



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 330 OF 2017

RICO KINYARIRO.....PLAINTIFF

=VERSUS=

RENATE WOLFF.....DEFENDANT

RENE NJUGUNA KARIUKI.....INTERESTED PARTY

RULING

1. The plaintiff (Rico Kinyariro) and the Interested Party (Rene Njuguna Kariuki) are biological sons of the Defendant (Renate Wolf). The Plaintiff and the Interested Party were sired by John Kariuki Kinyariro. The defendant resides in Germany. The Plaintiff and the Interested Party reside in Kenya.

2. The defendant is the registered proprietor (lessee) of Land Reference Number 12661/61 (Original Number 12661/10/1) comprised in Title Number 72109 situated in the Karen Area within the Nairobi City County (hereinafter referred to as **“the suit property”**). She was registered as proprietor of the suit property in January 1997 although the Plaintiff contends the defendant acquired the suit property in 1993.

3. On 19/4/2000 the defendant, while in Germany, swore an affidavit in which she made the following six depositions:

“1. That Rico Kinyariro ID No [particulars withheld] and Rene Njuguna ID No.[particulars withheld] both of P. O. Box 76360 Nairobi in the Republic of Kenya are my sons

2. That the land Title Deed Number IR 72109 in Nairobi-Kenya is mine

3. That I have authorized both my sons (Rico and Rene) to share the same said land equally

4. That I have allowed Rico and Rene to cultivate and develop the shared portion of the same said land in accordance to their wishes.

5. That in case of my death each son (Rico and Rene) will inherit his same said share of the land from me.

6. That what is stated herein is true to the best of my knowledge and belief.”

4. In November 2016, the defendant came to Kenya and informed the plaintiff and the interested party that she had decided to sell the suit property. It is this decision by the defendant to dispose the suit property which has triggered this suit. Through a plaint dated 17/5/2017, the plaintiff has sued the defendant contending that he (the plaintiff) is a beneficial owner of ½ of the suit property. He contends

that the defendant gave her the one half as a gift *inter vivos* and he thereafter proceeded to undertake developments and improvements on the suit property. He also avers that he has been paying annual rent and land rates over the years. The plaintiff seeks against the defendant, among other orders, a declaration that he is the beneficial owner of ½ of the suit property. He also seeks injunctive orders restraining the defendant against interfering with his possession of the suit property or dealing with the suit property. In the alternative, the plaintiff seeks an order granting him the first right of purchase of the suit property at a valuable consideration less the cost of improvements and developments he has undertaken on the suit property.

5. Together with the plaint, the plaintiff filed a notice of motion dated 17/5/2017 seeking an interlocutory order restraining the defendant against **“entering, evicting, selling, alienating, disposing of, leasing, charging, transferring, or in any way whatsoever dealing or interfering with the plaintiff’s quiet possession occupation, use and enjoyment of the suit property”**. This Ruling relates to that particular Application.

6. The plaintiff’s case is that the defendant gave him ½ of the suit property as a gift *inter vivos*, and that, having full trust in the defendant’s bequest as his mother, and without any fear of being dispossessed of the property, he developed ½ of the suit property using his life savings. He argues that he resides on the suit property. It is on this basis that he seeks an injunctive order against the defendant who to-date remains the registered proprietor of the suit property.

7. The defendant opposes the Application. She confirms that she swore the affidavit dated 19/4/2000 but adds that she did so when she was ill and that the bequest was to take effect only in case of her death. She contends that she subsequently recovered and she rescinded her “wishes on 10th November 2016”. She also contests the plaintiff’s contention that he has had possession of the suit property since 1993. She further contests the plaintiff’s contention that his developments and improvements on the suit property are worth Kshs.30,000,000.

8. The issue to be determined in this Ruling is whether or not, in the unique circumstances of this case, and having due regard to the applicable legal framework, principles of equity and prevailing jurisprudence, a restraining order should be granted in the manner proposed by the plaintiff. I should state at this point that in pronouncing myself on this issue, I am required to exercise caution and avoid delving deep into the parties’ respective cases or making what may appear to be a conclusive pronouncement on any aspect of the dispute.

9. A party seeking an injunctive order is required to satisfy the criteria for grant of an interlocutory injunction. This criteria was laid down in **Giella Vs Cassman Brown & Co. Limited (1973) E.A 358**. In summary, the applicant must establish that he has a prima facie case with a probability of success, and that he will suffer irreparable injury that cannot be compensated by an award of damages if the case were to succeed. If the court is in doubt, the application is to be determined on a balance of convenience.

10. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** as:

“ a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter.”

11. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the court outlined the key ingredients of a prima facie case as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court

does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”

12. The key question to be answered in making a determination as to whether or not the plaintiff has established a prima facie case with a probability of success is one: has the plaintiff demonstrated a legal or equitable interest in the suit property to warrant grant of a restraining order against the defendant who is a registered proprietor? The suit property was registered under the Registration of Titles Act [now repealed] and the substantive legal framework governing this Title was the Transfer of Property Act of 1882. Both statutes were repealed in 2012 and replaced by the Land Registration Act. The Transfer of Property Act had the following legal framework on land disposed as a gift.

“122 “Gift” is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

123 For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.....”

13. The Land Registration Act 2012 contains the following broad regulatory framework on disposition and dealings affecting land.

“36 (1) A lease, charge or interest in land shall not be disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with this Act or any other law, shall not extinguish, transfer, vary or affect any right or interest in that land, or in the land, lease or charge.

2. Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract.....”

The above framework was lifted from Section 38(1) of the repealed Registered Land Act.

14. Section 43(1) of the Land Registration Act contains the following framework on instruments of disposition of interest in land:

“43(1) Every instrument affecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.”

15. An examination of the materials placed before this court by the plaintiff at this point does not suggest that the gift alluded to by the plaintiff satisfied the formal requirements of the Transfer of Property Act 1882 or those of the Land Registration Act 2012. My view at this point is that the plaintiff has not placed before court sufficient material to establish a legal interest in the suit property.

16. Evidence has however been placed before the court to show that the plaintiff has been in possession of the suit property from the year 2000 when the defendant, through a sworn affidavit, allowed him and his sibling to take possession and utilize the suit property as their own property. This possession was pursuant to what the plaintiff regards as a gift. The operativeness or completeness of that “gift” is in doubt at this point owing to lack of evidence of satisfaction of the formal statutory requirements. There is also evidence that, with the consent of the defendant, the plaintiff made some developments and

improvements on the suit property. The defendant on her part contends that she revoked the “wishes” [affidavit] in November 2016. Two issues are however in contest; the exact period of time during which the plaintiff has had possession of the suit property and the extent of the developments and improvements effected on the property by the plaintiff. The truth will be established at the hearing of this suit. In my view, the materials and evidence placed before the court do suggest that, on a balance of probability, the plaintiff might have some equitable interest in the suit property, at least in form of developments on the property. They also suggest that the plaintiff has had possession of the suit property for same period of time. Conclusive findings will however be made at the hearing of this suit.

17. In **Mwangi & Another Vs Mwangi (1986) KLR 328** the Court of Appeal recognized the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land.

18. More important, if the suit property is not preserved, there is a likelihood that the developments and improvement made on it by the plaintiff at the prompting of the defendant would be lost both as valuable immovable assets and as evidence in this suit. There is therefore compelling reasons and legal basis informed by the principles of equity to preserve the suit property pending the hearing and final determination of this suit. I am in the circumstances satisfied that the plaintiff has satisfied the first two limbs of the criteria in *Giella Vs Cassman Brown*. I will however not grant restraining orders in the manner framed by the plaintiff.

19. Taking into account the unique circumstances of this dispute, it is my view that the court should focus on determining the substantive suit soonest. In the interim, the suit property shall be preserved as observed. I would make the following preservative and incidental orders in disposing the Notice of Motion dated 17/5/2017.

(a) The suit property shall be preserved as it is now, meaning that, the defendant shall not sell, transfer or charge it and the plaintiff shall cease further developments on it pending the hearing and determination of this suit.

(b) The existing developments and improvements on the suit property shall be preserved by all the parties.

(c) The plaintiff shall file and serve his bundle of documents, duly bound, paginated and indexed within 15 days from today.

(d) The defendant and the interested party shall file and serve their pleadings and bundle of documents, duly bound, paginated and indexed, within twenty (21) days from the date of service of the plaintiff’s bundle.

(e) The plaintiff shall file and serve a reply to defence within seven days from the date of service of the defence.

(f) This matter will be mentioned on 20/9/2017 with a view to fixing a hearing date within this calendar year.

(g) In view of the close blood relationship between the parties in this suit, there will be no orders as to costs.

In conclusion, I do encourage the parties to this suit to remove any existing communication barriers and engage each other with a view to resolving this dispute amicably noting that they have umbilical ties.

Signed and dated at Nairobi this 23rd day of June, 2017

B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court clerk