



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 114 OF 2016

GEOFFREY MUTHINGANI GICHURU..... PLAINTIFF/ APPLICANT

-VERSUS-

MARION MUTUNDU GICHURU.....DEFENDANT/RESPONDENT

RULING

1. The **plaintiff/applicant** (hereinafter referred to as the applicant) filed an ex parte Chamber Summons dated **30th May, 2016** seeking an injunction to restrain the defendant/respondent (hereinafter referred to as the respondent) from subdividing Title Number **Ruguru/Kiamariga/1392** (hereafter referred to as the suit property). He also prays for an order of inhibition against the Land Registrar, Nyeri.
2. The application is supported by the applicant's affidavit sworn on **30th May, 2016**. In that affidavit, he depones that although the respondent is the registered owner of the suit property, she holds it in trust for him as her son; that he is apprehensive that the respondent's planned subdivision will interfere with his beneficial interest over the suit property.
3. The application is opposed. The respondent vide her replying affidavit sworn on **28th June, 2016** denies holding the suit property in trust for the applicant. She depones that she is the registered owner of the suit property and that the application is overtaken by events as the suit property has since been subdivided.
4. By way of rejoinder vide a further affidavit sworn on **5th October, 2016** the applicant denies that he is a licensee of the respondent and also denies that the land is already subdivided because no new titles have been issued.
5. On **12th October, 2016** when the application came for hearing, the applicant reiterated the contents of his pleadings and admitted that subdivision had already taken place. He urged the court to stop the process of issuance of new titles to allow him consult with his sisters and the respondent, who is their mother. He further submitted that he had appeared before the Land Control Board and raised an objection but the objection was ignored and subdivision proceeded.
6. **Mr Warutere** for the applicant, submitted that the applicant's further affidavit, was filed without leave of the court and should be expunged from the court record. He further submitted that the respondent is the registered owner of the suit property and that the application is overtaken by events as the land has since been subdivided.

7. In reply, applicant urged the court to admit his further affidavit for the reason that he was not aware of the procedure as laid out in the Civil Procedure Rules.

8. On whether the court will expunge the applicant's further affidavit because leave of the court was not sought, I am guided by **Article 159(2)(d)** of the Constitution which urges courts to administer justice without undue regard to procedural technicalities and **Section 1A** of the Civil Procedure Act which provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution in civil disputes. In my view, I do not see what prejudice the respondent will suffer if I admit the further affidavit filed by the applicant and I proceed to do so.

9. On the instant application, it is now settled that for an applicant to succeed in an application for injunction, they must satisfy the following conditions as set out by **Spry VP** in **Giella v Cassman Brown and Co. Ltd & Another [1973] E.A. 358**:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

10. The issue for determination in the instant motion is whether the applicant has demonstrated a prima facie case which was defined by **Bosire JA** in **Mrao Ltd v First American Bank Kenya Ltd & 2 Others (2003) KLR 125**, to be of a standard higher than an arguable case.

11. From the pleadings filed by the parties herein and their oral submissions, it is not in dispute that the respondent is the registered proprietor of the suit property. **Section 26 (1)** of the **Land Registration Act, 2012** imposes an obligation on this court to take a certificate of title issued by the Registrar upon registration, as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the land. This registration confers upon the respondent certain rights under **Section 24 and 25** of the **Land Registration Act, 2012**, subject to the overriding interests in **Section 28**.

12. The applicant has submitted that the respondent holds the suit property in trust for him, a fact the respondent denies. The applicant has not submitted any proof of the alleged trust contrary to the maxim “he who alleges must prove” as enshrined in **Section 107** of the Evidence Act. Moreover, subdivision of the suit property has already taken place.

13. In the circumstances of this case, I find prayer (1) has been overtaken by events. Courts cannot grant orders in vain and an injunction cannot be granted to restrain that which has already happened. See the case of **Esso (K) Ltd V. Mark Makwata Okiya, (Civil Appeal No. 69 of 1991)**.

14. The upshot of the foregoing is that I decline to allow the application as prayed and I dismiss it with costs.

Dated, signed and delivered at Nyeri this 9th day of November, 2016

L. N. WAITHAKA

JUDGE

In the presence of:

Geoffrey Muthigani Gicheru – plaintiff/applicant

Mr. Warutere for the defendant/respondent

Court assistant - Lydia