



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 268 of 2010

HANNAH NJERI NGORONGO.....PLAINTIFF

VERSUS

JOHN MAKANGA.....1ST DEFENDANT

STEPHEN WAGEREKA.....2ND DEFENDANT

RULING

The Chamber Summons dated 11/10/2010 is brought by Hannah Njeri Ngorongo, the administrator of the estate of the late Peter Ngorongo Makanga against John Makanga and Stephen Wageroka. The applicant seeks an order of temporary injunction to restrain the defendant/respondents by themselves, their agents or servants from entering into, disposing of, alienating or in any manner dealing with the applicant's parcel of land known as Nyandarua/Ol Joro Orok West/3059. The grounds upon which the application is brought are that the plaintiff is the legal owner of the said parcel of land; that the respondents have encroached onto the said parcel of land and erected temporary structures thereon and that the applicant is unable to carry out any agricultural activities or built houses for her grown up sons and he stands to suffer irreparably. The application was supported by the affidavit of the applicant dated 11/10/2010 and a further affidavit dated 17/12/2010. She deponed that Plot 520 Ol Njoro Orok West Scheme had been allocated to Wangui Ngorongo (deceased) by the Settlement Fund Trustee. The said Wangui was the grandmother of Peter Ngorongo Makanga (deceased). Wangui moved to the plot in 1964 and in 1965, Peter Ngorongo was requested by John Makanga, (his father) and Ngorongo Kibe, his grandfather, to remain in the said land and look after Wangui, the grandmother. Peter Ngorongo moved to the land in 1965. The applicant and Peter settled on the said land. Wangui Ngorongo disappeared without a trace about 1972 and in 1974 a succession cause was filed in respect of that estate in 1974, Succession Cause No. 27/1974. On 24/10/74, a consent was recorded that the land be registered in the name of Peter Ngorongo Makanga (HNM1). As a result of the consent, the Settlement Fund Trustees entered the name of Peter Ngorongo in their records in place of Wangui Ngorongo (HNM 2); that Peter Ngorongo was paying the Settlement Fund Trustee loan as evidenced by the receipts (HNM3) and after he died, the applicant continued to repay the loan as evidenced by receipts (HNM4). It is the applicant's contention that if the respondents are aggrieved by the registration of Peter Ngorongo as the owner of the land, then they should apply to set aside the court's order of 27/20007 issued on 24/0/2007 because Peter Ngorongo did not hold the land in trust for others and that the respondents have never been dependants of the deceased nor have they ever resided on the suit land as alleged; that each of the applicants have their own pieces of land but the respondents have been trespassing on her parcel of land as evidenced by criminal proceedings Cr. Case No. 4390/04, **Rep. V John Makanga Wangui** (ANM5) where they were charged with forcible detainer contrary to **Section 91** of the **Penal Code**.

The respondents filed a joint replying affidavit in which they deponed that they have been residing on LR

Nyandarua/Ol Joro Orok West/520; that they are the sons of Magdalene Wangui Makanga who died in 1992 and was buried on the said plot; that Magdalene was the sister of the deceased, Peter Ngorongo; that the suit land was owned by their grandmother, Wangui Ngorongo who disappeared in 1971. After her disappearance, it was agreed that the land be registered in the name of Peter Ngorongo to hold in trust for all other family members of Wangui Ngorongo; That without informing other beneficiaries, the applicant filed succession proceedings in Nyahururu PMCC No. 22/2000 and obtained confirmation of grant. Wachira Ngorongo and Francis Makanga, who are uncles to the respondents, applied for revocation of the grant in HCC 150/2005. The applicant filed Nakuru HCC Succession Cause 339/07 without notice to them and after they became aware of it, after they were served with pleadings in the case, they have instructed their counsel to apply for revocation. The respondents contend that they have a beneficial interest in the suit land and the applicant has concealed material facts from the court. The respondents contend that the applicant did not disclose how the respondents came to be on the suit land.

At this stage the applicant has to demonstrate that she satisfies the requirement precedent to the grant of an order of injunction as was laid down in that case of **Giella v. Cassman Brown (1973) EA 358** they are that; the applicant has to demonstrate that he has a prima facie case with a probability of success; that if the order is not granted the applicant will suffer irreparable loss; lastly if the court is in doubt, it will grant the order on a balance of convenience.

Before I go into the merits of the application I need to address the objection raised by Mr. Simiyu on the replying affidavit. Mr. Simiyu submitted that the affidavit sworn jointly by the respondent offends the provisions of **Order 19 Rule 5** and **Section 15** of the **Oaths and Statutory Declaration Act** because the affidavit is not in singular form. Counsel got it wrong. **Order 19 Rule 5** of the **Civil Procedure Rules** provides that every affidavit shall be drawn in the first person and divided into paragraphs. Although the affidavit is sworn by two persons, they swore in the first person “we”. There is no evidence that all affidavits should be sworn by one person and it has not been demonstrated that any prejudice will be suffered by the applicant because of the said joint affidavit. The objection is not merited. The replying affidavit is proper and rightly before the court.

There is no doubt that the applicant is the registered owner of the suit land. This is evidenced by the title deed for Nyandarua/Ol Joro Orok Block West/3059 dated 18/10/04 in the name of the applicant. There is also evidence on record that the applicant’s deceased husband, Peter Ngorongo, paid for plot 520 since 1960s (MNM3) and receipts issued to Peter Ngorongo for payment for the said plot and after Peter Ngorongo’s death, the receipts were issued to the applicant (HMN4).

The applicant and respondents are related. The respondents deponed that they are the grand children of the deceased, Wangui Ngorongo and that the applicant’s late husband, Peter Ngorongo was a brother to their deceased mother, Magdaline. It is the respondents’ case that the land in issue was given to Peter Ngorongo, to hold in trust for the beneficiaries of Wangui Ngorongo and that they have a beneficial interest in it. I do note from their averments that there has been a long standing dispute over the suit land. The applicant had been issued with grant of letters of administration in respect of Peter Ngorongo’s estate in respect to the suit land on 13/12/2000 but on 7/7/06, J. Apondi revoked the said grant. The respondents have also alleged that without notice to them the applicant has gone ahead and filed Nakuru High Court Succession Cause No. 339/07. The court has not been told what happened after J. Apondi revoked the grant issued to the applicant. The respondent did not annex any proceedings in respect of the NKU HC Succession Case 339/07 but I noted that the applicant did not deny that she has filed those proceedings. If that is the case why would the applicant seek an order of injunction in respect of the same land outside those succession proceedings? There are also criminal proceedings at Nyahururu PMCC NO. 4390/2004, **Republic V. John Makanga** in which the 1st respondent was charged with forcible detainer and on 16/9/2005, the court convicted the 1st defendant for the offence and placed him on probation. The criminal proceedings go to confirm the long standing wrangles between the parties over the suit land.

This application was filed in court on 22/10/2010 and the respondent has deponed that the applicant entered his land about 25/3/2010. In effect the applicant seeks an order of eviction of the respondents, and an injunction to restrain them from entering the land. However, it seems the respondents are already in occupation of the land. It is not clear under what circumstances or exactly when the respondents entered

the land and put up structures without the applicant protesting. Giving an order of injunction as prayed would amount to an eviction in disguise because if the respondents are already in occupation they cannot be ordered to stay away from the land at this stage.

For the court to grant a mandatory injunction, the facts need to be clear and certain. In this case, it seems not all the facts have been ascertained. The court will not grant an order that may be prejudicial to the respondents. The applicant has failed to demonstrate that she is likely to suffer irreparable loss. I have also noted earlier in this ruling that it is not clear why the applicant would file this suit if there are succession proceedings pending over the same suit land in Succession Cause No. 339/2007.

For the foregoing reasons, I find that the court cannot grant the order sought. This is a matter that should proceed to full hearing so that all the parties can adduce evidence in support of their pleadings and all issues be determined at once. I dismiss the application with costs being in the cause.

DATED and DELIVERED this 5th day of October, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Simiyu for plaintiff/applicant

Mr. Chege for defendants/respondents

Kennedy – Court Clerk