



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 165 OF 2016

ANDREW GACHINI GITONGA.....PLAINTIFF/APPLICANT

- VERSUS -

WANJIRU GATHU.....DEFENDANT/RESPONDENT

RULING

1. By a plaint dated 25th July, 2016 and amended on 29th July, 2016 the plaintiff herein, Andrew Gachini Gitonga, hereinafter referred to as “the applicant”, filed the suit herein seeking that Wanjiru Gathu (hereinafter referred to as “the respondent”) be compelled to exhume the remains of her husband, Gathu Gitonga, buried on LR. No. Aguthi/Murugu/400.

2. The applicant also prays for damages for trespass, costs of the suit and interest in respect of the prayer for damages and costs at court’s rate.

3. Simultaneously with the amended plaint, the applicant filed the notice of motion of even date seeking an order for exhumation of the remains of Gathu Gitonga interred on L.R No. Aguthi/ Muruguru/400, Nyeri County, enforcement of the order of exhumation, if granted by the OCS Nyeri Police station and costs of the application.

4. The application is premised on the grounds that the applicant is the absolute registered proprietor of LR No.Aguthi/Muruguru/400; that the respondent illegally interred the remains of the deceased in the suit property and that the deceased had his own parcels of land adjacent to the suit property.

5. The application is supported by the affidavit of the applicant, sworn on 29th July 2016, in which the applicant has reiterated the grounds on the face of the application and contended that he will suffer irreparably if the remains of the deceased remain interred in his parcel of land.

6. In reply and opposition to the application, the respondent filed the affidavit she swore on **30th January, 2017** in which he deposes as follows:

(i) That the affidavit sworn in support of the application is full of falsehoods and half-truths aimed at inducing the court to grant the orders sought;

(ii) That despite being the registered proprietor of the suit property, the applicant holds it in trust for himself, his brothers and heirs, the deceased being one of them;

(iii) That the applicant's father had three parcels of land namely Aguthi/Muruguru/419- registered in the name of the deceased; Aguthi/Muruguru/ 400-registered in the name of the applicant and Aguthi/Mungaria/352-registered in the name of Munga Gitonga;

(iv) That the suit property which measures approximately 2.6 acres is sub-divided into four equal portions of about 0.65 acres;

(v) That the four portions were shared amongst the four sons of Gitonga Kabogo, deceased;

(vi) That the deceased was buried on his share of the suit property where he had been living since 1963;

(vii) That the deceased equally held Aguthi/ Muruguguru/419 in trust for himself and his brothers;

(viii) That the parcel of land held by her deceased husband was also sub-divided into four equal portions and shared between the deceased and his brothers.

(ix) That Aguthi/Mungaria/352 was also sub-divided amongst the sons of her father-in-law, Gitonga Kabogo.

7. The respondent accuses the applicant of denying his brothers and their heirs their rightful share of the suit property yet he has partaken in sharing the other parcels of land held in trust by his brothers.

8. In a rejoinder, the applicant filed the further affidavit he swore on 21st February, 2017 where he denies the respondent's contention that he holds the suit property in trust for his brothers. He also denies the respondent's allegation that he has a share in L.R No.Aguthi/Muruguru/419 registered in the name of the deceased and that the deceased lived in the suit land.

9. When the matter came up for hearing, counsel for the applicant relied on the grounds on the face of the application and the affidavit sworn in support of the application.

10. Pointing out that the applicant is the registered proprietor of the suit property and that the deceased is the owner of the parcel of land adjacent to the suit property, counsel for the applicant submitted that there was no good reason to inter the remains of the deceased on the applicant's property hurriedly.

11. Maintaining that the suit property is not family land, counsel for the applicant explained that the property was registered in the name of the applicant two years after the applicant's father passed on.

12. Counsel for the respondent, Ms Wanjira, relied on the replying affidavit of the respondent and maintained that the suit property is family land, held in trust by the applicant.

Analysis and determination:-

13. Whereas the applicant is the registered proprietor of the suit property hence entitled to the rights vested on a registered owner of land under **Section 25** of the Land Registration Act, 2012, from the pleadings filed in this suit and the averments made in support and against the cases of respective parties, it is clear that there is a dispute as to whether the registration of the applicant is subject to a trust in favour of the respondent.

14. Being of the view that the dispute as to whether registration of the applicant is subject to the pleaded trust in favour of the respondent who apparently is in occupation of the suit property cannot be determined on the basis of untested and/or unproven averments in the affidavits sworn by the parties, I find and hold that issuance of the orders sought before the cases urged by the respective parties to this dispute may unnecessarily prejudice the respondent.

15. In arriving at this decision I am persuaded by the case of **Geoffrey Mworira Mwari v M'ngaruni**

M'limingi [2014] e KLR where it was held:

“In interlocutory applications, one cannot determine facts and issues which deserve to be determined at the conclusion of the suit after all parties have been heard. Should a judge do so, he or she will be accused of going “far beyond my duties” as the Court of Appeal opined in JIMBA CREDIT CORPORATION & ANOTHER (1988) KLR I.

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of facts but rather to weigh up the relevant strength of each side's propositions. The lower Court Judge in this case had gone far beyond his proper duties and made final finding of fact on disputed affidavits.”

16. In view of the foregoing, I decline to grant the orders sought pending the hearing and determination of the question as to whether the applicant's registration of the suit property is subject to any trust in favour of the respondent.

Dated, signed and delivered in open court at Nyeri this 10th day of October, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Muhoho for Wahome Gikonyo for applicant

Mr. Mutuma holding brief for Gachiri Kariuki for defendant

Court assistant – Esther