



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 206 OF 2016**

**JAMES GICHUIYA MWAURA.....PLAINTIFF**

**-VERSUS-**

**MARY MUIRIGO WAINAINA.....DEFENDANT**

**RULING**

1. The plaintiff who claims to have a beneficial interest in the parcel of land known as **Loc.16/Mwagu/677** (the suit property) brought this suit seeking judgment against the defendant for a declaration that the defendant's registration as the proprietor of suit property is subject to a trust in his favour.
2. The plaintiff contends that attempts to get the defendant to sub-divide the suit property to enable him get his rightful share has been frustrated by the defendant who has charged the suit property in favour of Kenya Commercial Bank Ltd to secure a loan advanced to her. He laments that the defendant is in the process of further charging the suit property thus delaying the intended determination of the trust. For the foregoing reasons, the plaintiff prays for determination of the pleaded trust, sub-division of the suit property and registration of his share in his name.
3. Vide her statement of defence filed on 4th October, 2016 the defendant denies holding the suit property in trust for the plaintiff and instead explains that she holds it in trust of the plaintiff's father, Patrick Mwaura Gichuiya. For that reason, the defendant contends that the plaintiff lacks *locus standi* to bring and prosecute the suit.
4. Simultaneously with the plaint, the plaintiff brought the notice of motion dated 1st September, 2016, seeking the following orders:
  - (a) **Certification of the application as urgent and deserving to be heard ex parte within the first instance;**
  - (b) **An order of prohibition to stop any registration of a charge or further charge by any financial institution whatsoever and further stopping any registration of a transfer or any further instrument upon the register of the suit property pending the *inter partes* hearing of the application;**
  - (c) **An order of prohibition to stop any registration of a charge or further charge by any financial institution whatsoever and further stopping any registration of a transfer or any further instrument upon the register of the suit property pending the hearing and determination of the suit.**
  - (d) **Costs of the application be borne by the defendant/respondent.**
5. Through the grounds on the face of the application and the affidavit he swore in support thereof, the plaintiff has reiterated his contention that the defendant holds a portion of the suit property (2.5 acres) in trust for him and that his attempt to get the trust determined to enable him receive his share of the suit property has been frustrated by the defendant by using the suit property to secure her financial obligations to financial institutions.
6. Complaining that the defendant intends to further charge the suit property thereby delaying the intended determination of the pleaded trust, the plaintiff urges the court to grant him the order sought in order to prohibit further dealings with the suit property.
7. In reply and opposition to the application, the defendant has deposed that she holds the suit property in trust for the plaintiff's father and herself and that despite being ready and willing to have the trust determined, the plaintiff's father has never asked her to determine the pleaded trust.

8. Arguing that the plaintiff lacks *locus standi* to bring and prosecute the suit and application herein, the defendant contends that there is no trust relationship between herself and the plaintiff that can form the basis of the issuance of the orders sought in this suit and the application.
9. The defendant further contends that as the registered proprietor of the suit property, she has a right to enjoy the suit property unhindered and cannot be barred from charging it before the alleged trust is established.
10. Terming the application vindictive, vexatious, frivolous and an abuse of the court process, the defendant urges the court to dismiss it with costs to her.
11. In reply to the issues raised in the defendant's replying affidavit, the plaintiff's father Patrick Mwaura Gichuiya, swore the affidavit filed on **29th November, 2015** where he, inter alia, deposes that the defendant holds the suit property in trust for herself and the plaintiff. He also denies the defendant's contention that he charged the suit property to secure his financial obligations. Like the plaintiff, he urges the court to prohibit further dealings in respect of the suit property by way of charging or further charging of the suit property pending the hearing and determination of the suit.

#### **Analysis and determination**

12. From the pleadings filed in this matter and the affidavit evidence adduced in respect thereof, there cannot be any doubt that the defendant holds a portion of the the suit property in trust of the plaintiff. That fact is clear from the admission of the defendant that she holds the property in trust for herself and the plaintiff's father.
13. Whereas the defendant has challenged the plaintiff's capacity to bring and prosecute the suit on grounds that it is his father who should move the court for determination of the pleaded trust, the plaintiff's father has through the further affidavit he swore in support of the plaintiff's case, put the issue of the plaintiff's entitlement to the suit property at rest by deposing that the defendant holds the suit property in favour of the plaintiff as opposed to him.
14. As a beneficial owner of the suit property, the plaintiff has sufficient interest and capacity to bring and prosecute this suit to protect his interest in the suit property.
15. From the totality of the evidence adduced in this matter, I entertain no doubt that the plaintiff has made up a case for being granted the orders sought. Consequently, I allow the application as prayed.
16. For avoidance of doubt, the orders issued do not affect the rights of Kenya Commercial Bank Limited and/or any other financial institution which had accrued before this suit was filed.
17. Orders accordingly.

**Dated, signed and delivered at Nyeri this 13th day of June, 2017.**

**L N WAITHAKA**

**JUDGE.**

**In the presence of:**

Mr. Mshila h/b for Muchiri Wa Gathoni for Defendant/respondent

N/A for the applicant

Court assistant - Esther