



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC SUIT NO. 18 OF 2015**

**SARAH WAIMAITHA KIHARA**

**KURIA KIHARA WAITHAKA**

**CHIERA WAITHAKA (All suing as the Administrators**

**of the Estate of KIHARA WAITHAKA (Deceased).....PLAINTIFFS**

**VERSUS**

**ROBERT MACHARIA MUTHAMA.....DEFENDANT**

**RULING**

What is before me is the Plaintiff's Notice of Motion application dated 1<sup>st</sup> April 2015 seeking a temporary injunction to restrain the Defendant from transferring, charging, offering for sale or disposing of all those parcels of land known as L.R No. Kajiado/Ntashart/325, 326, 327, 328, 329, 330,331,332,333,334,335,336,337, 341, 342, 343, 345, 346, 347, 348, 349, 350, 360, 361, 362, 363, 7630, 7631, 7632 and 7633 pending the hearing and determination of this suit. The application was supported by the affidavit and further affidavit sworn by the 2<sup>nd</sup> Defendant, Kuria Kihara Waithaka sworn on 1<sup>st</sup> April 2015 and 12<sup>th</sup> May 2016 respectively. The Plaintiffs are the administrator of the estate of one, Kihara Waithaka ("hereinafter referred to only as "the deceased"). The Plaintiffs application was brought on the grounds that at all material times, the deceased and the Defendant were registered as proprietors in common of all those parcels of land known as LR No. Kajiado/Ntashart/55, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 341, 342, 343, 345, 346, 347, 348, 349, 350, 360, 361, 362 and 363. The Plaintiffs averred that the deceased and the Defendant purchased the said parcels of land through monies which they borrowed from Pan African Bank Ltd. The Plaintiffs averred that although the titles for the suit properties were issued in the joint names of the deceased and the Defendant, it was the intention of the parties that the said properties be owned in common in equal shares. The Plaintiffs averred that the deceased died on 6<sup>th</sup> April 2003 and they were issued with a Grant of Letters of Administration intestate in respect of his estate on 27<sup>th</sup> February, 2004. The Plaintiffs averred that they came to discover that the Defendant had caused some of the suit properties namely L.R No. Kajiado/Ntashart/326 - 337, 341, 342, 345 – 350, 362 and 363 to be registered in his sole name to the exclusion of the estate of the deceased. The Plaintiffs averred that they also discovered that the Defendant had illegally subdivided L.R No. Kajiado/Ntashart/55 into four portions namely, L.R No. Kajiado/Ntashart/7630, 7631, 7632 and 7633 and unlawfully caused L.R No. 7630 and 7631 to be transferred to his name and L.R No. Kajiado/Ntashart/7631 and 7632 to be transferred to a company known as Hamas Limited. The Plaintiffs averred further that the Defendant was in the process of transferring LR. No. Kajiado/Ntashart/343, 348, 360 and 361 to his sole name in disregard of the interest of the estate of the deceased in the said properties. The Plaintiffs contended that the registration of the

Defendant as the sole and absolute owner of L.R. No. Kajiado/Ntashart/326 – 337, 341, 342, 345-350, 362 and 363 and the sub-division of L.R No. Kajiado/Ntashart/55 into L.R No. Kajiado/Ntashart/7630 – 7633 and the sale and transfer of L.R No. Kajiado/Ntashart/7631 and 7632 to Hamas Limited were carried out fraudulently. The Plaintiffs averred that the Defendant was in the process sub-dividing and selling the suit properties which have not been sold unless restrained by the court. The plaintiffs averred that they stand to suffer irreparable injury which cannot be compensated in damages if the orders sought are not granted. The Plaintiffs annexed to the supporting affidavit of the 2<sup>nd</sup> Plaintiff copies of title deeds showing that the suit properties were initially registered in the joint names of the deceased and the Defendant and that some of the suit properties were subsequently transferred to the sole name of the Defendant in the year 2014. The Plaintiffs also annexed a copy of the extract of the register of L.R No. Kajiado/Ntashart/55 and copies of certificates of official search showing that the said parcel of was sub-divided into L.R. No. Kajiado/Ntashart/7630-7633 and that L.R No. Kajiado/Ntashart/7630 and 7633 were transferred to the sole name of the Defendant and L.R No. Kajiado/Ntashart/7631 and 7632 were transferred to Hamas Limited.

The application was opposed by the Defendant through a replying affidavit sworn on 3<sup>rd</sup> November 2015. In his response to the application, the Defendant stated that the suit properties were owned by him and the deceased as joint tenants and as such upon the death of the deceased he remained the sole owner of the suit properties. The Defendant stated that the interest of the deceased in the suit properties could not pass to his estate in the circumstances. The Defendant stated further that the deceased had during his lifetime executed a Novation Agreement dated 6<sup>th</sup> November, 1990 in which he renounced his interest in the suit properties. The Defendant averred that he was the one who purchased all the suit properties and caused the same to be registered in his name and the name of the deceased as joint tenants in undivided shares because the deceased was working in a bank and could assist him access credit facilities. The Defendant stated that the deceased never questioned his ownership of the suit properties during his lifetime and that it was surprising that the Plaintiffs were coming up twelve (12) years after the death of the deceased to lay a claim over the suit properties. The Defendant stated that he followed due process in transferring the suit properties to his sole name and that the entire process was carried out without any ill will.

The Defendant denied that the suit properties were purchased through credit facilities obtained from Pan African Bank Limited. The Defendant stated that he was not under any obligation to notify the estate of the deceased of his intention to transfer the suit properties to his sole name.

In his further affidavit, the 2<sup>nd</sup> Plaintiff stated that the Novation Agreement dated 6<sup>th</sup> November 1990 referred to in the Defendant's replying affidavit was nullified by the court. The 2<sup>nd</sup> Plaintiff also denied that the Defendant had paid to the deceased his contribution towards the purchase of the suit properties. The 2<sup>nd</sup> Plaintiff reiterated that the suit properties were owned by the deceased and Defendant as tenants in common in equal shares.

The Plaintiffs application was heard by way of written submissions. I have considered the application together with the affidavits filed in support thereof. I have also considered the Defendant's affidavit in reply to the application and the submissions on record. What is before me is an application for a temporary injunction. The principles upon which this court exercises its discretion in applications for a temporary injunction were enunciated in the case of Giella vs. Cassman Brown & Co. Ltd. (1973) E. A 358 which was cited by the Plaintiffs in their submissions. An applicant for a temporary injunction must establish a prima facie case with a probability of success against the respondent. He must also demonstrate that unless the order is granted, he will suffer irreparable injury which cannot be compensated by an award of damages. If the court is in doubt as to the above, the application would be determined on a balance of convenience. The Plaintiffs have placed evidence before the court showing that the suit properties were registered in the names of the deceased and the Defendant. What is in contention between the parties is whether the suit properties were owned by the deceased and the Defendant as joint tenants or as tenants in common. Whereas the Plaintiffs have contended that the suit properties were registered in the names of the deceased and the Defendant as tenants in common, the Defendant has contended to the contrary. The suit properties were registered under the Registered Land

Act, Chapter 300 Laws of Kenya (now repealed). Section 101 (1) of the Registered Land Act aforesaid provides that when land is registered in the names of more than one person, the land registrar should indicate whether those persons are joint tenants or tenants in common. In this case, the register for the suit properties does not show whether the deceased and the defendant owned the suit properties as joint tenants or as tenants in common. This is an issue which can only be determined at the trial. The much I can say for now is that equality is equity and equity leans against joint tenancies. It follows therefore that equity will presume a tenancy in common where there is no indication in the register or any other evidence showing that the parties had intended to own a property as joint tenants. Due to the foregoing, I am satisfied that the Plaintiffs have established a prima facie case against the Defendant with a probability of success. If the deceased and the Defendant owned the suit properties as tenants in common, the Defendant had no right to transfer the suit properties to his sole name without the consent or authority of the administrators of the estate of the deceased. The same applies to the sub-division and sale of portions of some of the suit properties to third parties. The Defendant had contended that the deceased had surrendered his interest in the suit properties to the Defendant through a Novation Agreement dated 6<sup>th</sup> November 1990. The said agreement which the Plaintiffs claimed to have been annulled by the court in 1992 was not placed before the court. Although the Defendant referred to the same in his affidavit and indicted that it was annexed and marked as Exhibit "RMM1", there was no such annexure or exhibit attached to the Defendant's replying affidavit. Having not perused the said agreement, I am unable to comment on the same.

As to whether the Plaintiffs would suffer irreparable injury which cannot be compensated in damages, I am persuaded that that would be the case. The evidence before the court shows that most of the suit properties are now in the sole name of the Defendant. The Defendant has already sold and transferred two of the properties to a company known as Hamas Ltd. Unless the injunction sought is granted, nothing would stop the Defendant from selling and transferring the remaining properties to third parties. If that happens, the said properties would be beyond the reach of the Plaintiffs. There is no evidence before the court that the Defendant would be able to compensate the Plaintiffs for the loss of the deceased's share in the suit properties.

In the final analysis, I am satisfied that the Plaintiffs have satisfied the conditions for grant of the order sought. The Plaintiff's Notice of Motion dated 1<sup>st</sup> April 2015 is allowed in terms of prayer 3 thereof save that L.R No. Kajiado/Ntashart/7631 and 7632 which are registered in the name of Hamas Limited which is not a party to this suit is excluded from the order. The costs of the application shall be in the cause. Since this suit was filed in Machakos, I direct that the file be returned to the Environment and Land Court at Machakos for further action.

**Delivered and Signed at Nairobi this 27<sup>th</sup> day of June, 2017**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Omolo h/b for Kageni for the Plaintiffs

N/A for the Defendant

Kajuju Court Assistant