



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 14 OF 2017

HANNAH WANGUI MATHENGE.....1ST PLAINTIFF/APPLICANT

PETER WAMUGU MATHENGE.....2ND PLAINTIFF/APPLICANT

EUNICE KARU MATHENGE.....3RD PLAINTIFF/APPLICANT

VERSUS

ROSE MUTHONI MATHENGE.....DEFENDANT/RESPONDENT

RULING

The plaintiffs herein filed this suit on 2nd February 2017 seeking the main order that the defendant holds land parcel No. MUTIRA/KAGUYU/1142 in trust for herself and the plaintiffs and that the said trust be terminated and the said parcel of land (herein the suit land) be sub-divided into four portions to be transferred to the defendant and each of the plaintiffs. The plaintiffs claim is premised on the pleading that the original land parcels No. MUTIRA/KAGUYU/96 was registered in the names of one **GERISHON MATHENGE** (deceased) the husband to the 1st plaintiff and mother to the 2nd and 3rd plaintiffs and the defendant. That during his life-time, the deceased sub-divided land parcel No. MUTIRA/KAGUYU/96 into MUTIRA/KAGUYU/1142 and 1143 and the suit land was registered in the names of the defendant to hold in trust for the family while parcel No. MUTIRA/KAGUYU/1143 was sold. The defendant has refused to terminate the trust and has threatened to sell the suit land thus necessitating the filing of this suit.

Simultaneously with the plaint, the plaintiffs have moved this Court by their Notice of Motion brought under **Section 68 of the Land Registration Act** and **Order 40 Rules 1 and 4 of the Civil Procedure Rules** seeking the following orders:

(a) Spent.

(b) Spent.

(c) That an inhibition do issue against L.R No. MUTIRA/KAGUYU/1142 inhibiting any dealings with the said land until this suit is heard and determined.

(d) That the defendant be restrained from sub-dividing, transferring, alienating, leasing or in any way disposing of L.R No. MUTIRA/KAGUYU/1142 until this suit is heard and determined.

The application which is the subject of this ruling is based on the grounds set out therein and supported by the affidavit of the 2nd plaintiff **PETER WAMUGU MATHENGE** in which he has deponed, inter alia,

that the 1st plaintiff is the wife of the deceased while the 2nd and 3rd plaintiffs and the defendant are siblings. That the suit land is a sub-division of land parcel No. MUTIRA/KAGUYU/96 which was registered in the names of their late father by his **UITHIRANDU CLAN** to hold in trust for himself and his family. That their late father subsequently divided the land and sold one portion and the other portion which is the suit land was registered in the names of the defendant to hold in trust for herself and the other parties who all live thereon. The defendant has however refused to terminate the trust and give the other parties their portions and intends to sell the suit land.

The defendant filed grounds of opposition to the application describing it as lacking merit since she is the sole proprietor of the suit land and does not hold it in trust for anybody. She also filed a replying affidavit stating that the 1st plaintiff has been sick with memory lapse and could not therefore have filed the suit. A medical report was annexed (annexture **RMM 1**). She also deponed that the original land MUTIRA/KAGUYU/96 was registered in the deceased's names and he had used it to secure a loan which he could not pay and so she paid it to protect the land. That the original land was later sub-divided into two portions and the suit land was transferred to her as a gift by the deceased to compensate for the money which she had repaid the bank. That it is only the 2nd and 3rd plaintiffs who are claiming the suit land while their other siblings have their own land elsewhere. That although the Green Card shows that the suit land was a gift to her, she infact purchased it and the 3rd plaintiff stays in Nairobi and should not claim the suit land.

The application was canvassed by way of written submissions which have been filed both by the firm of **WANJIRU WAMBUGU** Advocate for the plaintiffs and **J. NDANA & CO.** Advocates for the defendant.

I have considered the application, the rival affidavits and grounds of opposition, the annexures thereto as well as the submissions by counsel.

It is clear from the Green Card to land parcel No. MUTIRA/KAGUYU/96 that it was originally registered in the names of the deceased before its sub-division on 7th December 1977 to give rise to the suit land which was then registered in the names of the defendant as a gift. It is the plaintiffs case however that they have always lived on the suit land which the defendant holds in trust for the plaintiffs and herself. The defendant's case is that she infact purchased the suit land and the 1st plaintiff could not have filed this suit as she is not in a position to do so while the 3rd plaintiff lives in Nairobi. Whether the suit land is held by the defendant in trust for the plaintiffs or whether it is infact the defendant's private property will be a matter for the trial Court. While the defendant has deponed that the 1st plaintiff is un-well and could not have filed this suit, she has not rebutted the claims that the 1st and 2nd plaintiffs live thereon. She has only said the 3rd plaintiff lives in Nairobi. Further, the plaintiffs claim that the children of their other siblings **MARY HIUKU MATHENGE** and **JOSEPH MURIUKI MATHENGE** (both deceased) have also lived on the suit land. It is not rebutted. They are therefore in occupation of the suit land.

The plaintiffs seek orders of inhibition and temporary injunction and I shall therefore consider both remedies.

INHIBITION

Section 68 (1) of the Land Registration Act reads as follows:

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”

An order of inhibition, as was held by **OKWENGU J.** (as she then was) in **PHILIP MWANGI GITHINJI VS GRACE MAKARIMA GITHINJI (2004) e K.L.R.** is akin to an order of prohibitory injunction since it restricts the registered owner and any other person from making any transaction thereon pending the determination of the suit. In granting such an order, the Court will take into account various considerations including:

- 1. Whether the suit land is at risk of being disposed or alienated to the detriment of the applicant.**
- 2. Whether the refusal to grant the order of inhibition would render the applicant's suit nugatory.**
- 3. Whether the applicant has an arguable case.**
- 4. Whether the grant of the order will prejudice the other party.**

I have taken all those into account and bearing in mind that the suit land originally belonged to the deceased and the plaintiffs, at least some of them, reside thereon, it would be in the interest of justice that an order of inhibition is issued. Such an order will not prejudice the defendant who still holds the title to the suit land and if it is alienated before the trial, the plaintiff's case will be rendered nugatory. The order of inhibition is therefore well merited and I allow it.

TEMPORARY INJUNCTION

The conditions for the grant of a temporary injunction are well settled and the applicant must show:

- 1. A prima facie case with a probability of success at the trial.**
- 2. Such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.**
- 3. If the Court is in doubt, it will decide such an application on a balance of convenience – *GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358.***

The purpose of a temporary injunction is to conserve or preserve the suit land pending the determination of the case in which such property is in dispute. In this case, the Court is faced with a defendant who is the registered proprietor of the suit land and plaintiffs who are in occupation thereof and who claim an interest in the suit land in trust. None of those claims can be determined in this application. In my view, this application will be determined on the balance of convenience and in doing so, I am guided by the decision in **FILMS ROVER INTERNATIONAL LTD VS CANNON FILMS SALES LTD 1986 3 ALL ER 772** that the Court should aim at taking the course that appears to carry the lower risk of injustice should it turn out to have been "**wrong**". Bearing in mind that the plaintiffs are on the suit land, to deny them the remedy of an injunction pending trial would have the effect of dispossessing them of the same. That would be a great injustice to the plaintiffs. The defendant has deponed that the 1st plaintiff is sick and has memory lapses and could not therefore have filed this suit. For now, the Court can only presume that the plaint is properly filed by parties competent to do so until the contrary is proved. In the circumstances of this case, the interests of justice will best be served if this Court grants the order of temporary injunction pending trial.

Ultimately therefore, and upon considering all the circumstances in this case, I allow the plaintiff's Notice of Motion dated 31st January 2017 and filed herein on 2nd February 2017 in the following terms:

- 1. An order of inhibition inhibiting any dealings on land parcel No. MUTIRA/KAGUYU/142 until this suit is heard and determined.**
- 2. An order of temporary injunction restraining the defendant from sub-dividing, transferring, alienating, leasing or in any other way disposing land parcel No. MUTIRA/KAGUYU/142 pending the hearing of this suit.**
- 3. The parties to comply with pre-trial directions so that this suit is heard and determined within the next twelve (12) months.**
- 4. There shall be no order as to costs of this application.**

B.N. OLAO

JUDGE

19TH MAY, 2017

Ruling dated, delivered and signed in open Court this 19th day of May 2017

Mr. Magee for Mr. Ndana for Respondent present

Mr. Mwangi for Ms Wambugu for Applicants present.

B.N. OLAO

JUDGE

19TH MAY, 2017