REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 23 OF 2016

CYRUS MURIUKI MATHANGANI.....PLAINTIFF/APPLICANT

-VERSUS-

ROSE WANJIKU MBAI.....DEFENDANT/RESPONDENT

RULING

Background

1.On **25th May 2016,** the plaintiff ("applicant") filed the notice of motion seeking to restrain the defendant ("respondent") her agents and/or servants from interfering with the plaintiff's possession and use of land parcel **No. Kirimukuyu/Kiria/363** ("the suit property") or any subdivision thereof, pending the hearing and determination of the application and the suit.

2. The application is premised on the grounds on its face and is supported by the applicant's affidavit sworn on **25th May, 2016.** He depones that he is the beneficial owner of two-thirds of the suit property and the respondent is entitled to the remaining one-third; that he exchanged the one-third portion held by the respondent with his brother Justus Bai (deceased) for parcel No. Iriaini/Kairia/136. It is his contention that the respondent's actions to survey and subdivide the suit property are adversely affecting his extensive developments therein.

3.In reply and opposition to the application, the respondent filed an affidavit sworn on **8th June, 2016** in which she depones that the matter of the alleged exchange with her portion of the suit property was extensively canvassed in the judgment of **Kasango J** delivered on 18th December, 2008 in Nyeri High Court Succession Cause No 489 of 2006; that the applicant's attempt to appeal against the judgment did not succeed; that the survey activities on the suit property are only confined to the one-third portion which the court found to be rightfully hers; that she was only executing the order issued by the court on 5th March, 2009 and therefore cannot be said to have trespassed on the applicant's portion of the suit land.

4. The application was disposed off by way of written submissions.

The applicant's submissions

5.The applicant submitted that he has established a *prima facie* case and deserves the orders sought. In his view, theexchange of parcel No.136 with the suit property created a constructive trust. He relied on the cases of **Yaxley v Gotts & another [2000] 1 All ER 711** and **Banner Homes Group PLC v Luff Development Ltd [2000] 2 All ER 111.**

6. It is his contention that the High court had no jurisdiction to determine the issue of trust under **Rule 41(3)** of the Probate and Administration Rules. He relied on the following cases to buttress this point: **Re the Estate of Richard Karanja Javan (Deceased) [2014] eKLR, Re the Estate of Julius Wachira (Deceased) [2013] eKLR** and **Re the Estate of Tapnyobi Chemurer Leldayet (Deceased) [2011] eKLR.**

7. He further submits that he will suffer irreparable loss if the injunction is not granted as he has developed the suit property extensively and that the balance of convenience tilts in his favour since he has been in occupation of the suit land property from 1979 todate. He relied on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR.**

The respondent's submissions

8.The respondent submitted that the applicant has not met the conditions set out in the case of **Giella v Cassman Brown [1973] EA 358;** that the applicant has not established a *prima facie* case since he refused to comply with the order issued on 5th March, 2009 to subdivide the suit property following the judgment of **Kasango J** in Nyeri High Court Succession Cause No 489 of 2006 and also failed to comply with further orders of the court granted on 23rd September, 2015 directing him to execute the necessary transfer documents in favour of the respondent failure of which the Deputy Registrar to execute the aforesaid documents for transfer.

9. She further submits that the applicant will not suffer any irreparable loss as he is in occupation of his rightful two-thirds portion; does not occupy her one-third portion of the suit property and has no developments therein. It is her contention that if the orders sought are granted, she will be the one to suffer irreparable harm which cannot easily be compensated by way of damages because she has planted coffee, Napier grass and built her house therein. According to her, the balance of convenience also tilts in her favour since each party is occupying their respective portions which status should be maintained.

Analysis and determination

10. In considering the application before me, I am guided by the principles set out by **Spry VP** in the case of **Giella v Cassman Brown and Co. Ltd & Another** [1973] E.A. 358; that the applicant must first show a prima facie case with a probability of success; Secondly, the applicant must demonstrate irreparable injury, which would not adequately be compensated by an award of damages and thirdly, where the court is in doubt, it will decide the application on the balance of convenience.

11. From the pleadings and submissions filed, I find the issue for determination to be whether the applicant has satisfied the above conditions to be granted the orders sought.

12.At this interlocutory stage, this court is not required to make any final findings on the facts as pleaded which are expressly reserved for determination at the trial as stated in the case of **American Cyanamid Co. v Ethicon Limited (1975) 1 ALL ER 504** at 509 thus;

> **"It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."**

13.It is common ground that the suit property was subject of Nyeri High Court Succession Cause No 489 of 2006; that judgment was entered in favour of the respondent on 18th December, 2008 and that the applicant was denied leave to appeal against the aforesaid judgment.

14. In the aforesaid judgment, **Kasango J** on page 6 paragraph 2 held as follows:

> "**Parcel No 136 as stated by Rose is not part of the estate. The judgment of this court is that Kirimukuyu/Kiria/363 be divided with Rose Wanjiku Mbai getting one third of it and Cyrus**

Muriuki Mathangani getting two thirds of it. There shall be no orders as to costs."

15.The applicant has submitted that the reason why the he filed the instant suit is because the High court lacked jurisdiction to determine the issue of constructive trust and for that reason, Kasango J did not determine this issue. Even if this argument was correct, no explanation has been given by the applicant why he did not institute a separate claim regarding the issue of constructive trust before and during the succession proceedings. It is noteworthy, that in 2006 when this suit was filed, and in 2008 when **Kasango J** delivered her judgment, up until 2012, the High court had jurisdiction to hear and determine land matters and claims on all kinds of trust. Even after his attempt to appeal against the judgment of **Kasango J** failed, the applicant still did nothing. He went to sleep and only woke up from his slumber when the respondent obtained an order on 1st October, 2015 authorising the Deputy Registrar to execute the necessary documents for transfer for the one third portion of the suit property in favour of the respondent if the applicant failed to sign the aforesaid documents.

16. I have also noted from the pleadings that when the applicant filed this suit, although he disclosed that there was a succession matter, he did not disclose the full facts. He failed to disclose that judgment had been rendered against him in the succession case; his attempt to appeal against the judgment had failed and an order had been issued to the respondent on 1st October, 2015 ordering the applicant to sign the necessary transfer documents.

17. **Onguto J** in **Esther Muthoni Passaris v Charles Kanyuga & 2 others [2015] eKLR** observed the following regarding material non disclosure;

> **"So strong is the rule that where disclosure has not been met the court will not even decide the applicant's application on its merits. In Ex parte Princess Edmond de Polignac [1917] 1 KB 486, Washington L. J stated as follows at page 509:**
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> **"It is perfectly well established that a person who makes an ex parte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him".**

18. Considering the above actions by the applicant, it is clear that he does not deserve the orders sought. Consequently, I dismiss the application dated 25th May, 2016 with costs to the respondent.

Dated, Signed and Delivered at Nyeri this 9th day of February, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. King'ori for the applicant

N/A for the respondent

Court clerk - Esther