



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO.3 OF 2020

BENARD NJERU NYAGA.....1ST PLAINTIFF

NJOGU NYAGA.....2ND PLAINTIFF

JUSTA WAWIRA KIURA (Suing as the legal representative of the

late Fredrick Kiura Nyaga (DECEASED).....3RD PLAINTIFF

V E R S U S

MISHECK MUTURI NYAGA.....1ST DEFENDANT

GLADYS GATURI.....2ND DEFENDANT

RULING

A. INTRODUCTION

1. By a notice of motion dated 6.02.2020 expressed to be based upon Order 40 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act (Cap.21) and all enabling provisions of the law the Plaintiffs sought an interim injunction to restrain the 1st Defendant from selling, charging or alienating in any manner whatsoever Title No. Ngandori/Kirigi/6131 (the suit property) pending the hearing and determination of the suit. The Plaintiffs also sought an order for costs of the application to be in the cause.

B. THE PLAINTIFF'S CASE

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Plaintiff on 03.02.2020 and his further affidavit sworn on 11.08.2020 and the exhibits thereto. The Plaintiffs' case was that the 1st Defendant had fraudulently acquired registration of the suit property in his name whereas the same was family property which was to be shared amongst family members. The Plaintiffs contended that the 1st Defendant was consequently holding the suit property in trust for them and that the court ought to impose a constructive trust upon him in the circumstances.

3. The Plaintiffs contended that their late father Nyaga Muyaweru (Nyaga) who was a polygamist was the owner of Title No. Ngandori/Kirigi/3854 (*Parcel 3854*). It was further stated that upon his demise parcel 3854 was subdivided amongst his two wives and as a consequence the Plaintiffs' mother acquired the suit property as her share.

4. The Plaintiffs further contended that they were recently shocked to discover that their mother (now deceased) had purported to transfer the suit property to the 1st Defendant as a gift without reference to the rest of the family members who had beneficial interest therein. They contended that their late mother was a trustee who only enjoyed a life interest in the suit property hence she could not dispose of it without the consent of the beneficiaries or a court of law.

C. THE DEFENDANTS' RESPONSE

5. The 1st Defendant filed a replying affidavit sworn on 6.03.2020 in opposition to the said application on two main grounds: First, he contended that the suit property was transferred to him by his late mother as a gift during her lifetime and that due process was followed after which he was issued with a title deed. Second, he contended that the Plaintiffs had delayed for over 21 years in challenging his acquisition of the suit property. He wondered why the Plaintiffs did not question the transfer during the lifetime of their mother. There was, however, no indication of the 2nd Defendant having filed any response to the application.

D. DIRECTIONS ON SUBMISSIONS

6. When the application came up for hearing, it was directed that the same shall be canvassed through written submissions. The 1st Defendant filed his written submissions dated 23.08.2020 whereas the Plaintiffs filed a reply to those submissions dated 3rd September, 2020. The Plaintiffs also filed their own submissions on the notice of motion dated 6.02.2020 on or about 12.08.2020. The Plaintiffs also filed a supplementary list of authorities dated 3rd September, 2020 in support of their application for interim orders.

E. THE ISSUES FOR DETERMINATION

7. The court has considered the Plaintiffs' application for injunction, the 1st Defendant's replying affidavit in opposition thereto and the Plaintiffs' further affidavit. The court has also considered the submissions and material on record in this matter. The court is of the opinion that the key issues which arise for determination are as follows:

- a. Whether the Plaintiffs have made out a case for the grant of an interim injunction use.
- b. Who shall bear costs of the application.

F. ANALYSIS AND DETERMINATION

a. Whether the Plaintiffs have made out a case for the grant of an interim injunction

8. The court has considered the submissions of the parties and the material on record on the first issue. Whereas the Plaintiffs' advocates submitted that the Plaintiffs had established the three principles for the grant of an injunction as set out in the case of *Giella v Cassman Brown & Co Ltd [1973] EA 358*, the 1st Defendant's advocates were of a contrary opinion.

9. The court has considered the numerous authorities which were cited by the Plaintiffs. Most of them really dealt with the merits of the main claim, that is, whether or not the suit property was trust property and whether or not their late mother had the legal authority to deal with it and transfer it as she wished. The question of whether or not the material on record is capable of establishing trust goes to the root of the main claim in the suit. The existence or otherwise of a trust and the legality of the impugned transfer are matters which can only be conclusively determined upon a full trial.

10. This court has to be cautious at this interlocutory stage to refrain from making any comments or provisional findings which might prejudice the fair trial of the action. The court must also be careful not to usurp the functions of the trial court on the various matters in dispute herein. All the court is required to do at this juncture is to ascertain whether or not the Plaintiffs have established a *prima facie* case with a probability of success without purporting to determine the issues in controversy in a summary manner.

11. There is ample evidence on record to demonstrate that parcel 3854 belonged to the late Nyaga who was the father of the parties herein (save the 3rd Plaintiff). There is no dispute that Nyaga was a polygamist and that he had two wives. There is no contest that upon his death parcel 3854 was distributed between his two houses and that the suit property was ultimately registered in the name of the mother of the warring parties.

12. What is in dispute are the circumstances under which the suit property ended up in the sole name of the 1st Defendant to the exclusion of all his siblings. Whether or not the 1st Defendant acquired the suit property fraudulently and whether or not his mother had legal authority to transfer the same to him as a gift are matters for the trial court. However, the court is satisfied on the basis of the material on record that the Plaintiffs have established a *prima facie* case within meaning of the principles enunciated in the case of *Giella vs Cassman Brown and Co. Ltd (supra)*.

13. The court is further satisfied that the loss or injury which the Plaintiffs might suffer cannot be adequately compensated by an award of damages. The Plaintiffs clearly consider the suit property to be part of their ancestral or family land hence monetary compensation may not adequately atone for its loss. The court is thus satisfied that the Plaintiffs have made out a case for the grant of an interim injunction hence the court is inclined to grant the same.

14. The 1st Defendant contended that since the Plaintiffs had delayed in moving the court for a remedy, they were not entitled to the equitable relief of injunction. Whereas the 1st Defendant may have acquired the suit property about 21 years ago, the Plaintiffs' contention was that they only learnt of the transfer when the 1st Defendant asserted his rights in 2019 or thereabouts. The Plaintiffs' allegations in their further affidavit that they were no problems in their utilization of the suit property between 1999 – 2019 were not controverted by the 1st Defendant.

b. Who shall bear costs of the application

15. Although costs of an action or proceedings are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21). Accordingly, a successful party should ordinarily be awarded costs, unless, for good reason, the court directs otherwise. See *Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co. Ltd [1967] EA 28Z*. The court is aware that the litigants herein are close relatives. As such, the court is of the opinion that costs of the application should be in the cause.

G. CONCLUSION AND DISPOSAL ORDER

16. The upshot of the foregoing is that the court finds merit in the Plaintiffs' application for interim orders. Accordingly, the Plaintiffs'

notice of motion dated 6th February, 2020 is hereby allowed in the following terms:

a. An interim injunction be and is hereby issued restraining the 1st Defendant by himself, his servants or agents from selling, charging or alienating Title No. Ngandori/Kirigi/6131 pending the hearing and determination of the suit or until further orders of the court.

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

Orders accordingly.

Dated and Signed at NYAHURURU this 18th day of December, 2020, and delivered via Microsoft teams platform in the absence of the parties.

In the presence of:

Court Assistant – Carol

No appearance by the Plaintiffs

No appearance by the Defendants

Y.M. ANGIMA

JUDGE

18.12.2020