



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 776 OF 2016

ANN NGINA MUTISYA.....PLAINTIFF

=VERSUS=

SAMMY NGUGI NGINA.....DEFENDANT

R U L I N G

1. Parties to this suit are mother and son. They are currently registered as absolute proprietors in common of Land Title Numbers: Dagoretti/Waithaka/804, Dagoretti/Waithaka/805, Dagoretti/Waithaka/806 and Dagoretti/Waithaka/807 (hereinafter referred to as “**Parcel Nos. 804, 805, 806 and 807 respectively**”). Original Title Deeds to the four parcels of land are held by the Defendant. In addition to the above four parcels, the Defendant is also currently registered as the absolute sole proprietor of Land Title Number: Dagoretti/Waithaka/816 (hereinafter referred to as “**Parcel Number 816.**”). All the five parcels of land were previously part of Parcel Number: Dagoretti/Waithaka/167 which belonged to the late Paul Mutuku Mutisya. Upon the death of Paul Mutuku Mutisya, the five pieces of land together with others not in this dispute, were inherited by Paul Mutuku Mutisya’s mother Esther Njeri Wagakura. Transfers to the current proprietors were executed by the Deceased, Esther Njeri Wagakura, mother to the Plaintiff and grandmother to the Defendant [hereinafter referred to as “**the Deceased**”].
2. The Plaintiff contends that the intention of the Deceased was to transfer all the five parcels of land to the parties to this suit as proprietors in common, to hold the same in trust for all the 8 Children of the Plaintiff. She further contends that the Defendant, unknown to the Plaintiff, lied to the Deceased to execute consent and transfer papers transferring Parcel No. 816 to the Defendant as the sole absolute proprietor.
3. On 11/7/2016, the Plaintiff brought this suit seeking three principal prayers; 1) an order cancelling the Defendant’s title to Parcel No. 816 and converting it to joint ownership by the two parties to this suit as trustees for all the Plaintiff’s children; 2) a declaration that Title Nos Dagoretti/Waithaka/804, 805, 806, 807 and 816 are held in the joint names of the Plaintiff and the Defendant as trustees for the Plaintiff and all the Plaintiff’s children; and 3) an order compelling the Defendant to release to the Plaintiff all the original title deeds for the five suit properties.
4. Together with the Plaintiff, the Plaintiff brought a Notice of Motion dated 9/7/2016 seeking interim orders of injunction restraining the Defendant against trespassing into, selling, transferring, constructing on, demolishing any fence or in any other way alienating parcel No. 816. In addition, she seeks a mandatory injunction compelling the Defendant to release to the Plaintiff original title deeds to all the five suit properties. This Ruling relates to this particular Notice of Motion by the Plaintiff dated 9/7/2016.
5. The Application is supported by the Plaintiff’s affidavit sworn on 9/7/2016 in which she reiterates the

allegations outlined above. She has attached to the said Affidavit copy of Land Certificate for Dagoretti/Waithaka-167, Copy of Certificate of Confirmation of Grant in respect of the Estate of the Late Paul Mutuku Mutisya in which the five parcels of land together with other parcels of land were given to Esther Njeri Wagakura in Nairobi High Court Succession Cause No. 2786 of 1999, Certificate of Death of Esther Njeri Wagakura and Copies of Title Deeds for all the five suit properties.

6. The Defendant opposes the Application through a Replying Affidavit sworn by him on 21/7/2016. He contends that his Grandmother (Esther Njeri Wagakura) was worried about the Plaintiff's behavior in that the Plaintiff wanted to sell all the suit properties. To safeguard against that, the Deceased caused the suit properties to be registered in the joint names of the Plaintiff and the Defendant to hold the same on their own behalf and in trust for the Plaintiff and the Defendant's brothers; Peter Mutisya Ngina and Paul Mutuku Ngina. He further contends that Esther Njeri Wagakura procured consent and transferred parcel No. 816 to him. He denies the allegation that Parcel No. 816 is trust property. He faults the Plaintiff for unilaterally selling part of the jointly held property which is trust property.

7. The question to be answered in this Ruling is whether or not the Applicant has satisfied the criteria for grant of an interlocutory injunction as spelt out in **Giella Vs Cassman Brown**. In summary, the Plaintiff must establish that she has a prima facie case with a probability of success; that she will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted; and if the court is in doubt, the application is to be determined on a balance of convenience.

8. Both parties agree that Parcel Numbers 804, 805, 806 and 807 are held by them jointly on their own behalf and in trust for other beneficiaries. The Plaintiff contends that all her eight children are beneficiaries to the five parcels. The Defendant in Paragraph 7 of the Replying Affidavit only recognizes the Plaintiff, himself and his two brothers, Peter Mutisya Ngina and Paul Mutuku Ngina as the only beneficiaries to Parcel Numbers 804, 805, 806 and 807. He further contends that Parcel Number 816 is not one of the trust properties.

9. In an application for injunction, courts are enjoined to exercise caution and avoid delving deep into parties' cases or appearing to make final or conclusive pronouncements on questions before them. What is required of me at this stage is to establish if the Applicant has presented a prima facie case with a probability of success. I will first make some pronouncements on Parcel No. 816 and thereafter deal with Parcel Numbers 804, 805, 806 and 807.

10. The Plaintiff's Application has two limbs. The first limb seeks interim restraining orders in respect of Title Number: Dagoretti/Waithaka/816. The second limb seeks a mandatory injunction in respect of all the five parcels. The Defendant is the sole registered proprietor of Title Number: Dagoretti/Waithaka/816. Under Section 24(a) of the Land Registration Act, the registration of a person as the proprietor of land vests in that person the absolute ownership of that land, together with all rights and privileges belonging or appurtenant to the title. Under Section 25(1) of the Land Registration Act, the rights of a proprietor are indefeasible except as provided in the Act. These rights are held by the proprietor, together with all privileges and appurtenances belonging to the title, free from all other interests and claims whatsoever, but subject only to the encumbrances and overriding interests specified in Section 25(1) (a) and Section 28 of the Land Registration Act and to the duty and obligations of a proprietor holding title as a trustee.

11. Article 40 of the Constitution of Kenya protects the right to acquire property either individually or in association with others. It also provides a broad framework of principles ring-fencing the right to enjoy the benefits and privileges accruing from ownership of property.

12. Section 28 provides a framework aimed at protecting equitable rights accruing pursuant to a trust. It provides as follows:

“28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:-

- (a) spousal rights over matrimonial property;**
- (b) trusts including customary trusts;**
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;**
- (d) natural rights of light, air, water and support;**
- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;**
- (f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;**
- (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;**
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;**
- (i) electric supply lines, telephone and telegraphs lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and**
- (j) any other rights provided under any written law.”**

13. In essence, the Plaintiff seeks to challenge the rights conferred upon the Defendant as a registered proprietor of land under Section 24(b) of the Act. The grounds upon which a registered proprietor's rights may be challenged are spelt out under Section 26(1) of the Land Registration Act. Those grounds are fraud, or misrepresentation to which the registered proprietor is a party, procedural illegality or illegality arising from a corrupt scheme. A party seeking to annul a title on the basis of any of the above grounds has a statutory obligation under Sections 107, 108 and 109 of the Evidence Act to present to the court evidence in support of the ground.

14. It is not disputed that the Deceased executed a transfer in favour of the Defendant in respect of Parcel Number 816. It is also not in dispute that she signed the Application for consent. The Plaintiff asserts that the Deceased's signatures were procured by the Defendant through fraud. There is, however, no evidence presented to court to support the allegation of fraud or any of the vitiating grounds set out in Section 26 of the Land Registration Act. In this regard, I am not satisfied that at this point the Plaintiff/Applicant has established a prima facie case in support of the first limb of the Application.

15. The second limb of the Application seeks a mandatory injunction compelling the Defendant to deliver to the Plaintiff Title Deeds for the five parcels of land. Parties to this suit are proprietors in common in respect of Parcel Numbers 804, 805, 806 and 807 and they both concede that the four properties are held in trust. The extent of the trust is what is in dispute. Section 30(4) provides some general framework on receipt and custody of instruments of title involving more than one proprietor. It provides as follows:-

“if there is more than one proprietor, unless they are tenants in common, the proprietors shall agree among themselves on which of them shall receive the certificate of title or the certificate of lease, and if they fail to agree, the certificate of title or the certificate of lease shall be filed in the registry”

16. In my view, either of the proprietors is entitled to receive and keep safe custody of the titles. From the material presented to the court, it would appear that there was initially no dispute about custody of Title instruments relating to the suit properties. The dispute arose when the Plaintiff purported to sell

Title Number Dagoretti/Waithaka/807 **[the Agreement refers to parcel No. 807 but the Plaintiff refers to Parcel No. 816]**. After receiving purchase price, she approached the Defendant and sought Title instrument to the property. The Defendant declined to give her the Title. At this point, it is not clear why and with whose authority the Plaintiff purported to sell what she clearly acknowledges to be trust property.

17. I have deliberately elected to say little about this dispute and the parties because at this point caution ought to be exercised to avoid exposing the litigants to any form of prejudice or appearing to make final findings on key issues in the dispute.

18. I would have dismissed the Plaintiff's Application with costs were it not for the fact that four out of the five Titles are acknowledged to be trust properties and there is evidence of intermeddling. In the interest of justice to both parties herein and to the beneficiaries, I would make the following orders in disposing the Plaintiff's Application dated 9/7/2016.

(a) There shall be a preservative order to the effect that both parties herein are restrained against disposing, alienating, charging or intermeddling in Title Numbers Dagoretti/Waithaka/804, Dagoretti/Waithaka/805, Dagoretti/Waithaka/806 and Dagoretti/Waithaka/807 which they have both acknowledged to be holding in trust for themselves and for other beneficiaries.

(b) Title Deeds to the said four parcels of land shall be deposited in a bank for safe keeping and both registered proprietors shall be mandatory signatories to all withdrawal instructions relating to the Titles.

(c) Parties shall prepare this suit for hearing within the time frame to be set by the court at the time of reading this Ruling.

(d) Because parties to this suit are members of the same family, there will be no order as to costs.

Dated, signed and delivered at Nairobi on this 18th day of May 2017.

B M EBOSO

J U D G E

In the presence of:-

Jakech holding brief for Muchira- Advocate for the Plaintiff

Waithera holding brief for Wandaka-Advocate for the Defendants

Kevin-Court clerk