



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 4 OF 2011

MARIA GATITU JOSEPH.....1ST PLAINTIFF

ELIZABETH THAIRORA..... 2ND PLAINTIFF

LUCY KINYA..... 3RD PLAINTIFF

GABRIEL KUBAI KINGORA 4TH PLAINTIFF

V E R S U S

DOMINIC NTONGAI KINGORA DEFENDANT

TIMOTHY GACHANJA NGUNYANGI INTERESTED PARTY/APPLICANT

RULING

1. The application dated 19th January 2012 seeks that the Defendant, Dominic Ntongai Kingori, be ordered to vacate parcel number Block 3/1(A) Pumwani Redevelopment Scheme, Nairobi to the Interested Party, Timothy Gachanja Ngunyangi and that the said Defendant be ordered to pay rent for the said plot to the Interested Party at the rate of Kshs. 25,000.00 per month from 1st August 2011 till the date he delivers up vacant possession. There is a further prayer that the officer commanding the Pumwani Police Station do ensure that the orders are complied with.

2. The application is brought at the instance of the interested party. It is grounded on the reasons listed on the face of the application as well as on the affidavit sworn in support thereof by the interested party on 19th January 2012.

3. The factual background is that the subject property formed part of the estate of one Joseph Kingori M'twamwari, the father of the Defendant. It had been ordered on 30th November 2010 in **Nairobi HCELC No. 310 of 2010** that the said property be sold and the proceeds of sale realized therefrom be shared equally between the nine (9) survivors of the deceased. The purchase price was reserved at Kshs. 8,000,000.00, with the survivors being given the first option to purchase to be exercised within thirty (30) days. The survivors of the deceased were unable to raise the purchase price within the thirty (30) days, whereupon the interested party purchased the same on 29th April 2011 for Kshs. 8,000,000.00 vide an agreement entered into with the administrator of the estate, the first Plaintiff herein. The Defendant is in possession of the subject property and has refused to give vacant possession thereof to the interested party.

4. The interested party has attached copies of three (3) documents to his affidavit. There is the order

made on 30th November 2010 by Muchelule J. in **Nairobi HCELC No. 310 of 2010**. The said order directs by consent that Block 3/1(A) Pumwani be sold and the proceeds thereon be shared equally between the nine (9) beneficiaries, and that the nine (9) beneficiaries be given first priority to buy at a reserve price of Kshs. 8,000,000.00, to be exercised within thirty days failing which any other buyer be sought. There is also copy of a sale agreement entered into on 29th April 2013 between the interested party and Maria G. Kingori in respect of the said parcel of land, also known as LR No. 36/VII/698. There is also copy of a lease executed between the interested party and the City Council of Nairobi allegedly in respect of the same parcel of land.

5. The respondent replied to the application vide an affidavit sworn on 12th March 2012. He avers that he is joint administrator with the plaintiff, Maria Gatitu Joseph, of the estate of Joseph Kingori, deceased. He states that no property of the deceased could be sold without his consent or signature on the sale agreement. He pleads that he was not party to the sale of the subject property with the interested party, who was not even party to the consent order recorded on 30th November 2011. He states that the alleged agreement of sale was null and void for it was not endorsed by all the beneficiaries of the said property all who were tenants in common to the said property. He evinces his willingness to refund the money paid by the interested party and asserts that he was not a tenant in the said property.

6. He has attached to his affidavit several documents to buttress his case. There are minutes from the Social Services and Housing Committee of the defunct City Council of Nairobi, where the transfer was approved of plot or House No. B3/1 "A" at the Pumwani Re-development Scheme from the name of Joseph Kingori M'twamwari to the name of Mrs. Maria Gatitu King'ori to hold in trust for Dominic Ntongai, Elizabeth Thairoba, Lucy Kinya, Martha Ncece, Agnes Rigiri, Gabriel Kubai, Annah Kamathi, Magdalina Kabuya and Margaret Kaembe who are to eventually hold the same as tenants in common. There is a letter dated 23rd June 2011 from the advocates for the Defendant, Messrs. Mbithi Mboroki & Co. Advocates, stating that the subject land could not be sold by the trustee solely without involving the beneficiaries. There is also a copy of the order issued on 30th November 2010 by Muchelule J. in **HCELC No. 310 of 2010**.

7. The reply to the affidavit of defendant/respondent is by the second plaintiff, Elizabeth Thairora. Her affidavit was sworn on 22nd March 2012 and she purports to swear the affidavit on her own behalf and that of the other plaintiffs. She accuses the defendant of failing to cooperate with her mother, who is his co-administrator of the estate of the deceased. She avers that the property in question was no longer estate property for it had since been transferred to the first plaintiff who was holding it in trust for the children. She asserts that the defendant is just one among the beneficiaries of the property and he does not enjoy a greater right from the rest of them, therefore he should not be collecting the rent and spending it solely on himself and he should be called upon to account for what he has collected so far. She states that the current proceedings were prompted by the defendant's failure to cooperate with their mother, the first plaintiff, to allow transfer of the assets held in their joint names. She states that after the order of 30th November 2010 the survivors of the deceased were unable to raise the reserve price of Kshs. 8,000,000.00 within thirty (30) days as ordered hence the sale to the third party. The purchaser is said to have complied with the terms of sale but the sale cannot be completed on account of non-cooperation by the defendant.

8. She has attached to her affidavit a number of documents to support her case. There is a copy of the minutes that the defendant had attached to his affidavit of approval by the Social Services and Housing Committee of the City Council of Nairobi dated 12th June 1991 transferring the property from the name of the deceased to that of the first plaintiff. There is also copy of the order made by Muchelule J. on 30th November 2010, as extracted on 24th May 2011. There is copy of an agreement dated 24th March 2011 between the second plaintiff and a land agent instructing him to obtain buyers for the said property. There is also copy of the sale agreement dated 29th April 2011 between the first plaintiff and the interested party.

9. The application dated 19th January 2012 was argued initially before Njagi J. on 25th March 2012 and

ruling was reserved for 6th December 2012. It transpired that Njagi J. left the Judiciary before the ruling was delivered on the application. On 15th May 2013 it was directed that the said application be heard afresh. Further directions were given on 27th February 2014 that the said application be disposed of by way of written submissions to be highlighted.

10. The plaintiffs and the interested party/applicant did file their respective written submissions. The interested party/applicant's written submissions were filed on 22nd April 2014, dated 17th April 2014. The plaintiff's written submissions were filed on 18th June 2014, dated 17th June 2014. The defendant did not file written submissions.

11. The interested party/applicant's case is that he did buy the property on the strength of the court order of 30th November 2010. The sale agreement was entered into by the first plaintiff as trustee on behalf of the beneficiaries, and by signing the agreement the trustee bound the beneficiaries, and the agreement cannot be overturned, except where it is demonstrated that the trustee acted against the interests of the beneficiaries. He cites Order 31 rule 1 of the Civil Procedure Rules and the decision of Visram J. in *Mary Wambui Chege vs. Hamida Bana & three others* (1977)eKLR to buttress his case. He asserts that he is entitled to the orders sought in his application.

12. On their part, the plaintiffs submit that the sale in question was founded on the court order of 30th November 2010. The beneficiaries were to have the first option to purchase, exercisable within 30 days of the order of 30th November 2010. They submit that none of them were able to raise the reserved purchase price within the 30 days hence the sale to the interested party/applicant. They submit that the said sale was not illegal, and the signature of the defendant in the said sale was not necessary given that the property was registered in the name of the first plaintiff.

13. The said submissions were highlighted on 16th October 2014. Mr. Kenyatta for the interested party reiterated the contents of the written submissions filed on behalf of the interested party/applicant, adding that the application had become necessary because the defendant had failed to give up vacant possession. He stated that the defendant's action amounted to contempt of court.

14. On his part, Mr. Mwangi for the plaintiffs submitted that the plaintiffs did not breach any court order by disposing of the subject property in the manner they did. The agreement of sale was said to have been in conformity with the court order as the same was entered into way after the thirty (30) days had lapsed.

15. Mr. Kithinji for the defendant argued that the sale agreement was not properly entered into for the defendant should have signed the agreement as a co-administrator. He also submitted that the agreement was entered into without consulting the beneficiaries. He also submitted that the interested party is seeking to enforce a consent order that he was not party to. It is stated that he has not filed a counter-claim for the rent he claims and therefore there is no basis for him to obtain the orders that he seeks in the matter. It is submitted that the interested party ought to have filed a counter-claim which he had to prove against the other parties. It was submitted that the prayers for rent arrears and vacant possession could not be obtained in a summary manner. It was submitted that the interested party's application ought to be dismissed to pave way for full hearing of the case.

16. The suit herein commenced on 29th June 2010 at the Land and Environment Division of the High Court. The suit was at the instance of the first plaintiff and three of her children, against the defendant who is one of the other children of the first plaintiff. The suit touched on several properties that the first plaintiff and the defendant held in trust on behalf of the second, third and fourth plaintiffs. The defendant was accused of being unlawfully in occupation of Block 3/1(A) Pumwani Redevelopment Scheme Nairobi and of collecting rents from the premises on the said property which he did not account to the other beneficiaries of the trust that he held with the first plaintiff. The suit sought to have defendant compelled to sign documents to facilitate the sale of the said property and to also have him ordered to account for the rents so far collected since 1991.

17. Contemporaneously with the plaint, the plaintiffs filed a chamber summons in the suit dated 24th June 2010. Regarding Block 3/1(A) Pumwani Redevelopment Scheme Nairobi, the summons sought a mandatory injunction to compel the defendant to execute all documents to effect the sale of the said property and for an account for the rent proceeds since 1991 to date.

18. The defendant filed a defence to the suit, but he did not specifically respond to the matters pleaded concerning Block 3/1(A) Pumwani Re-Development Scheme Nairobi.

19. I have carefully gone through the documents in the file and the papers filed in respect of the instant matter and I have not come across any reply by the defendant to the application dated 24th June 2010.

20. The application was placed before Muchelule J. on 30th November 2010 and the application was compromised. The consent was recorded before Muchelule J. by Mr. Irungu for the plaintiffs and Mr. Mboroki for the defendant. Block 3/1(A) Pumwani Re-Development Scheme Nairobi was to be sold and the proceeds of sale shared equally among the nine (9) beneficiaries. The sale price was reserved at Kshs. 8,000,000.00. The beneficiaries were given the first option to purchase limited to a period of thirty (30) days from the date of the consent order, failing which the property was to be available in the open market.

21. The matter was then moved to the Family Division by the order of Warsame J. on 21st June 2011.

22. What emerges from the material before me is that after the order by consent was recorded on 30th November 2010, the subject property was not purchased by any of the nine (9) beneficiaries within the thirty (30) days that had been allowed by the consent order. This meant that the said property was then available for sale at the open market.

23. The thirty (30) days expired on or about the 30th day of December 2010. The sale agreement herein was entered into by 29th April 2011, which was well outside the 30 day period stated in the order of 30th November 2010. The beneficiaries, including the defendant, had the opportunity to buy the property within the thirty (30) days at the price reserved. None of them have demonstrated that they had the ability to buy the said property within the 30 days and that they had indeed made an effort within that period to conclude the sale.

24. In view of the above I am persuaded that the sale entered into on 29th April 2011 was within the time frame set out in the order of 30th November 2010.

25. The defendant complains that the said sale cannot be valid as he did not sign the agreement in his capacity as trustee. The argument advanced by the defendant is fairly strong. I have not had occasion to peruse the succession cause in which the first plaintiff and the defendant were constituted trustees of the subject property, but the first plaintiff pleads in her plaint that she and the defendant were registered as trustees of the subject property. That being the case it would be expected that the two trustees would always work together in respect of the trust property. It has not been demonstrated that the two trustees acted in concert after the order of 30th November 2010 with respect of the disposal of the said property.

26. I note however from the record that the defendant has not always cooperated with first plaintiff with regard to the property. It is precisely for that reason that the plaintiffs went to court in this suit seeking to have the subject property sold and its proceeds shared out amongst the beneficiaries and to also have the defendant account for the rent collected from the suit property from 1991. That would suggest that the chances of the two trustees acting in concert were minimal.

27. Going by the provisions of the Trustee Act, Cap 167, Laws of Kenya, on power of sale, there is nothing that prevents a trustee in whom a power of sale is vested to dispose of property subject thereof without the concurrence of the other trustee or trustees. The trustee would only be obliged to act within his powers, in the best interests of the beneficiaries and to account to the beneficiaries.

28. To that extent the sale transaction of 29th April 2011 is valid. The first plaintiff, as a trustee of the subject property, had vested in her the power to sell the said property, and a sale entered into by her would be valid so long as she acts in good faith and in the best interests of the beneficiaries.

29. The sale in question was at the sale price reserved by the court in the consent order of 30th November 2010. The reserve price was consented to by the defendant through his counsel, who was party to the consent order. After the sale, the defendant, although questioning the same in the letters exhibited in his affidavit did not move the court to have the sale vitiated in any way. He does not challenge it at all on any of the grounds allowed under the Trustee Act. He only appears to be saying that the sale did not afford him the opportunity to purchase the property.

30. I am satisfied from the material before me that there was a valid sale of Block 3/1(A) Pumwani Re-Development Scheme to the interested party by the first plaintiff. The said sale bound the defendant, and the same cannot be vitiated except on the various grounds set out in the Trustee Act. Consequently, the purchaser should be put in possession of the subject property to facilitate completion of the transaction and the eventual distribution of the sale proceedings amongst the persons entitled as per the court order of 30th November 2011.

31. The interest party asks for an order that the defendant pay rent for the premises from 1st August 2011. I note that although an order was made making the interested party a party to the proceedings, the said interested party did not file any pleadings that would provide a basis for the making of the orders sought regarding payment of rent by the defendant. He has not filed pleadings for declaratory orders that he was entitled to rent for the defendant.

32. In view of everything that I have stated above, I do hereby make the following final orders:-

- a. **That the defendant, Dominic Ntongai King'ori, shall in the next thirty (30) days of the date of this order give vacant possession to the interested party, Timothy Gachanja Ngunyangi, of the parcel of land known as Block 3/1(A) Pumwani Re-Development Scheme Nairobi;**
- b. **That the Officer Commanding the Pumwani Police Station is hereby directed to give effect to the order in (a) above;**
- c. **That the defendant shall bear the costs of the application; and**
- d. **That the matter shall be mentioned on a date given at the delivery of the ruling to confirm compliance.**

DATED, SIGNED and DELIVERED at NAIROBI this 10TH DAY OF JULY, 2015.

W. MUSYOKA

JUDGE

No appearance for the applicant.

In the presence of Mr. Kithinji advocate for the respondent.