



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO. 20 OF 2019

LUCY MURINGI MURIU(suing as a Representative of

the Estate of John Muriu Kamiri (deceased).....PLAINTIFF

VERSUS

ZIPPORAH NYAWIRA MURIU.....1st DEFENDANT

FRANCIS KAMAU MURIU.....2nd DEFENDANT

DISTRICT LAND REGISTRAR.....3rd DEFENDANT

RULING

1. The Application before me is dated the 16th April 2019 wherein the Applicant seeks temporal injunctive orders against the Respondents restraining them, their agents, servants, employees, and/ or proxies from trespassing and/or interfering in any manner with the parcel of land known as Nyandarua /Ol Kalou Salient/63, measuring approximately 14 acres, pending the hearing and determination of the suit.

2. The said application is premised on the grounds on the face of it as well as the Applicant's supporting affidavit dated the 16th April 2019.

3. That upon effecting service upon the Respondents herein, only the 1st Respondent entered appearance and filed a replying affidavit thereto. On the 24th June 2019, by consent, parties agreed to have the application disposed of by way of written submissions which submissions I have considered as herein under;

Applicants' Submission.

4. The Applicants submission was based on the fact that the suit land herein was family land belonging to the Estate of the deceased but jointly registered in the name of the 1st and 2nd Respondents as trustees.

5. That there was need to preserve the said land pending the hearing and determination of the Succession Cause No. 265 of 2015 pending before the Nakuru High Court.

6. The Applicant's submission was based on the fact that she was apprehensive that the 1st and 2nd Respondents were likely to dispose of the suit land the same having been fraudulently transferred to them by the deceased in order to defeat justice after the Applicant filed for a divorce cause No. 32 of 2014 which was never concluded following the death of the deceased.

7. That indeed the deceased had had the suit land registered to the 1st and 2nd Respondents on the 22nd October 2014 following the filing of the divorce case on the 21st July 2014, and the Matrimonial Cause on the 15th July 2014, with the sole purpose of removing it from the Applicant's reach in case the Divorce case succeeded and secondly so as to dispose it of in case he (deceased) fell into financial difficulties following the divorce proceedings.

8. That although the 1st Respondent has disposed that the suit land was gifted to them by the deceased, yet the property in question was matrimonial property and her consent as a spouse to transfer the said suit land ought to have been sought pursuant to the provisions of Section 93 of the Land Registration Act and Section 12 of the Matrimonial Property Act. To this effect thereof, the Applicant had established a prima facie case with chances of success.

9. Further, it was the Applicant's submission that if the interim orders so sought were not granted, she would suffer loss which could not be compensated in damages. That the suit land being matrimonial property, after the death of the deceased, the same was to devolve upon all the

surviving members of the deceased's family including the Applicant who was the Administratrix of the deceased's estate and not only upon the two Respondents.

10. On a balance of convenience, it was the Applicant's submission that the same lay with the estate of the deceased who were supposed to share out the deceased's property equally amongst all beneficiaries. That since the Applicant had demonstrated that the land had been transferred illegally to the 1st and 2nd Respondents that it was incumbent that the same reverts back to the deceased's estate for equal distribution amongst his beneficiaries.

1st Respondents Submission.

11. The 1st Respondents submission was to the effect that the suit land herein was gifted to her jointly with the 2nd Respondent by their father the deceased, John Muriu with the knowledge of the Applicant, way back in the year 2014 wherein they had been registered as it's proprietors, had obtained title and had been enjoying quite possession of 7 ½ acres since the year 2014 to date.

12. That by virtue of the fact that the Respondents had obtained title to the suit land the same was conclusive proof of ownership and it was upon the Applicant to prove otherwise.

13. That indeed the Applicant and the deceased had an acrimonious marriage which ended up in their separation more than 20 years ago and the subsequent filing of the Divorce Cause and Division of matrimonial property which proceedings had excluded the present suit land as forming part of the matrimonial property.

14. It was further the 1st Respondent's submission that in order to prove that the 1st and 2nd Respondents had been gifted the suit land by the deceased in his lifetime certain elements had to be demonstrated that the said property was given out by the deceased inter vivos as per the provisions of Section 42 of the Law of succession which provides as follows:

Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

15. It was the 1st Respondent's submission that according to the Halsburys Laws of England dealing with incomplete gifts, it was stated that:-

"...If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."

16. That the three conditions that were to be met for a gift *inter vivos* to be valid were all fulfilled in the present case to which:

(a) the individual making the transfer actually intended to make a gift; in this case, the deceased had gifted the Respondents because he had considered them filial children who took care of him and respected him as their father unlike the rest of the children.

(b) that the second condition is that the donee accepts the gift made to him or her; in this case the 1st and 2nd Respondents accepted the gift upon which they have been enjoying quite possession.

(c) The third condition for a gift *inter vivos* to be complete is delivery of the property that is the subject-matter of the transfer by the donor to the donee as could be seen in the present case where the transfer was effected and the Respondents are now in occupation of the said parcel of land.

17. That it was therefore not true that the suit land had been held in trust by the Respondents for the deceased's family which allegation was aimed at depriving the Respondents what was rightfully theirs.

Determination.

18. I have considered the Application herein filed, both the Applicant's and the Respondent's written submissions as well as the annexures and authorities cited herein.

19. The threshold for grant of temporary injunctions are well settled in the often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

20. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicant, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.

21. In the present case there is no dispute that the Applicant herein is the mother to the 1st and 2nd Respondents. Coupled with that, there is further no dispute that the said Respondent are joint proprietors of the suit land herein having had been gifted the same by the initial proprietor who was their deceased father in the year 2014. Land which they took possession and have been in occupation since then to date.

22. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows.

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-

a. *to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and*

b. *to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

23. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship section 26 (1) provides:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except

a. *on the ground of fraud or misrepresentation to which the person is proved to be a party, or*

b. *where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.*

24. The 1st and 2nd Respondents having demonstrated that they were the registered owners of the suit property namely No. Nyandarua /OL Kalou Salient/63, and having been issued with a title, prima facie thier title is indefeasible and the burden shifts to the Applicant to show or demonstrate that the title is challengeable within the provisions of the law.

25. Secondly, since it is not disputed the both the 1st and 2nd respondents are in occupation of the suit land, granting the orders of injunction so sought in a situation where the Respondents are in occupation would amount to an eviction order at an interlocutory stage which orders are premature at this stage and would cause irreparable harm to the Respondents who have been in occupation since the year 2014.

26. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 1st Respondent’s title but the mere proof that the 1st and 2nd Respondents hold a duly registered certificate which on the face of it was properly acquired is sufficient to lead the court to hold that the Applicant has not established that there is a prima facie case.

27. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

28. Consequently, I dismiss the application dated 16th April 2019 with costs to the 1st Respondent.

29. Parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

Dated and delivered at Nyahururu this 15th day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE