



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 4 OF 2015**

**FREDRICK ARAP MARITIM (Suing on behalf of MARITIM ARAP BORETOR)  
.....PLAINTIFF**

**VERSUS**

**ELIZABETH CHEPCHIRCHIR .....1<sup>ST</sup>  
DEFENDANT**

**THE DISTRICT LAND REGISTRAR, NAKURU..... 2<sup>ND</sup>  
DEFENDANT**

**THE ATTORNEY GENERAL .....3<sup>RD</sup>  
DEFENDANT**

**RULING**

***(Application for injunction; principles to be applied; case of plaintiff being that suit property is held in trust for an adopted minor; minor adopted after the registration of the property in name of 1st defendant; no evidence of trust; no prima facie case established; application dismissed)***

1. This suit was commenced by way of plaint filed on 7 January 2015. The plaintiff is one Maritim arap Boretor who is suing through one Fredrick arap Maritim. It is pleaded in the plaint that the plaintiff was the registered owner of the land parcel Njoro/Ngata Block 2/ 107, and that sometimes in the year 2004, in good faith, he did subdivide the said land, and transferred one portion thereof, being the land parcel Njoro/Ngata Block 2/1589 (the suit property), to the 1st defendant on the understanding that the same would be held in trust for an adopted child known as AK. It is pleaded that the 1st defendant illegally went ahead to register the said property in her sole name and not as holder of the property in trust for the minor. The plaintiff has pleaded that he is now surprised that the 1st defendant is frantically looking for a buyer of the said property. In the suit, the plaintiff wants a declaration that he is the bona fide owner of the suit property; a permanent injunction to restrain the 1st defendant from dealing with the same; and an order that the 2nd defendant, do rectify the register by cancelling the title of the 1st defendant and have the plaintiff registered as proprietor.

2. Together with the plaint, the plaintiff filed an application under certificate of urgency, seeking orders of injunction to have the 1st defendant stopped from disposing or dealing with the property until the determination of the suit. The application is supported by the affidavit of Fredrick arap Maritim, who has deposed that he holds a power of attorney donated by the said Maritim arap Boretor. He has deposed inter alia that the 1st defendant has left the matrimonial home with the original title with the intention of selling

it to the detriment of the minor. It is averred that the plaintiff could not have transferred the property to the 1st defendant for her sole benefit and that the plaintiff has never gifted any of his property to his beneficiaries or dependants. He has stated that the purported transfer of the property to the 1st defendant was illegal as the 1st defendant, despite being aware of the intentions of the plaintiff, went ahead to register the property in her sole name and not in trust for AK.

3. The 1st defendant filed appearance, defence and reply to the application. She has first denied the agency between the plaintiff and Fredrick arap Maritim. She has also denied being the registered proprietor of the suit property. She has pleaded that she was forced to seek refuge elsewhere because the sons of the plaintiff endangered her life and the life of the adopted child. She has pleaded that the sale is for good reason in that she will acquire alternative settlement. She has pleaded that Maritim Boretor has no problem with her, and that they have a good relationship, except that, the donee of the power of attorney and the siblings of the first house, have manipulated him in his old age. She has pleaded that the plaintiff gave her the land as a gift without any strings attached and that the donor is pursuing his own agenda.

4. In her replying affidavit, she has averred that she got married to Maritim arap Boretor after the death of his first wife. She has deposed that in the year 2006, Boretor sub-divided his land among his children and gave her the suit property which measures 2.709 hectares. She has deposed that he did not attach any conditions in the manner in which she should deal with the property. She has deposed that Boretor is now about 95 years old and has grown senile and in view of his advanced age, his sons, including the donee have taken advantage and have chased her away from the matrimonial home with the intent of taking over her land. She has averred that they have not accepted her as their stepmother and have ganged up to exclude her from the family. She has stated that she has no children of her own but has adopted one, whom the entire family marginalized and called him "chokora" or "the child who was bought", causing him mental anguish. She has stated that she has sold her interest in the land and has relocated. She has deposed that the son of the donee, beat her up and tore her clothes but the donee did nothing to reprimand his son or restrain him. She has averred that her husband is senile and incapable of donating a power of attorney. It is her position that the land is not matrimonial property but a gift and inheritance given to her voluntarily.

5. The 1st defendant also raised a preliminary objection that the said Maritim arap Boretor is senile and lacks capacity to donate a power of attorney and that the children of the first house are pursuing their own interest rather than the interests of the donor. She has asked that the suit be struck out with costs.

6. The State Law Office entered appearance and filed defence on behalf of the 2nd and 3rd defendants. It is their position that if the suit property was transferred to the 1st defendant the same was done procedurally and within the law. The 2nd and 3rd defendants are however strangers to the issues between the plaintiff and the 1st defendant.

7. At the hearing of the application, Ms. Wambui Kariuki for the State, did not oppose the orders sought. Mr. Otieno for the applicant asked for the orders sought whereas Mr. Kipkeni for the 1st respondent, argued that the threshold for an injunction has not been met. It was his view that since the 1st respondent has in her affidavit stated that the property has already been transferred to a 3rd party, the plaintiff needed to get the current certificate of official search. He asked that the application be dismissed.

8. I have considered the material before me. This being an application for injunction, I stand guided by the principles laid down in the case of ***Giella v Cassman Brown (1973) EA 358***, that is, that I need to be satisfied that the applicant has a prima facie case with a probability of success; be satisfied that the applicant stands to suffer irreparable loss unless the orders are granted; and if in doubt, decide the application on a balance of convenience.

9. I feel it necessary to start with the point raised in both pleadings and affidavit of the 1st respondent, and in the preliminary objection, which attack the power of attorney donated to Fredrick arap Maritim. I have seen the power of attorney, which appears to have been registered on 22 December 2014. The 1st respondent has averred that she doubts the power of attorney and that the donor could not have granted it,

as he is old and senile. But no material has been tabled by the 1st defendant to cast doubt on the mental capacity of the donor, and I have no material before me, which would make me doubt the power of attorney. I am therefore unable to hold that the suit is improperly before court because of the power of attorney. It must also be understood that Fredrick Maritim is only holder of a power of attorney, and the real plaintiff in the matter is Maritim Boretor, only acting through the agency of Fredrick Maritim.

10. The key complaint of the plaintiff is that the 1st defendant proceeded to register the property in her sole name, rather than register it in her name, as trustee for AK, who is an adopted child. I have looked at the title displayed by the plaintiff and I can see that the 1st defendant became registered as proprietor on 6 June 2006. I have also gone through the plaintiff's documents and the same show that the minor in issue was handed over, to the plaintiff and 1st defendant, on 17 January 2008. Clearly, by the time the 1st defendant became registered as proprietor, the minor in issue was not in the picture. Moreover, other than the mere statement in the affidavit, that the suit property was transferred to the 1st defendant to hold in trust, there is absolutely no additional evidence to support the allegation that the suit property was transferred to the 1st defendant to hold it in trust. I therefore find it difficult to hold that the plaintiff has established a prima facie case, that the suit property was transferred to the 1st defendant, for her to hold it in trust for AK. The burden was upon the plaintiff to demonstrate prima facie evidence of a trust which I am afraid he has not done so.

11. I also find it curious that in the body of the plaint, the plaintiff has pleaded that the property was to be held in trust for AK, yet in his prayers, the plaintiff does not want a declaration to that effect, but rather, wants a declaration that he is still the bona fide owner and proprietor of the suit property, and for an order that he be registered as proprietor thereof. It will be observed that the plaintiff is not asking for any order that he be registered as proprietor of the suit property in trust for AK. The above gives some credence to the allegations of the 1st defendant that the plaintiff is pursuing a different agenda.

12. Mr. Kipkenei argued that the plaintiff has not shown that the suit property is in the name of the 1st defendant and that the property has been transferred to 3rd parties. The 1st defendant could of course have been more helpful by demonstrating the sale to a 3rd party , but I think faced with this point, the plaintiff needed to obtain a current search of the property, to show that the allegation that the property has been transferred has no basis, which was not done in this case. There is therefore some doubt as to who the current owner of the property is, which I am unable to resolve, given the conflicting positions taken by the parties, none of whom thought fit to demonstrate through documentation, who the current owner of the property is.

13. The upshot of the foregoing is that I am not convinced that the plaintiff has established a prima facie case with a probability of success. Not being in doubt, I need not consider the balance of convenience. I have no option but to dismiss this application with costs. Any interim orders are hereby vacated.

14. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 24<sup>th</sup> September 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :-**

Ms. Kipruto holding brief for Mr. Otieno for plaintiff/applicant

Mr. Kipkenei present for 1<sup>st</sup> defendant/respondent

Mr Mbaka of state law office present for 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents

Court Assistant : Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**