



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 151 OF 2017

JANE KANARIO STANLEY.....1ST PLAINTIFF

JOCELYN KANAU MWIRICHIA.....2ND PLAINTIFF

VERSUS

CLIFFORD MWONGERA.....1ST DEFENDANT

JOHN K. MWIRICHIA2ND DEFENDANT

KIMATHI S. MWIRICHIA.....3RD DEFENDANT

RUTH NDURU STANLEY4TH DEFENDANT

DAVID MUGO.....5TH DEFENDANT

MUTHURI RUFUS M'RINGERA6TH DEFENDANT

RULING

Background

1. This ruling is in respect of two applications. The one dated 11.5.2017 filed by plaintiffs and the one dated 15.6.2017 filed by 1st defendant. Plaintiffs as well as 1st, 2nd and 3rd defendants are all siblings. Their mother is 4th defendant. The 5th and 6th defendants are alleged to be purchasers of some of the parcels in dispute.

2. At the heart of the dispute is the properties which originally belonged to one Stanley Mwirichia who died in 1998. He is the father of plaintiffs and the 1st, 2nd and 3rd defendants, and he is husband of the 4th defendant. By the time Stanley died, he had effected transfers to some of his properties. The rest of the properties were distributed through succession.

3. The dispute has manifested itself in a rather acrimonious and vicious manner.

Application of 12.9.2017

4. In the application dated 11.5.2017, the orders sought by the plaintiffs are:

(i) Spent.

(ii) That the defendants/respondents be restrained by way of temporary injunction from harassing, chasing, wasting and or selling properties, interfering with applicant's occupation and utilization of suit lands particularly parcel numbers Abothuguchi/Mariene/980, 981, 982 until this application is heard and determined.

(iii) An order of inhibiting, preventing any further dealing with the registrations of parcel numbers Abothuguchi/Mariene/980, 981, 982, Ntima/Igoki/1797, plot no. 9 Kinjo market plots no. BII, 1849 and 850 within Meru municipality until hearing and determination of this application and until hearing and determination of this suit.

(iv) Any other orders that the court deems just for ends of justice to be met.

(v) Costs and interest.

5. The grounds in support of this application are:

(i) That the suit lands are family land and defendants are holding the same in trust for the plaintiffs herein.

(ii) That the plaintiffs are entitled to a share of the suit land.

(iii) That the 1st respondent has been trying to dispose off parcel no. Abothuguchi/Mariene/980 measuring about 5 ½ acres leaving out the plaintiffs landless and destitute and to that effect, the 1st defendant was scheduled to attend land board on 21.3.2017 to dispose off the land.

(iv) If the orders of inhibition are not issued, the plaintiffs will lose their entire livelihood and shall suffer irreparable loss.

6. 1st plaintiff has also sworn a supporting affidavit on her own behalf and on behalf of her sister (co-plaintiff) where she has deponed that their father died in 1998 leaving all the suit property under his name except parcel no. Ntima/Ntakira/1797 which he had transferred to their mother to hold the same in trust for the children.

7. Plaintiffs aver that although they are nine siblings, the 1st to 3rd defendants have fraudulently and secretly taken the family properties by coercing, confusing and cheating their mother, thus occasioning illegal and irregular transactions and registrations of the suit properties.

8. Plaintiff's also claim that all family members were born and brought up in parcel no. Abothuguchi/Mariene/980, which land belonged to their grandfather one Irura before it was passed on to their father Stanley Irura. The said parcel is adjacent to parcels no. 981 and 982.

9. The plaintiffs claim that they have recently discovered that parcel no. 980 is registered in favour of 1st defendant, whereas 981 is for 3rd defendant, and 982 is for 2nd defendant.

10. Plaintiffs further claim that 1st defendant is harassing them and is threatening to evict them. They also claim that 1st defendant has taken loans using the suit land and he has also brought buyers.

11. Plaintiffs contend that they utilize parcel no. Abothuguchi/Kariene/980 land measuring about 5 ½ acres as their home and that this is the source of their livelihood. They also claim that recently, they discovered that a succession cause no. 1938 was secretly filed in Nairobi whereby their father's land was distributed to 1st to 3rd defendants.

12. The application of the plaintiffs is opposed by 1st defendant through his replying affidavit filed on 24.5.2017 and by 6th defendant through his replying affidavit filed on 6.6.2017.

13. The 1st defendant avers that he is the registered proprietor of land title no. Abothuguchi/Mariene/980 the main subject matter to this application. He further avers that the plaintiffs/applicants have not come to this court with clean hands, but instead they have concealed material facts, for instance, that there are many other pieces of land that the deceased had sold and transferred to third parties and which, just like the suit land were not part of his estate at the time of his death.

14. 1st defendant contends that parcel no. Abothuguchi/Mariene/980 was never part of succession cause number 1938 of 2001, as the same had been transferred to him way back in 1995 before the death of their father.

15. 1st defendant further claims that in the aforesaid succession cause, distribution of the estate was done whereby plaintiffs were each given 5 acres of land at Ruiru and therefore the allegation that the defendants shared out the estate and locked them out of inheritance is meant to mislead this court.

16. 1st defendant also claims that 1st plaintiff is in fact married for 15 years and lives with her husband in a location away from the suit land and does not occupy the suit land, while the only time the 2nd plaintiff lived on the suit land was when 1st defendant had employed her to take care of their mother.

17. 1st defendant contends that 1st plaintiff is a fraudster and has on several occasions been convicted for fraud and that the said plaintiff has already fraudulently transferred plot no. Nkando/Mariene 15 "A" to themselves (plaintiffs) which plot, the 1st defendant inherited through the succession cause no. 1938 of 2001.

18. 1st defendant also claims that the interim orders granted to the plaintiffs barring him from selling the parcel of land is overtaken by events since the suit land was sold in December 2016 and he is in the process of obtaining consent to transfer the property to the purchasers which consent has been frustrated by the plaintiffs.

19. 1st defendant claims that as the registered owner, he has the right to deal with the land in whichever way he deems fit without any interference from the plaintiffs, since even the plaintiffs have been using their inheritance without interference from him.

20. The 6th defendant avers that he is not in occupation of, and he is not interested at all with L.R Nos. Abothuguchi/Mariene/980, 981, 982,

Ntima/Igoki/1797, market plots Nos. B11, 1849 and within Meru Municipality, but claims that plot no. 9 at Kinjo Market measuring 30 by 80 feet belongs to him having bought the same from the 4th defendant. He has been in occupation of this plot for over 17 years, whereby, he has also been paying rates for this property all this time.

Application of 15.6.2017 filed by 1st defendant

21. This application is more or less similar to the one filed by plaintiffs. The only difference is that in this application, the 1st defendant is seeking orders of injunction against plaintiffs restraining them from dealings in land no. Abothuguchi/Mariene/980. His (1st defendant) affidavit in support of this application is more or less similar to the one he filed in response to plaintiffs application.

22. A response to this application was also made via the affidavit of 2nd plaintiff (filed on 12.6.2017), where she avers that she was born on the parcel Abothuguchi/Mariene/980, she is raising her two children on this land and that her father never told her that she was to move out of this land at any time.

23. 2nd plaintiff also claims that family members were not aware that 1st defendant was the sole registered owner of the suit land despite having the title for over 23 years. She also states that their mother has no other land to leave on. The two plaintiffs are wondering where their mother will go if the suit land is sold. They further claim that all the buildings on the suit land were built by their father and they have been enjoying the said facilities all along.

24. The 3rd defendant has also filed an affidavit of 3.11.2017. He contends that before their father died, he had given and duly transferred most of his real property to his sons and whatever real property and financial assets remained under his name including a plot Ntima/Ntakira/3085 that he had transferred to 4th defendant should have been given to his two sisters (the plaintiffs) who were left in occupation of Abothuguchi/Mariene/980.

25. According to 3rd defendant, the assets which were left in their fathers name are : 2 plots at Kinjo Market, 1 plot at Mariene Market, Peugeot 304 station wagon, 2 acres at Makandune (Abothuguchi/Makandune/506), 1050 ordinary shares of Standard Chartered Bank Ltd and 824 ordinary shares of BAT Ltd (Marked KSM 3 and KSM 4).

26. The 3rd defendant claims that the reason their father did not transfer to the two sisters as he did to the sons was because at the time of his death one sister, the 1st plaintiff was a minor.

27. 3rd defendant avers that their father owned land parcel no. Abothuguchi/Mariene/977 which he subdivided to yield. Abothuguchi/Mariene/980, Abothuguchi/Mariene/981 and Abothuguchi/Mariene/982 and transferred these parcels to his sons. The other properties transferred jointly to the 1st, 2nd and 3rd defendants was Meru Municipality Block 2/71 which is at Meru CBD near Kenya Commercial Bank Meru Branch.

28. 3rd defendant contends that in light of these transfers and issuance of titles to 1st- 3rd defendants, these parties had absolutely no other claims on the estate of their father upon his death.

29. 3rd defendant claims that parcel no. Abothuguchi/Mariene/980 is the place their father built his farm house and where all the children grew up, hence even if he transferred this land to the 1st defendant, he left plaintiffs and their mother on it. As per the Meru customs, the 1st defendant was to hold the title in trust and it was incumbent upon him to live with others harmoniously and perpetually.

30. 3rd defendant claims that when their father passed on in 1998, the 1st, 2nd and the 4th defendants colluded and surreptitiously filed a succession case in Nairobi where the 2nd and 4th defendants appointed themselves administrators of the estate and they proceeded to forge signatures and eventually only 1st defendant and 4th defendant benefitted from the estate of Stanley. The 3rd defendant and plaintiffs have therefore started a process to have the grant in the succession cause annulled.

31. 3rd defendant views the 2nd defendant very negatively, claiming that the latter is the first born in their family who should be at the forefront of protecting his sisters but instead, he apparently prefers to stay in the IVORY TOWER. 3rd defendant claims that 1st defendant is violent.

Analysis and findings

32. The affidavit of 3rd defendant clearly indicates that he is on the side of the plaintiffs (his sisters).

33. At the infancy of this suit, the court detected the acrimonious nature of the dispute and requested that there be a scene visit report to be availed by the Deputy Registrar of this court. In the report, the Deputy Registrar was to capture information regarding who is in occupation of the suit land.

34. The court also directed that parties file submissions in respect of the two applications. No submissions were filed. However the scene visit report was availed to this court.

35. It is not disputed that 1st defendant is the registered owner of L.R No. 980 and that this is where the family of Stanley (Deceased) and Ruth (4th defendant) raised their children. It is also not disputed that 2nd defendant is the registered owner of parcel no. 982 whereas 3rd

defendant is the registered owner of parcel no. 981.

The scene visit report

36. From this report it emerged that there is a main house standing on parcel no. 980. The main house has a room which is like a store and there is a living room, a bed room and a kitchen. Still on parcel 980, there is a granary, chicken pen, pit latrine, a kitchen, two timber houses and a big store. There is also machinery in the big store, there are banana and maize plants, trees and honey combs. 2nd plaintiff stays on this land (980) while 1st plaintiff who is apparently married comes to cultivate the aforementioned parcel of land. The main house belonged to deceased (Stanley), whereas the machinery belongs to 1st defendant. The mother of the feuding siblings does not stay on parcel no. 980. She stays with 1st defendant elsewhere. Her husband apparently gave unto 1st defendant the parcel no 980 with all that was there on including the house.

37. The court has also seen a certificate of a confirmed grant in succession case no. 1938 of 2001 whereby the property of deceased Stanley Mwirichia Irura was distributed in the following manner:

(a) 2 plots at Kinjo market	Ruth Nduru Stanley
(b) 1 plot at Miriene Market	Clifford Mwongera
(c) Peugeot 304 station Wagon	Ruth Nduru Stanley
(d) 2 acres at Makandune	Ruth Nduru Stanley
(e) 1050 ordinary shares of standard Chartered	Clifford Mwongera
(f) 824 ordinary shares BAT	Clifford Mwongera
(g) 23 acres at Ruiru	Ruth Nduru Stanley (3 acres)
(h) “	Julia Nkatha (5 acres)
(i) “	Evalyne Kathure (5 acres)
(j) “	Jane Kanorio (5 acres)
(k) “	Jocelyn Kinanu (5 acres)

38. From the material so far presented before this court, it is clear that some of the property which had belonged to deceased (Stanley) was transferred to other persons before his death, where as other property was distributed through the succession case. It appears that the plaintiffs are staking a claim on all these properties on the basis of trust.

Property distributed via succession

39. A reading of paragraph 7 and 8 of the plaint reveals that plaintiffs were not satisfied with the way the estate of deceased was distributed. 3rd defendant has also stated that him and plaintiffs have embarked on the process of having the grant nullified as the succession cause was filed fraudulently.

40. This court has no jurisdiction to determine the legality (or illegality) of the distribution of the estate of the deceased. This court cannot therefore purport to give directions regarding the plots at Kinjo market, the plot at Mariene market, the land at Makandune, the land at Ruiru or any other property that was distributed through the succession cause.

Properties transferred during the life time of deceased

41. From the available evidence, the properties which were a transferred during the lifetime of Stanley are Land parcel No. 980 belonging to 1st defendant, 981 belonging to 3rd defendant and 982 belonging to 2nd defendant.

42. The plaintiffs do not reside on parcel no 981 and 982, and they are not the registered proprietors of these two properties. There is nothing to indicate that these two properties are in danger of being alienated. **In the circumstances, the injunctive and inhibition orders sought by the plaintiffs in respect of these two properties (no. 981 &982) are unmerited.**

43. At the heart of the dispute is land parcel no. 980 which is registered in name of 1st defendant who has availed a title deed to that effect. Although no documentary evidence has been availed regarding the registration of parcels no. 981 & 982 it is not disputed that they belong to 3rd and 2nd defendants respectively. The 3rd defendant has given an explanation that it is their father who subdivided his land no. Abothuguchi/Mariene/977 to yield 980, 981 and 982.

44. The two applications are basically seeking orders of injunction for plaintiffs against 1st defendant and vice versa. The court has to analyze the available material to see whether any of the parties deserves the orders sought for

45. This is a situation whereby one of the plaintiffs (2nd plaintiff) occupies the land no. 980. But the land parcel no. 980 belongs to 1st defendant. 1st defendant was issued with the title on 21.9.1995 during the life time of his father. There is no evidence as yet adduced to show that any fraud was used during the transfer. 3rd defendant (through his affidavit of 3.11.2017) admits that indeed their father transferred some of his properties (precisely land no. 980, 981 and 982) during his life time.

46. The effect of such registration is captured in section 27 of the registered land act (cap 300 now repealed) where it was provided that; **“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”** .

47. The green cards in respect of parcels no. 980, 981 and 982 all indicate that the three parcels were subdivisions of Land registration no. 977. They also reflect that the first registered owner was Stanley Mwirichia on 2.4.1990. There is nothing to indicate that this land belonged to Stanley’s father as alleged by the plaintiffs.

48. In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows: **“A prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”** From the material so far presented, it is 1st defendant who has established a prima facie case as the registered owner of parcel no.980.

49. Both plaintiffs and 1st defendant are claiming the family house and properties on land No. 980. However their mother has shed light on this aspect of the dispute. During the scene visit she clarified that the house belonged to her husband but that the house and whatever there is on it belong to 1st defendant. That is why she locked the house and asked 2nd plaintiff to leave. From the foregoing it is apparent that the mother of plaintiffs had made it clear to them (plaintiffs) that parcel no.980 was no longer their home. She even left this home just to emphasize her point.

50. It is quite apparent that 2nd plaintiff has not known any other home save the one known as no. 980. She has no other place of abode. The 1st defendant had apparently set out to operate a timber business which now cannot progress due to the wrangles. Both 2nd plaintiff and 1st defendant have high stakes on this land and in one way or the other they stand to suffer irreparable damages if the orders sought for are not granted. The court will have to weigh and balance their interests taking into account that the court cannot and will not resolve the dispute at this interlocutory stage.

51. As for 1st plaintiff, she does not reside on land no. 980. She is married and stays somewhere far from this land. It cannot be said that she stands to suffer irreparable damage if the orders she desires are not granted at this stage.

52. The confirmed grant clearly shows that each plaintiff was given five acres at Ruiri. The two plaintiffs have not commented on this aspect of the claim. This is not a situation whereby the plaintiffs are destitute as they claim. The plaintiffs have also stated that they don’t even know where their mother will reside if they leave land no. 980. However the mother of plaintiffs is emphatic that she is comfortable being away from this land. It has emerged that what she wants is for the two daughters to leave this land.

53. I must point out that plaintiffs have not demonstrated candidness in their quest for justice. For instance why do they claim that by the time their father died, the properties no. 980, 981 and 982 were still in their father’s name when clarity this is not the case? Why have they failed to be candid about the distribution of their father’s estate as per the confirmed grant. The grant was issued many years ago in year 2002, but no evidence has been availed to indicate that the same was challenged in a court of law.

54. It is quite apparent that the plaintiffs and 1st defendant do not see eye to eye. Never the less, they (particularly the 2nd plaintiff and 1st defendant) must strive to co-exist in light of the orders which the court will grant.

55. **Orders:**

(i) The 2nd plaintiff is to continue utilizing land parcel no 980 in the following terms; she will occupy the main house as her place of abode. She will also utilize the latrine, chicken pen and the kitchen. She will continue cultivating the portion of land which she has been utilizing where there are banana plants and maize crops. She is not to cause any damage to any of the property on the suit land 980. These orders are to remain in force for a period of six months only.

(ii) The 4th defendant is at liberty to also occupy the main house, kitchen and latrine. She is also at liberty to utilize any other part of this land with permission from 1st defendant excluding the portion being utilized by 2nd plaintiff.

(iii) The 1st defendant is hereby authorized to utilize all the structures found on parcel no. 980 except the main house, the chicken pen, and kitchen. In addition, the 1st defendant is at liberty to utilize the rest of the land parcel no 980 save the portion with banana and maize plants which is being utilized by 2nd plaintiff.

(iv) The 1st defendant is hereby estopped from alienating the land parcel no.980 until further orders are given by the court.

(v) The 1st plaintiff is hereby estopped from utilizing any part of land parcel no.980.

(vi) The orders given herein are to remain in force for a period of six months only and within this time, parties should be ready for the trial of the main suit.

(vii) This being a family matter I direct that each party bears their own costs save that 6th defendant (who is not a family member) who is to get costs from plaintiffs in respect of the application of 23.5.2017.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 18TH DAY OF JULY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Mr. Kaume for plaintiffs

Miss Wanjohi for Kiogora A. for 6th defendant

Mr. Gikonyo for 1st & 4th defendant

Plaintiffs

6th defendant

HON. LUCY. N. MBUGUA

ELC JUDGE