



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

THIKA LAW COURTS

ELC CASE NO.397 OF 2017

MARGARET WANGUI KARUGU.....PLAINTIFF/APPLICANT

-VERSUS-

JOHN NJENGA KARUGU.....DEFENDANT/RESPONDENT

MARY NJERI NJENGA.....DEFENDANT/RESPONDENT

RULING

The Plaintiff herein *Margaret Wangui Karugu*, filed an *Originating Summons* dated *17th December 2014*, and sought for various orders. Among the orders sought are:-

- 1) *A declaration that there exists a beneficial interest over land title No.Muguga/Kahuho/470 in favour of the Plaintiff.*
- 2) *A declaration that John Njenga Karugu (the 1st Defendant) who is the registered owner of the land title No.Muguga/Kahuho/470, Nairobi, holds the subject parcel of land in trust for his lawful children.*
- 3) *A declaration that John Njenga Karugu (the 1st Defendant) who is the registered owner of the land title No.Muguga/ Kahuho/470 Nairobi does not hold the subject parcel of land in trust for the 2nd Defendant or any other person under the Succession Act.*

The Plaintiff had alleged in the said *Originating Summons* that the 1st Defendant, *John Njenga Karugu*, is her husband and 2nd Defendant, her sister-in-law and sister to the 1st Defendant respectively. Further that the

suit land *No.Muguga/Kahuho/470*, is registered in the name of the 1st

Defendant which is an ancestral land passed onto him by his father during his lifetime way back in *1960s*. She also alleged that with the help of 2nd Defendant, the 1st Defendant has been insistent on *illegally alienating, subdividing, offering for sale* the suit property without following the due process of law and/or first obtaining consent of his wife and children who hold an overriding interest over the subject property. For that reason the Plaintiff placed a caution upon the suit land and thereafter this suit.

The *Originating Summons* was *opposed* by the Defendants and *Mary Njeri Karugu*, the 2nd Defendant filed her *Replying Affidavit* on *19th June 2015*, and averred that the suit property is a resultant subdivision of *LR.No.Muguga/Kahuho/369*, which was owned by her father *Karugu Ngata*. That the said *Karugu Ngata* died in *1973*, and was survived by four wives and several children. After Succession Cause, the title *No.Muguga/Kahuho/369*, was subdivided into four portions and the suit land herein *No.Muguga/Kahuho/470*, was registered in the name of the 1st Defendant to *hold in trust* for the *house* of *Wangari Karugu*, the mother to the Defendants and one *Nyakio Karugu* (now deceased). She further averred that she is now pursuing her lawful share of inheritance of her father's estate and the instant *Originating Summons* lacks merit and should be dismissed.

Parties appeared for directions in court on *20th April 2015*, wherein the Respondents were granted leave to file their responses to the *Originating Summons* and the Court further issued *status quo* Order to the effect that parties were to observe the obtaining *status quo*. The obtaining *status quo* was that the 1st Defendant was

the registered owner of the suit property.

However on 25th October 2016, the Applicant filed the instant *Notice of Motion* under various provisions of law and sought for various orders. The orders sought are:-

- 1) Spent.
- 2) Spent.
- 3) That Eliud Karugu Gatamba & Esther Nyatuga Muriithi who are the Plaintiffs in Kikuyu PMCC.No.96 of 2016 be and are hereby enjoined in this proceedings as the 3rd and 4th Defendants respectively.
- 4) That there be an order of stay of execution of the court orders dated 31st May 2016, and all proceedings in Kikuyu PMCC No.96 of 2016 pending the hearing and determination of this application or further orders of the court.
- 5) That the Honourable Court be pleased to vary, discharge, and set aside the proceedings and all the consequential orders dated 31st May 2016 and issued on 2nd June 2016 in Kikuyu PMCC No.96 of 2016.
- 6) That all the entries and registrations entered on 17th June 2016, against title No.Muguga/Kahuho/470, be and are hereby cancelled and revoked and the title to revert back into the names of John Njenga Karugu.
- 7) That a conservatory order be and is hereby issued directed at the Defendants either by themselves, their servants, their agents and/or whomsoever acting under their instructions from disposing, selling, offering for sale, subdividing, charging, transferring or in any way interfering with the suit property title No.Muguga/Kahuho/470 pending the hearing and determination of this case or further orders of the court.
- 8) That the orders so granted be served upon the Kiambu District Land Registrar for compliance.
- 9) That this Honourable Court be pleased to grant any other order and relief that it may deem fit and just to grant.
- 10) That the costs of this application be provided for.

These application is based on the following grounds:-

- 1) That the Plaintiff has been legally married to the 1st Defendant for over 50 years and blessed with five children.
- 2) That the 2nd Defendant is a sister-in-law to the Plaintiff and the 1st Plaintiff in Kikuyu PMCC No.96 of 2016.
- 3) That the Plaintiff was not aware and nor was she a party to the suit in Kikuyu PMCC No.96 of 2016, filed by her husband the 1st Defendant and sister-in-law, 2nd Defendant with a view of fraudulently alienating the suit property.
- 4) That the subject matter in Kikuyu PMCC No.96 of 2016 is also the suit property in the instant suit being property No.Muguga/ Kahuho/470.
- 5) That the Defendants herein together with Eliud Karugu Gatamba & Esther Nyatuga Muriithi obtained a Consent Order dated 31st May 2016 and subsequently issued in their favour on 2nd June 2016, without making full material disclosure of facts to the court such as the pendency of the instant suit.
- 6) That the consent order dated 31st May 2016, was precipitated by the conspiracy between the Defendants to defeat the beneficial interest of the Plaintiff and the instant suit.
- 7) That the suit property belongs to the Plaintiff and her family.
- 8) That the consent order of 31st May 2016, removed the caution that the Applicant had placed over the suit property to protect her spousal/overriding interest.
- 9) That the Defendants herein together with Eliud Karugu Gatamba and Esther Nyatuga Muriithi were registered as joint proprietors of the suit property on 17th June 2016.
- 10) That the 1st Defendant was until the 17th June 2016 registered as the sole proprietor of the suit property while

the Plaintiff and her children claimed beneficial interest.

11) That the Defendants failed to disclose the existence on this instant suit in Kikuyu PMCC No.96 of 2016 touching on the same subject matter whereat the court issued a status quo order on 13th May 2016.

12) That the status quo dated 13th May 2016 issued by this Honourable Court barred any person from interfering with the suit property.

13) That unless stopped, the Defendants may proceed to subdivide, sell and transfer the suit property to the detriment of the Applicant and her children.

14) That the Plaintiff will suffer irreparable damage and loss should the Defendants proceed to subdivide and alienate the suit property.

The application is also supported by the affidavit of **Margaret Wangui Karugu**, the Plaintiff herein who reiterated the contents of her grounds in support of the application and attached various annexures and exhibits to support her averments. She further reiterated that the suit property forms part of their matrimonial property and she urged the Court to safeguard her interest and those of her children by stopping the fraudulent alienation of the suit property by the Defendants. That if the same is not stopped, they stand to suffer irreparable loss.

When the matter appeared in Court on **28th March 2017**, the Court issued Inhibition Order, **inhibiting** any registration of any other or further dealing with the suit property **No.Muguga/Kahuho/470**.

Further, the 2nd Defendant filed a **Replying Affidavits** on **30th October 2017**, on behalf of herself and the 1st Defendant. However, the said **Replying Affidavit** was in opposition to the **Originating Summons** dated **17th December 2014**, but not the instant application. The Court directed that the instant **Notice of Motion** application be canvassed by way of written submissions.

In compliance, the **Law Firm of Kimathi Wanjohi Muli Advocates** filed their written submissions on behalf of the Plaintiff/Applicant on **13th November 2017**, and urged the Court to allow the prayers sought. The Defendant too filed their submissions on **24th November 2017**, and delt with the issues raised in the **Originating Summons** dated **17th November 2014**, but not the issues raised in the instant **Notice of Motion** dated **25th October 2016**.

The Court has carefully considered the instant **Notice of Motion** and the annexures thereto. The Court has also considered the written submissions, cited authorities and the various provisions of law and the Court makes the following findings;

There is no doubt that the **Originating Summons** herein was filed in the year 2014 (**17th December 2014**) and the Plaintiff had sought for determination of various issues among them, that the 1st Defendant, **John Njenga Karugu** is registered as the owner of the suit property **No.Muguga/Kahuho/470**, to hold it in trust for the Plaintiff and their children and that he is not holding it in trust for 2nd Defendant and/or any other person. It is also not in doubt that the Court did issue an Order of **status quo** prevailing to be observed. The prevailing **status quo** was that the suit property was registered in the name of the 1st Defendant. The said **status quo** Order was issued on **20th April 2015**.

There is also no doubt that during the pendency of this suit, the 2nd Defendant and two others filed a **Civil Suit No.96 of 2016** at **Kikuyu Law Courts**, against the 1st Defendant herein. The subject matter in the said **Civil Suit No.96 of 2016**, is the suit property **No.Muguga/Kahuho/470**. The Court has not seen the pleadings in the said **PMCC No.96 of 2016**, but has only seen the consent filed by the parties in court. This Court is not sure whether the parties did disclose the existence of this case at Milimani Environment and Land Court and the status quo order that were in force.

From the consent filed in court by the parties the court did adopt the same as the order of the court and directed that the suit property be registered in the names of both Plaintiffs and the Defendant, that is **John Njenga Karugu** and **Mary Njeri Njenga** and **Eliud Karugu Gatamba** and

Esther Nyatuga Muriithi, who were parties in **PMCC No.96 of 2016**. In essence, the said order of the Principal Magistrate overturned the **status quo** Order issued by an Environment and Land Court Judge. The Consent Order was issued in contravention of the **status quo** issued by the **Environment and Land Court** on **20th April 2015**. Due to the **Consent Order** issued on **31st May 2016** through material non-disclosure and in contravention of the existing **status quo**, the suit property was registered in the names of the Plaintiffs and the Defendant **PMCC No.96 of 2016**, on **17th June 2016** as is evident from **MNN-5**. This new certificate of title was issued even before the issues raised by the Plaintiff in the instant **Originating Summons** which was filed in 2014 had been resolved. In essence, the issuance of the new title deed was meant to defeat the Plaintiff/Applicant's claim as raised in the **Originating Summons**.

It is on the above background that the Plaintiff/Applicant has filed the instant **Notice of Motion** application seeking to enjoin the new proprietors of the suit property and also cancellation of the title deed which was issued without full disclosure of the existing case and *status quo* in place.

It is evident that **Eliud Karugu Gatamba** and **Esther Nyatuga Muriithi**, were the 2nd Plaintiffs in **PMCC No.96 of 2016**, which was filed while this suit was in existence. They were parties to the consent that was entered by the parties without giving full disclosure of the existing *status quo* Orders. They are also joint proprietors of the suit property. Their presence is therefore necessary herein and their participation would assist the court in determining the real issues in controversy. **Order 1 Rule 10(2) of the Civil Procedure Rules** provides as follows:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

Being guided by the above provisions of law, the Court finds that the participation of the intended 3rd and 4th Defendants is very necessary in addressing the issues in controversy and the Court proceeds to enjoin them as prayed by the Plaintiff/Applicant.

Further said **Order 1 Rule 10(2)** also provides that the court may at any stage of the proceedings **either upon or without the application of either of the party...order that the name of any person who ought to have been joined whether as Plaintiff or Defendant.... be added.**

Therefore it is evident that the court has discretion to enjoin any party whose presence is necessary on its own motion. Though the Applicant has not sought to enjoin the **District Land Registrar, Kiambu** as a Defendant herein, the Court finds its presence necessary in order to enable the Court to effectually and completely adjudicate upon the issues in controversy herein. Therefore the **Court proceeds to enjoin the said District Land Registrar, Kiambu as a 5th Defendant herein. The Plaintiff/Applicant to amend the Originating Summons accordingly to reflect the enjoined parties.**

On whether the Court should **vary, discharge** and **set aside** the proceedings and all consequential Orders dated **31st May 2016** and issued on **2nd June 2016**, in **Kikuyu PMCC No.96 of 2016**, the Court finds that the said suit was filed while this suit was in existence and while there was in existence the *status quo* order. The Court finds that the parties therein did not disclose the existence of this suit because had they done so, the Learned Magistrate would not have issued the orders that he issued therein. There was therefore material non-disclosure and the filing of **PMCC No.96 of 2016** while there existed another suit dealing with the same subject matter went against the spirit of Section 6 of the Civil Procedure Act. Further this Court finds that the filing of **PMCC No.96 of 2016** was **an abuse of the court process** and the said filing of another suit caused issuance of conflicting Court Orders by different courts. This is indeed embarrassing to the courts and as provided by Section 3A of the Civil Procedure Act, the court has powers to make any necessary orders to prevent abuse of the court process.

Having found that the filing of **PMCC No.96 of 2016** was an abuse of the court process, this **Court has no option but to discharge and set aside the proceedings and all consequential orders** dated **31st October 2016** and issued on **2nd June 2016**, in **Kikuyu PMCC No.96 of 2016**.

Having found that the proceedings in **Kikuyu PMCC No.96 of 2016**, were an abuse of the court process, and having discharged and/or set them aside, the Court finds that the Orders now in force are the *status quo* orders that were issued by the court on **20th April 2015**. The *status quo* to be observed was that the **suit property was to remain registered in the name of the 1st Defendant**. The registration of a new title on **17th June 2016** was done through **contravention** of the existing Court Order issued on **20th April 2015**. Any action done in contravention of the Court Order is **null and void**. See the case of **Koinange Investment & Development Ltd...Vs...Nairobi city Council & 3 Others (Supra)**, where it was held that:-

“The sale by auction that followed thereafter was in contravention of the court order. Accordingly, it follows that and so I hold that the sale of the suit property by auction on the 17th October 2006 was unlawful, null and void and of no effect whatsoever”.

Although Section 26(1) of the Land Registration Act provides that a Certificate of title issued to a proprietor is a *prima-facie* evidence that such proprietor is the **absolute** and **indefeasible** owner, subsections 1(a)&(b) of the said Act provide that such proprietorship can be challenged if the same was obtained through **fraud, misrepresentation, illegally, unprocedurally** or through **corrupt scheme**. **Section 26(1) (a)&(b) of the Land Registration Act** 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 proprietor shall not be 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.

It is very clear that the order of the Court issued on **31st May 2016**, was issued through material non-disclosure and therefore through misrepresentation. The proprietors of the certificate of title issued on **17th June 2016** misrepresented to the **Land Registrar Kiambu** that the Orders of the court were issued regularly. However, the said Orders were obtained **irregularly** and **unprocedurally** through **material non-disclosure**. The parties in **PMCC No.96 of 2016**, colluded to have a **Consent Order** entered and recorded thus stole a march against the Plaintiff herein. Through the said material non-disclosure, the Court is entitled to issue **Mandatory Orders** as the action of the said proprietors was meant to steal a march against the Plaintiff herein. See the case of **Kenya Breweries Ltd & Another...Vs...Washington O. Okeyo (2002) eKLR**, where the Court held

that:-

“A mandatory injunction can be granted in an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not usually be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiffs.... a Mandatory injunction will be granted on an interlocutory application”.

Therefore the Court finds that the **certificate of title issued on 17th June 2016** is **impeachable** and as provided by **Section 80(1) of the Land Registration Act**, the **Court proceeds to cancel and revoke the same**. The **District Land Registrar-Kiambu**, should **rectify the register** so that **the suit property reverts** to the name of the **1st Defendant, John Njenga Karugu** as per the **status quo Order issued on 20th April 2015**.

Section 80(1) of the Land Registration Act provides:-

Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

The Court also finds that the suit property herein **should be preserved pending the hearing and determination of the Originating summons dated 17th December 2014**. For the above reasons, the **Court finds that it is proper and just to issue Conservatory Orders**.

Further, it is **imperative to serve the orders** issued herein to the **District Land Registrar, Kiambu** so that he **can rectify the register and revert the title of the suit property to the name of the 1st Defendant** herein. That is why it was **important to enjoin the District Land Registrar, Kiambu as a 5th Defendant** herein. The **Plaintiff/Applicant** is the **successful litigant** and she is therefore **entitled to costs** of this application.

Further, the parties are directed to fix the matter for directions on the **Originating Summons** as provided by Order 37 of the Civil Procedure Rules and then set it down for hearing expeditiously so that the disputed issues can be resolved at once.

The **Plaintiff/Applicant** is also **directed to amend the Originating Summons** accordingly to **reflect the enjoined parties** within the next **14 days** from the date hereof and **serve all the Defendants**. The Defendants have 14 days to file their responses and thereafter matter to be fixed for mention for directions

It is so ordered.

Dated, Signed and Delivered at Thika this 16th day of March 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Njuguna holding brief for Mr. Kimathi for Plaintiff/Applicant

In person for 1st Defendant/Respondent(Present)

In person for 2nd Defendant/Respondent(present)

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above stated parties.

L. GACHERU

JUDGE

16/3/2018