parcel No. Tigania West/Uringu II/644, 2096 and 937** which they hold in trust for heirs of the late Ethangatha Mwirabua as listed in the 1st defendant's paragraph 3 of affidavit in support as:

i. Aggrey Muraga Ethang'atha – son

ii. Eric Kinoti Ethang'atha – son

iii. Moses Ndereba Ethang'atha – son

iv. Willian Nkumbuku Ethang'atha – son

v. Humphrey Kiramana – son

- vi. **Joseph Murangu Ethang'atha – son**
- vii. **Faith Ethang'atha – daughter**
- viii. **Solomon Laaria Ethang'atha – son – Survived by Eva Laaria (daughter)**
- ix. **Julius Ntongaiti Ethang'atha – son (deceased) survived by Nancy Ntongaiti (wife)**
- x. **Simeone Rukanga – Nephew (deceased) survived by:-**
 - **Sarah Mwathera – daughter**
 - **Mary Mukiri (deceased) survived by 3 children**
 - **Stephen Kimathi – son (deceased) survived by 1 child**
 - **Isaac Karethi – son (deceased) survived by 1 wife and 3 children**
 - **Moses Muriungi – son and that they ought to distribute the same to the listed persons.**

5. The plaintiffs sought for the orders that:

- i. **A declaration that the 1st and 2nd respondents who are registered owners of Land Parcels No. Tigania/Uringu 11/2096 & 937 respectively, hold the said parcels of land in trust for the benefit of all the heirs of Ethang'atha Mwirabua (deceased).**
- ii. **An order directing the 1st and 2nd respondents who are registered owners of Land Parcels No. Tigania West Uringu 11/2096 & 937 respectively to distribute and transfer the said parcels of land equally (or in such portions as the court deems fit) among the heirs of Ethang'atha Mwirabua (deceased) alongside the 1st applicant who is ready to so distribute and transfer Land Parcel No. Tigania West/Uringu 11/644 which he admittedly holds in trust for the benefit of all the heirs of Ethang'atha Mwirabua (deceased) or in default, all the relevant transfer document be executed by the Land Registrar, Meru North Land Registry.**
- iii. **An order of permanent injunction restraining the respondents by themselves, their agents, assigns, heirs or anyone working on their behalf from cultivating, trespassing into or otherwise interfering with the applicant's quiet possession of Land Parcel No. Tigania West/Uringu 11/644 pending completion of the distribution and transfer contemplated in prayer No. 2 above.**
- iv. **That costs of the originating summons be borne by the defendant herein.**

6. In the aforesaid affidavit in support the 1st plaintiff explained the manner in which the parcels were registered under the named persons as a result of AR objection No. 1179 Tigania West/Uringu 11 Adjudication Section in 2009 while the 1st and 2nd defendants also lodged AR objections regarding parcels **Tigania West/Uringu 11/2096 and 937**.

7. Similarly the plaintiffs stated the 2nd plaintiff and her siblings were in occupation of more than half of Parcel No. 644 with built houses, and were cultivating thereon. The 3rd and 4th defendants returned from Mombasa in 2020 and intruded a portion of Land Parcel No. 644 which is occupied by the 2nd plaintiff and her siblings, destroyed crops, cut down their trees and were currently erecting temporary residential structures while at the same time, threatening to forcefully evict the 2nd plaintiff and her siblings from the suit land.

8. Further the 1st applicant averred attempts to distribute the property amicably in April 2019 were thwarted by the defendants after they declined the inclusion of the 1st applicant and her siblings despite an application for Land Control Board consent to effect transfer for each of the siblings. Similarly the plaintiffs accused the defendants especially 1st and 2nd for breach of trust. The 1st plaintiff attached copies of the title deed and the application for Land Control Board consent in support of the originating summons.

9. Together with the originating summons, the plaintiffs filed a notice of motion dated 22.4.2020 in which his lawyers filed a notice of motion dated 15.5.2020. In opposition to the preliminary objection the 1st plaintiff filed a replying affidavit sworn on 5.6.2020 in which he attached copies of the green card and adjudication records with respect to the suit properties to confirm that the said properties were never recorded in the name of their deceased father and hence did not belong to his estate.

10. Similarly on 12.7.2020 the respondents filed an authority dated 2.7.2020 authorising one William Nkumbuku Ethang'atha to appear, plead and act on their behalf in the suit herein, subsequent to which the said William Nkumbuku Ethang'atha swore a replying affidavit on 3.7.2020 in reply to the originating summons and averred the plaintiffs had no legal capacity to sue for the estate of the deceased, raised a preliminary objection to that effect and alleged the claim was basically on division of his late father's estate allegedly to be held in trust. He therefore maintained the originating summons was incompetent and an abuse of the court process.

11. By a ruling delivered on 23.9.2020 the preliminary objection was dismissed on the basis the suit lands were not in the name of the deceased but was a claim on account of trust which issues were to be ascertained through viva voce evidence.

12. The record indicates on 27.1.2021 the application dated 22.4.2020 was by consent of parties fixed for hearing on 10.5.2021 during which the defendants or their counsel on record failed to attend. The court allowed the same in terms of prayer 3 and 5 thereof and the matter was listed for pretrial directions on 21.9.2021.

13. It is not in dispute the defendants gave one Eric Kinoti Ethang'atha authority to plead, appear and or defend the suit on 2nd July 2020 after which he filed a replying affidavit to the originating summons. He did not raise any other defence or counterclaim against the plaintiffs' claim; other than seeking for its dismissal on account of a preliminary objection.

14. In the instant notice of motion the affidavit in support is by Eric Kinoti Ethang'atha. If the said Eric Kinoti Ethang'atha and his co-defendants had on 2.7.2020 granted William Nkumbuku Ethang'atha the 3rd defendant authority to plead and defend the suit, one wonders what became of him and why he did not exercise those powers assuming the 1st defendant was indisposed and at paragraph 13 of the supporting affidavit, the deponent now says the 1st respondent is ready to and willing to distribute and transfer Parcel No. 644 which he holds in trust. The deponent is talking as if he is not the 1st respondent. Strangely what he is now proposing is contrary to what was in the replying affidavit by the 3rd defendant.

15. Further the applicants/defendants state the orders granted amount to eviction and shall occasion great hardship to them. Unfortunately the plaintiffs originating summons and the supporting affidavits gave clear particulars on the alleged acts by the defendants and which led the court to issue both inhibition and temporary orders. The defendants have not explained how an order for inhibition against Parcels No. 2096 and 937 will affect them more so when the 1st plaintiff swore an affidavit in support of the originating summons over threats to dispose of the suit properties and the recent intrusion in April 2020 threatening to evict the 1st applicant and her siblings.

16. Additionally, one of the grounds is that the plaintiffs did not make material disclosure to the court hence obtained orders through concealment. Unfortunately the defendants have not set out the material evidence withheld by the plaintiffs and which if the court had it in mind would not have proceeded to grant the said orders as it did.

17. Regarding the averments in paragraph 8, 9, 10 and 11 of the supporting affidavit, the said deponent has not stated he has authorized to swear the affidavit on his behalf and that of the other defendants. He cannot therefore purport to speak on their behalf especially on account of the authority to swear and plead dated 2.7.2020.

18. Turning to the law under which the application is made **Order 40 rule 7** is drawn as follows:-

“Any order for an injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied party with such order.”

19. It has not been sufficiently demonstrated how the respondents have been prejudiced by the orders. The court was alive to the fact that there was need to preserve the property pending hearing. There is no demonstration of how the respondents have used the orders so as to oppress the applicants. No post injunction behavior on the part of the plaintiffs has been raised at all in which the court would have a basis to discharge or vacate the orders. Similarly I do not understand the defendants to be saying the plaintiffs have abused the orders obtained and or that they have been ordered to vacate the suit land especially the parcels in which the applicants are the registered owners.

20. The search to Parcel No. 644 is clear the registered owner is the 1st applicant. Though he admits he holds the same in trust, under **Sections 26 and 27 of Land Registration Act** he is deemed as a bonafide holder of the title deed with all rights and privileges as per **Article 40 of the Constitution** unless the property was procured through fraud, corrupt means or through illegalities.

21. Again I do not understand the applicants to be saying the orders have been used to defeat the ends of justice. **Article 23 of the Constitution** specifically identifies an order of injunction as one of the reliefs a court can grant if it is satisfied that a person's right or fundamental freedom is being violated or threatened so as to prevent the ends of justice from being defeated. **Order 40 of the Civil Procedure Rules** allows courts to grant temporary orders where the property in dispute is in danger of being wasted, alienated, damaged or where a party threatens or intends to remove or dispose it. An injunction may also be issued to restrain a party from committing a breach of contract or other injury.

22. The defendants have not demonstrated any change of circumstances since the granting of the injunction to warrant the orders to be discharged. Nothing new has been put before this court to show the situation prior to June 2021 has changed in favour of denying the applicants the orders. The respondents do not appear to have anything new other than the replying affidavit to the originating summons. See **Robert Nyangaresi –vs- Onuonga suing as the administrator of the Estate of Zakayo Ondara Nyandoro –vs- Mark Nyabayo Ratemo [2016] eKLR.**

23. In sum I find the application herein lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 10TH DAY OF NOVEMBER, 2021

In presence of:

Advocates – absent

Parties - absent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE