



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT EMBU

ELC CASE NO. 186 OF 2014

KINYUA KAREKO.....PLAINTIFF/APPLICANT

VERSUS

KITHAKA KAREKO.....DEFENDANT/RESPONDENT

R U L I N G

- 1) By a Plaint dated and filed on the 7th October 2013, the Plaintiff sued the Defendant, his step brother, alleging the latter's violation of trusteeship with respect to Title Nos. **KAGAARI/KIGAA/867** and **KAGAARI/GIKURI/T.63** in respect of which the Defendant was registered as proprietor.
- 2) It was pleaded by the Plaintiff that their late father Kareko Njau was the owner of the said parcels of land during his lifetime and that the Defendant was registered as proprietor in trust for the rest of the family members who have a beneficial interest therein.
- 3) The Plaintiff also pleaded that he had filed a case before the Land Disputes Tribunal being LTD No. 52 of 2010 which was decided in his favor and the resultant award adopted by the court in Embu CMCC No. 26 of 2015. He therefore prayed for a declaration that the Defendant is in violation of the trusteeship with respect of the two parcels together with costs of the suit. It would appear that there was an oversight on the part of the Plaintiff in seeking an order for determination of the trust and for division of the property.
- 4) It would appear from the record that despite of service of summons, the Defendant defaulted in entering appearance and filing a defence in consequence of which interlocutory judgment was entered against him on or about 22nd January 2014.
- 5) On or about 7th January 2016, the Plaintiff filed an application for interlocutory injunction Order 0.40 of the CPR under certificate of urgency seeking an order of inhibition forbidding any dealings with the two aforesaid properties until disposal of the suit or further orders of the court.
- 6) The grounds of the application stated, *inter alia*, that the Defendant was in the process of selling the land to strangers while this suit was still pending an act which may render the suit nugatory.
- 7) The application was supported by the supporting affidavit of the Plaintiff sworn on 7th January 2016 in which he reiterated the grounds of the application and deponed that the Defendant was not the absolute owner of the suit properties but that he was registered on behalf of the entire family of their late father. He urged the court to issue the orders sought in order to preserve the subject matter of the suit to facilitate a fair determination of the suit.
- 8) The Defendant did not file a replying affidavit or grounds of opposition to the said application but he

appeared personally at the hearing hereof on 4th April 2017 ready to oppose the application.

9) During the hearing on 4th April 2017, the Plaintiff prosecuted his said application and urged the court to grant the orders of inhibition sought. He relied upon the grounds stated in the application and the supporting affidavit. He maintained that the two properties belonged to his late father and that the Defendant, who is his step brother, wanted to take everything and leave him without an inheritance.

10) The court allowed the Defendant to respond to the application even though he had neither filed a replying affidavit nor grounds of opposition thereto. He conceded that the two properties belonged to their late father but stated that Title No. **KAGAARI/GIKUURI/T.63** had not been fully paid for by the time their father died. He stated that there was an outstanding balance of 2 goats on account of the purchase price.

11) The Defendant also stated that it was the wish of his late father that he should inherit parcel No. 786. He therefore left the other parcel No. T.63 to the Plaintiff. He maintained that the orders sought should not be granted.

12) The main issue for consideration is whether the Plaintiff has met the requirements for the grant of an order of injunction as set out in the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**.

13) The parties herein are step brothers who are fighting over inheritance of properties left by their late father. The first property T.63 measures 0.05 ha whereas the other parcel No. 786 measures 1.09 ha. The Defendant has apparently taken the bigger parcel claiming that it was the wish of his late father that he should inherit the same. No evidence of any oral or written will was adduced by the Defendant to that effect.

14) On the basis of the material on record, coupled with the Defendant's admission that the properties were bought by their late father, the court is satisfied that the Plaintiff has made out a *prima facie* case with a probability of success on the basis of the pleaded customary law trust. The Plaintiff has, therefore, satisfied the first principle for the grant of an order of injunction.

15) The second principle relates to adequacy or otherwise of monetary damages should the action succeed at the trial. It is clear from the record that the two properties were the only parcels which the late father of the parties had. The Plaintiff stated in his application that he has been living on one of the properties for over 40 years and he has no other place to call home. The court is satisfied that the plaintiff would suffer irreparable harm should the suit properties be sold before the suit is heard and determined. It is, therefore, not necessary to consider the third principle on the balance of convenience.

16) The upshot of the foregoing of that the Plaintiff's Notice of Motion dated 7th January 2016 has merit and the same is hereby allowed in terms of prayer No. 2. Costs of the application shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Embu on **11th** day of **May** 2017 in the presence of the Plaintiff in person and in the absence of the Defendant.

ANGIMA Y M

ELC JUDGE