



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 496 OF 2017

MWANGI RUHOHI - 1ST PLAINTIFF

JULIUS KIRUMA KARIUKI - 2ND PLAINTIFF

SOSPETER MAINA NDAUWA - 3RD PLAINTIFF

(ALL SUING AS THE TRUSTEES OF KIAWATHIA MUMBUINI

SELF-HELP GROUP FORMERLY ANJIRU A MBARI YA KIIRU CLAN)

VS

MUCHIRI KIRUMA - 1ST DEFENDANT

STEPHEN MAINA MUTHONDU - 2ND DEFENDANT

RULING

1. The application before this Court is the Notice of Motion dated 6/11/2017 filed on 7/11/2017 by the Applicants' Plaintiffs herein for the following orders;

a. Spent

b. That the District Land Registrar Murang'a restricts any transactions or dealings concerning parcel Title No. LOC. 13/GITUGI/1655 (the suit land) until this suit is determined.

c. That this Honourable Court be pleased to issue a temporary injunction restraining the Respondents/Defendants either by themselves, their servants, agents, representative or workmen or any of them jointly or severally or otherwise howsoever from trespassing, occupying, constructing, cultivating or cutting standing trees, interfering with, transferring or in any other way alienating the parcel of land known as Title No. LOC. 13/GITUGI/1655 within Murang'a County pending the interpartes hearing and determination of this suit.

d. That upon hearing and determination of this suit at the Court's expediency, the District Land Registrar of Murang'a be ordered to cancel the title illegally and fraudulently acquired by the Defendants / Respondents and the same to revert back to the name of Mwangi Ruhohi as trustee of Kiawathia Mumbuini Self Help Group (formerly Anjiru a Mbari ya Kiiru Clan)

e. That further after hearing and determination of this suit, the Defendants/ Respondents or any other person purporting to have acquired land from the Defendants/ Respondents either by way of

purchase or otherwise be evicted and compelled to pull down all structures erected on the suit land known as Title No. LOC 13/GITUGI/1655 and in default the Plaintiffs be allowed to demolish the said structures at the Defendant's costs under the supervision of the area chief and the officer commanding Nyakianga police station.

f. That costs of this application be in the cause.

2. The application is premised on the following grounds;

a. That the Defendants/Respondents have illegally and fraudulently held themselves out to be the real heirs of the late Maina Kamau who the registered trustee of parcel of land was Title No. LOC 13/GITUGI/1655 for the clan incorporated as Kiawathia Mumbuini Self Help Group, formerly known as Anjiru a Mbari ya Kiiru clan.

b. That the said land does not belong to the late Maina Kamau, per-se as part of his estate but he was holding it as a trustee for the clan and hence cannot be part of his estate to be subjected to succession intestate.

c. That the Defendants/ Respondents have knowingly misdirected the Court, and subsequently the District Registrar of land Murang'a to believe that they are the beneficiaries to the said parcel of land inheriting the same from the late Maina Kamau as heirs.

d. That the Defendants/Respondents have illegally continued to trespass on the land and have even gone further to transfer the land into their own names as beneficiaries thus committing act of illegality with the intention of grabbing the said land from the clan

e. That the Plaintiffs/ Applicants will suffer irreparable damage and injustice if the Defendants / Respondents are allowed to persist with their actions of illegality and fraud.

3. The application is supported by the affidavit of Mwangi Ruhohi the 1st Applicant herein in which he states that the suit land was the subject matter in the High Court at Nairobi in Civil suit No. 1276 of 1978 in which the award of 2/07/1989 was confirmed in effect MUCHIRI KURUMA (the 1st Defendant) was given 2acres which he bought from KABIRU GAKURA and the remaining portion of 3.8 acres(the suit land) was registered in the name of MAINA KAMAU to hold in trust for the Anjiru A Mbari Ya Kiiru Clan. That clan was later registered as Kiawathia Mumbuini self help group. That Maina Kamau later died and the Applicant herein was appointed as trustee for the self help group and had the title for the suit land registered in his name. He claims that Defendants have been trespassing on the suit land and even invited strangers to occupy the suit land, as a result the Applicants made complaints to the local authorities with no held hence necessitating the Court's intervention.

4. The Applicants then filed ELC No. 280 of 2013 at Kerugoya which was later transferred to Murang'a as ELC No. 86 of 2017. The Applicants would then withdraw that suit based on what they now claim was misadvised from their advocate. He claims that 1st Defendant then took advantage of the withdrawal to have the name of the Applicant cancelled from the register of the suit land and had it replaced with that of the 1st Defendant. He alleges the change in names was done fraudulently but does not give the particulars of the fraud. That when he discovered the change in ownership of the suit land he entered a caution against the title which he later learnt was removed vide the Orders given in ELC Civil suit no. 86 of 2017. He avers that he is apprehensive that the Defendants are in the process of subdividing and disposing off the suit land to strangers in order to defeat the course of justice. He claims that the Applicants will suffer irreparable loss if the Defendants are allowed to continue with what he claims to be illegal acts.

5. The application is opposed by the replying affidavit sworn by the 1st Respondent herein who deposes that prayers 4 and 5 in the application are tantamount to final orders therefore they cannot be given at an interlocutory stage. He brings to the attention of the Court that the suit land was the subject matter in Kangema Succession Cause No. 32 of 2011 in which a certificate of confirmation of grant dated

17/1/2013 was issued and used to transmit the suit land from the deceased Maina Kamau to Maina Njoroge and the 1st Defendant herein. Further that the green card of the suit land shows that the 1st Plaintiff was registered as the proprietor of the suit land on 19/10/2012 whilst the former registered owner Maina Kamau died on 11/04/2001 and before the Succession Cause at Kangema had been concluded, it is therefore unclear how the 1st Plaintiff became the registered owner without filing a Succession Cause.

6. The Plaintiff then filed the ELC No. 280 of 2013 at Kerugoya seeking a declaration that the Plaintiff was the absolute owner of the suit land and an injunction against the Defendants from dealing with the suit land. To that claim the Defendants in that suit of which the 1st Defendant herein was the 3rd Defendant in the Kerugoya matter filed a counterclaim seeking cancellation of the Plaintiff's name from the register for having been registered without filing a succession cause. Later, on 9/3/2013 the advocates for the 1st Plaintiff entered into a consent to withdraw the Plaintiff's suit in Kerugoya. In that withdrawal the counterclaim was not included and the Defendants applied to have the counterclaim reinstated which was allowed vide a ruling dated 29/1/2015 delivered at Kerugoya it is after this ruling that the file was transferred to Murang'a as ELC No. 86 of 2017.

7. The matter then came up for hearing at Murang'a when consent was entered to have the counterclaim allowed in effect the name of the 1st Plaintiff was cancelled and the suit land reverted to the original owner Maina Kamau (deceased). The Defendants then registered the certificate of confirmation of grant issued by the Kangema Court against the title of the suit land in their names as the 2nd Defendant herein had been substituted in place of the original Defendant Maina Njoroge (deceased). The Plaintiff then lodged a restriction on the suit land. That in their replying affidavit to the Defendant's application for reinstatement of the counterclaim the Plaintiffs had stated there was a pending Murang'a High Court Succession Cause No. 620 of 2013 for revocation of the Kangema SRM Succession Cause No. 32 of 2011. He contends that the current suit filed between the same parties litigating over the same subject matter is res judicata, therefore the application cannot qualify for grant of injunctive orders and this Court is functus officio in regard to the suit land. He is of the view that the current application and suit is an afterthought and an abuse of Court process and should be struck out.

8. The Applicants in their submissions largely reiterate the grounds on the face of the application. They also lay a background of how the clan now the self help group acquired the land and had it registered in the name of Maina Kamau (deceased) to hold in trust for the clan. They claim that the Defendants have been trespassing on the suit land and drew up a scheme to grab the land from the Plaintiffs. They also claim to have been misadvised into withdrawing the Kerugoya matter and that the 1st Plaintiff never gave his consent to the withdrawal. They also claim that the Defendants used the orders of this Court issued on 26/04/2017 beyond the scope of the orders to have the suit land registered in their names. They claim that they have established a prima facie case in that they were deregistered based on their failure to file a succession cause while the suit land being a trust land the correct law that should have been the Trustees perpetual succession Act cap 164 and that the Applicants will suffer irreparable damage if the orders are not granted. It is their contention that the issue of res judicata and functus officio will be handled in the main suit.

9. The Respondents on their part reiterated their position in the replying affidavit that prayers 4 and 5 cannot be granted at an interlocutory stage as they amount to final orders. That the Applicants have failed to meet the threshold set in **Giella vs. Cassman Brown** for grant of injunctive orders in terms of prayers 2 and 3 in that the plaint filed by the Applicants offends the provisions of Order 4 rule 1 (f) as it does not have that mandatory averment which is couched on mandatory terms under the act. Further that the affidavit filed thereafter offends sub rule 6 of order 4. That the failure on the part of the Applicants to disclose to the Court the existence of previous and pending suits between the parties herein is fatal. That the issue of ownership of the suit land was decided by the consent decree issued in Murang'a ELC case no. 86 of 2017 and that issue is now Res judicata. That the pending Murang'a High Court Succession Cause No. 620 of 2013 for revocation of the Kangema SRM Succession cause No. 32 of 2011 will also be seeking to resolve the same subject matter and that Court has concurrent jurisdiction to the current Court.

Determination

10. The suit land is LOC. 13/GITUGI/1655. It had been registered in the name of Maina Kamau until his death on 8/4/2001. He was holding the land as trustee of the clan which registered itself as Kiawathia Mumbuni Self Help Group. After Mwangi Kamau died on 15/10/2012 the 1st Plaintiff was appointed by the Court to become registered trustee of suit land. Both certificates of registration are on record. After Mwangi Ruhohi became registered owner he filed a case in Kerugoya No 280 of 2013 against Muchiri Kiruma and Stephen Maina Muthondu. In that suit the claim by the 1st Plaintiff was that he is the owner of the suit land. The Defendant counterclaimed. The 1st Plaintiff in his case withdrew his claim on ownership following which the whole suit is deemed to have been withdrawn including the counterclaim.

11. The Defendant in that case applied for their counterclaim to be reinstated. Prior to this period the Defendant in that suit applied to the Kangema Senior Resident Magistrate in case no 32 of 2011 and obtained a grant of representation that they are the administrators of Maina Kamau. Maina Kamau was the registered owner of the suit land in trust for the clan and the self help group but had by then passed away.

12. Upon reinstatement of the counterclaim in ELC No 280 of 2013 the file was transferred to Muranga ELC Court and registered as 86 of 2017. When the parties came before the Court they consented to the counterclaim being allowed by removal of the name of Mwangi Ruhohi as registered owner of the suit land and reverting to the name of Mwangi Maina, deceased. Note that on 17/1/2013 the grant of representation issued to Maina Njoroge and Muchiri Kiruma as administrators to the estate of Maina Kamau was confirmed. Relying on the counterclaim the Defendants in this case removed the name of the 1st Plaintiff from the register of suit land as owner. And relying on the grant of representation which had been issued in succession cause No 32 of 2011 at, the Defendants transferred the suit land from Maina Kamau to themselves. In the intervening period the Plaintiffs filed succession cause No 620 of 2013 seeking revocation of grant issued in Kerugoya SRM Court – suit No 32 of 2011.

13. From the said background the Plaintiffs are suing in their capacity as trustees of the clan that changed its name to Kiawathia Mumbuni the defence of the Defendants did not seek ownership in their counterclaim.

14. The Court has taken cognizance of the fact that Succession No 620 /2013 is pending for determination.

15. The issues for determination are; was the ownership of the suit land determined with finality by way of the orders issued in 280 of 2013 and 86 of 2017; whether an interlocutory injunction should be issued as pleaded; who pays the cost of the suit?

16. The answer to the first issue is no. The order in No 86 of 2017 reverted the land to Maina Kamau who going by the title on record was a trustee of the clan. Such situation makes it doubtful that the suit land formed part of the estate of Maina Kamau for which a succession can lawfully issue to the Defendants.

17. As to whether the interlocutory injunction should be issued, the Plaintiffs are seeking to show that the suit land was trust property. Prima facie there is evidence that Kamau Maina held the property in trust for the clan represented by the Plaintiffs as office bearers. In the same footing and entirely on a without prejudice to any decision that may be taken in 620 of 2013 there is all probability that the Plaintiffs have a reasonable cause of action. Damages is not sufficient as the land in question is clan asset and land being an emotive issue, the Court finds that damages will be sufficient. The balance of convenience tilts towards the Court granting an injunction.

18. If the case in HCCC No 620 of 2013 is successfully prosecuted the effect is to revert the title to suit land in the name of Maina Kamau for the clan now being registered as a self help group represented by the Plaintiffs. Save as aforesaid, the Court makes the following orders;

- a). a temporary injunction restraining the Respondents/Defendants either by themselves, their servants , agents , representative or workmen or any of them jointly or severally or otherwise howsoever from trespassing , occupying constructing cultivating or cutting standing trees ,

interfering with, transferring or in any other way alienating the parcel of land known as Title No. LOC. 13/GITUGI/1655 within Murang'a County pending the hearing and determination of this suit.

b). An order of inhibition is hereby placed on the Title No. LOC. 13/GITUGI/1655 inhibiting the registration of any dealings with the suit land until the hearing and determination of this suit.

c). This suit be stayed pending the hearing and determination of the HCCC No 620 of 2013.

d).The costs of this application to abide the main suit.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF MARCH 2018.

J G KEMEI

JUDGE