



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT & LAND COURT OF KENYA AT KAKAMEGA**

**ELC. CASE NO. 132 OF 2015.**

**TOM NDIDI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**CAROLINE NDIDI.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**ROY NDIDI.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**NELSON NDIDI..... 4<sup>TH</sup> PLAINTIFF/RESPONDENT**

**SARAH NDIDI..... 5<sup>TH</sup> PLAINTIFF/RESPONDENT**

**TONNY NDIDI..... 6<sup>TH</sup> PLAINTIFF/RESPONDENT**

**GEOFREY NDIDI..... 7<sup>TH</sup> PLAINTIFF/RESPONDENT**

**JANE NDIDI.....8<sup>TH</sup> PLAINTIFF/RESPONDENT**

**DAVID NDIDI.....9<sup>TH</sup> PLAINTIFF/RESPONDENT**

**VERSUS.**

**JACKTON NDIDI.....DEFENDANT/APPLICANT**

**RULING.**

[1]. The notice of Motion herein is filed by the applicant Jackton Ndidi against the 9 applicants who are his children.

[2]. The history of this matter is that the nine applicants filed this suit against their father and stated that he was the registered owner of land parcel Nyang'ori/Gamalenga/215, 278 and 280 and plot No. 7 at Kiboswa market. They alleged that their father has had the intention of selling and taking loans over them. Leaving the Plaintiffs homeless and landless. They prayed for a permanent order of injunction restraining the defendant from carrying out any transaction i.e. selling, alienating, transferring, subdividing and/or wasting land parcels Nyang'ori/Gamalenga/215, 278 and 280 and plot No. 7 at Kiboswa market pending the hearing of this case. This suit was filed on 5/5/2015. The defendant filed his defence in person on 11/5/2015 and denied the allegations of the plaintiffs.

[3]. On 11/7/2015 a consent was filed on how the plaintiffs properties should be shared out and it was signed by the Elven (11) children of the defendant, this consent was not adopted by the Kakamega Court. On 27/7/2015 the parties appeared before the court and said they wished to withdraw the case and proceed with the Consent. The court ordered that the consent dated 6/7/2015 had no relationship with the prayers in the plaint. The court further said the parties were at liberty to file the necessary notice for withdrawal. On 28/7/2015 the parties told the court that they have reconciled and have agreed to withdraw the case. The matter was stood over generally.

[4]. On 3/3/2016 the 3<sup>rd</sup> 4<sup>th</sup> 6<sup>th</sup> 7<sup>th</sup> and 9<sup>th</sup> plaintiffs withdrew from the suit. The 5<sup>th</sup> plaintiff withdrew from the suit on 29/6/2016. The case remained for 1<sup>st</sup> 2<sup>nd</sup> and 8<sup>th</sup> defendants.

[5]. The respondent filed his notice of motion and asked the court to dismiss this suit and order a removal of Caution lodged by the 1<sup>st</sup> plaintiff Tom Ndidi on land parcel Nyang'ori/Gamalenga/280. He said that the suit parcels has been distributed by him even before the filing of the suit and that there is no basis for the suit being in court. In his affidavit the applicant said he is sickly and old and that the remaining plaintiffs 1<sup>st</sup> 2<sup>nd</sup> and 8<sup>th</sup> are all over 40 years old and are working and have a steady income. He supported his application by the affidavit dated 27.11.2017.

All the other six children of the defendant swore an affidavit dated 17<sup>th</sup> November 2017. They denied ever filing a suit against their father and alleged that their signatures on the pleadings were forged. They stated that this was the reason why they withdrew from the suit. They alleged that there was a family settlement on 6/7/2015 and 30/7/2016. That the consents are filed in court. They asked the court to dismiss this suit as being incompetent and having been overtaken by events.

[6]. The second Plaintiff acting on behalf of herself and the other 2 defendants filed a replying affidavit and objected to dismissing the suit. She said that the suit should be heard interpartes. That the withdrawal of 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> 7<sup>th</sup> and 9<sup>th</sup> respondents cannot stop their claim. That the assertion that the defendant distributed his property to his children is a lie. They argued that the intention of the defendant is to have the caution removed on Parcel No. Nyang'ori/Gamalenga/280 so that he can sell the same which they object to.

[7]. The issue for determination in this application is whether the defendant is entitled to the orders he seeks.

[8]. The prayers in this suit are not for distribution of property they are for a permanent injunction against the defendant, the registered owner from using his own properties. The injunction is by his children who are grown ups. The rights of a proprietor are well set out Sec. 25(1) of the Land Registration Act. Those rights are subject to the overriding interests found in Sec. 28 of the Land Registration Act. A registered proprietor is free to use, dispose, transfer, charge and or in any other way deal with his property subject to Sec. 28 aforesaid. The plaintiffs who are the children of the defendant and who are all over 40 years old and gainfully employed have absolutely no right to interfere with the defendant on his enjoyment of his lands above quoted. The applicant/defendants rights to own property are guaranteed by article 40(1) of the Constitution. No one can take that away not even his adult children.

[9]. The prayers in the plaint cannot be granted at all. The applicant is right and well within his rights when he says that it is the interest of justice that this suit be dismissed. The suit is an abuse of the process of the court. I therefore dismiss this suit and order that the land registrar Kakamega do remove the caution lodged by the 1<sup>st</sup> plaintiff on the land parcel Nyag'ori/Gamalenga/280 forthwith. The parties herein are father and his children. I will therefore order that each party bears their own costs.

Ruling read in open Court in the presence of the parties.

**Dated at Bungoma this 28<sup>th</sup> day of March, 2018.**

**S. MUKUNYA**

**JUDGE.**

**In the presence of:**

Joy: Court clerk

Plaintiffs - Present

Defendants - Present