



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI LAW COURTS**

**ELC NO. 254 OF 2018**

**TABITHA WANGARI KOIMBORI.....1<sup>ST</sup> PLAINTIFF**

**ESTHER RUGURU GITAU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**GEORGE KAGO KAMANU & 2 OTHERS.....DEFENDANT**

**RULING**

1. The plaintiff/applicants filed a Notice of Motion dated 29<sup>th</sup> May 2018. in which they sought the following orders.

**1) Spent**

**2) Spent**

**3) Spent**

**4) A temporary injunction be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/ respondents whether acting in person, by proxy ,through their agents, servants, employees or any other person acting at their behest, from transferring, leasing, trespassing, engaging in construction /fencing and/ or interfering in any other way with land title No.Dagoretti/Kangemi/1863 ( suit property), pending hearing and determination of the suit.**

**5) A mandatory injunction be issued compelling the 3<sup>rd</sup> defendant/respondent to recall and revoke the title issued and dated 16<sup>th</sup> March 2018 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents.**

**6) Costs for this application be provided for.**

2. The applicants are aunties to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The dispute in this case revolves around LR No Dagorretti/Kangemi/1863 (suit property). The suit property was initially registered in the name of Rachel Wairimu Waweru who is the mother to the applicants and grandmother to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The suit property has since been transferred to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Racheal Wairimu Waweru is still alive.

3. The applicants contend that their father and mother had nine children. Their father has since died but their mother is alive. The properties belonging to the parents were shared among their siblings. It was later decided by their mother that the applicants too should get a share of the suit property. A surveyor was engaged to subdivide the suit property. The process was carried out but it was not completed as the original title was held by their brother Nicholas Kamunu Waweru who did not want to part with it. The applicants had registered a caution against the title but they later removed the same to allow the subdivision to proceed.

4. The applicants took possession of their portions and fenced. They accumulated building materials but one of their brothers came in the company of hired goons who removed the fence and carted away the building materials. The applicants heard rumours that the suit property had changed hands. They went and carried out a search which confirmed that indeed the suit property had been registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The applicants contend that the transfer of the suit property was fraudulent.

5. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have opposed the applicants' application based on a replying affidavit sworn on 16<sup>th</sup> October 2018. The applicants contend that the suit property was transferred to them as a gift by their mother. The respondents contend that their grandmother

had been coerced by the applicants into swearing an affidavit indicating that she was to give a portion of the suit property to the second applicant and the rest was to be given to them in equal shares. The respondents' grandmother later swore another affidavit renouncing the earlier one. In the subsequent affidavit she stated that she had been coerced by her daughters into swearing the same. As she changed her mind, she transferred the suit property to them.

6. The respondents contend that the applicants had been given properties by their mother and that they should not claim the suit property in which they have no interest.

7. I have considered the applicant's application as well as the opposition to the same by the respondents. I have also considered the submissions by the parties herein. The only issue for determination in this application is whether the applicants have demonstrated a case for grant of both temporary and mandatory injunctions. It is clear from the affidavits filed herein that there are serious fights for the suit property between the applicants and their siblings.

8. The property over which the parties are fighting was in the name of the applicants' mother who is alive. The mother has since transferred the property to her grandsons. If the mother of the applicants who is the grandmother of the respondents feels that the property was fraudulently transferred, she is the one who should have filed this suit and not the applicants who are claiming interest. The respondents have indicated in their replying affidavit which has annexed an affidavit sworn by their grandmother that the 2<sup>nd</sup> applicant had been given a property elsewhere. The 2<sup>nd</sup> applicant filed a supplementary affidavit in which she doubts the genuineness of the affidavit sworn by her mother but she does not refute the fact that she has land which was given to her by her mother.

9. It is evident from the affidavits herein that the applicants' mother is being manipulated to suit individual interest. The applicant's mother is alive; she has already transferred the suit property to her grandsons who are the respondents. She is the best placed person to resolve this dispute. There can be no order for revocation of title at this stage without evidence that the transfer was fraudulent. The applicants are asking the court to make orders which will force their mother who is alive to distribute her properties. The proper procedure for claim to property of a person who is alive is clear. Courts cannot intervene unless there is sufficient reason to do so and only in a legal way. It is apparent that the applicants concealed material facts. An injunction cannot be granted to a person who does not come to court with clean hands. I find no merit in this application which is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The injunction orders granted on 17<sup>th</sup> October 2018 and subsequently extended are hereby discharged.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 21<sup>st</sup> day of February 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of;-

Mr Gikera for Mr Murimi for applicant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**