



IN THE REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 894 OF 2014

FRANCIS THANDE JAMES KIARIE.....PLAINTIFF

=VERSUS=

JOHN KARANJA KAHERA.....1ST DEFENDANT

NELLIE NGONYO MWAURA.....2ND DEFENDANT

RULING

The Plaintiff filed an application dated **3rd July 2014** seeking an order that the Defendant be restrained by way of an injunction whether themselves, servants, agents, assigns or in any other manner howsoever from remaining on or continuing in occupation or possession for or from entering, interfering with, alienating dealing in **LR. No. Dagorretii/Kangemi/307** until the suit is heard and determined. The application is based on the grounds outlined thereunder and supported by an affidavit sworn by the Plaintiff.

The Plaintiff deposes that he is the registered owner of the suit property as evidenced by the annexed copy of the Certificate of Official Search dated **28th May 2014**. However, that the Defendants have wrongfully entered into the suit premises and taken possession thereby trespassed on the suit premises. The Plaintiff annexed photographs showing the construction by the Defendant which he deposes are without his consent. Further that the structures are interfering with his tenants thereby depriving him of his rental income. Additionally they have prevented him from utilizing or developing the property hence occasioning him substantial loss and damage.

The 2nd Defendant swore a replying affidavit on **10th July 2015** wherein she deposed that the parties herein are siblings and the property in dispute was a consequence of a sub-division of **Dagoretti/Kangemi/204** belonging to **Mungai Kahira, Kanyari Muiru, Hassan Njenga Njuguna and Loise Wanjira Kahera** (deceased) who died intestate on **4th May 1974**. It is deposed that the deceased is their grandmother and she held one fifth (1/5) in **Parcel 204**. The deponent states that as at **9th June 1965**, the aforementioned persons were tenants in common and the deceased's share was equivalent to **2.08 acres**. The deceased was survived by three daughters – **Wanjiru Kahera, Elizabeth Ngonyo and Milka Waceke**, who are all deceased. During their lifetime, they did not take out letters of administration for the estate of **Loise Wanjira Kahera**, but that they, together with their families settled on **Parcel 204**.

The deponent states that on **10th June 1969** the Plaintiff being the grandson fraudulently caused the transfer of the share in the deceased's estate in **Parcel 204** to himself. It is deposed that the transfer was

effected whereas the Plaintiff had not obtained letters of administration to the estate and such transfer was therefore void. Following the transfer, **Parcel 204** was sub-divided into 4 parcels: **No. 306, 307, 309 & 310** and **Parcel No. 307** was issued and registered in favor of the Plaintiff on **10th July 1973**. The deponent denies that they have trespassed onto the suit property deposing that they have resided thereon since they were born. It was further denied that the Plaintiff had constructed any properties on the suit property with the intention of renting them out. She deposed that the properties thereon are their homes built by their deceased parents. The deponents denied all the allegations terming the application as an abuse of the Court process.

The application was further canvassed by way of written submissions which I have carefully read and considered. The issue for determination by this court is whether the Plaintiff has established a case so as to entitle the court to grant temporary injunction order as prayed. The principles to be considered by the court was enunciated in the case of **Giella vs Cassman Brown & Co. Ltd [1973] E.A 358**. These principles are;- ***that an injunction would not be issued unless the applicant establishes that he has a prima facie case with a probability of success. Secondly, that he would suffer irreparable injury which is not likely to be compensated by an award of damages. Thirdly, where the court is in doubt, it will decide the application on a balance of convenience.***

It is not in dispute that the Plaintiff is the registered owner of the suit property. What emerges from the Defendant's affidavit is that that registration was fraudulent as it was done without obtaining letters of administration of the estate of **Lois Wanjira Kahira**. The Defendants have endeavored to show the genesis of the suit property deposing that the same is as a result of a sub-division from **Dagoretti/Kangemi/204** in which their grandmother was an owner of one fifth. In support of this deposition, they annexed copies of the Green Card of **Parcels No. 204** showing the names of the registered proprietors which included **Lois Wanjira Kahira and No. 307** which indicates that it is a partition of **Parcel No. 204**.

Section 26 of the Land Registration Act provides that a title document is to be taken as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. Further, that such title cannot be challenged except on:

- a) On the ground of fraud or misrepresentation to which the person is proved to be party:***
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

However, in circumstances where title to property is challenged, it is not enough for the proprietor to waive the title as proof of ownership, but he must go beyond and prove the legality of the said title. This was the finding of the Court of Appeal in the case of **Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009** where the court held that;-

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

Having carefully evaluated the affidavit evidence and annexures, it is the position that the Plaintiff became the registered owner of their deceased's grandmother's one fifth share of **Parcel 204** during her lifetime. The Defendants depose that their grandmother died on **4th May 1974**. On perusal of the copy of green card for **Parcel 204**, it shows that the property was registered in favour of **Loise Wanjira Kahira** and three others until **9th July 1969** when the register was updated to have the Plaintiff as the registered proprietor in common with the three others in place of **Loise Wanjira Kahira**. The Defendants also annexed a copy a Transfer of Undivided Share for **Parcel No. 204** dated **10th June 1969**. The Transfer indicates that the tenants in common namely: **Mungai Kahira, Kanyari Muiru, Hassan Njenga Njuguna and Loise Wanjira Kahira** in consideration of by way of gift (value 4,000/-) transfer to

Francis Thande J. Kiarie (1/5), Mungai Kahira (1/5), Kanyari Muiru(1/5), Hassan Njenga Njuguna(2/5) shares in Parcel 204.

It is therefore evident that the transfer was effected during the lifetime of the **Loise Wanjira Kahira**. Consequently, there would be no need for the Plaintiff to have obtained letters of administration to effect the transfer. That said, however, on careful perusal of the transfer document, I note that the said **Loise Wanjira Kahira** did not appear before the Lands Registrar to acknowledge her signature or mark to show that she freely and voluntarily executed the transfer instrument and understood its contents. This casts doubt as to whether the deceased sanctioned the transfer to her grandson.

Whereas the Plaintiff holds a title which this Court must take as prima facie evidence of absolute proprietorship, the same is under challenge on the allegation of fraud. The Plaintiff's allegation that the Defendants have recently trespassed on the property was contested by the Defendants who depose that they have been in occupation of the suit property since they were born and that the houses constructed thereon were built by their deceased parents.

On the foregoing, I find that the Plaintiff has failed to establish a prima facie case with probability of success to warrant the grant of injunction orders. This finding notwithstanding, I am alive to the fact the parties herein are siblings and therefore have an interest on the suit property. It would only be just and reasonable that the property be preserved pending the hearing and determination of the suit.

Having now carefully considered the instant Notice of Motion and the pleadings in general and written submissions the court makes this findings;-The orders of the court are as follows:

1. A status quo order is hereby entered to the effect that none of the parties shall interfere with the others possession of the property. There shall be no further construction thereon until the suit is heard and determined or until further orders of the court.

2. Costs of the application shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this 7th day of **October, 2016**

L. GACHERU

JUDGE

In the Presence of:-

Mr Chege Kamau holding brief Mr Njogu for the Plaintiff/Applicant

Mr Ongeri holding brief Mr Olouch for the 1st & 2nd Defendants/Respondent

Vincent : Court Clerk

L. GACHERU

JUDGE

Court

Ruling read in open Court in the presence of the above stated advocates.

L. GACHERU

JUDGE