



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

**AT NYERI**

**E.L.C CASE NO. 106 OF 2014**

**ANDREW WAIRAGU KIBOI ..... PLAINTIFF**

**-VERSUS-**

**ANNAH WANJIKU KIBOI .....DEFENDANT**

**RULING**

**Introduction**

1. By a plaint dated 2<sup>nd</sup> April 2015, the plaintiff seeks judgment, declaration and orders that:-
  - a) **The defendant holds land parcel number Nyeri/Mweiga/1686 (the suit land) in trust for himself and his siblings and prays that the trust be terminated so that he gets 15.52 acres out of the suit land.**
  - b) **An order of permanent injunction restraining the defendant, her servants or agents from selling the suit land and from interfering with his quiet possession and occupation of the farmhouse standing on the suit land.**
  - c) **Costs of the suit and interest at court rates.**
  - d) **Any other relief which the court may deem fit to grant.**
- 2 The plaintiff contends that the defendant, who is his mother, holds the suit land in trust for him and his other siblings. He explains that the suit property is a sub-division of Nyeri/Mweiga/326 which was registered in his father's name to wit, Joseph Kiboi Theuri, who passed on in 2000.
3. Vide her statement of defence dated 4<sup>th</sup> May, 2015 the defendant denies holding the suit property in trust for the plaintiff or any of his siblings. She explains that in 2003 she gave each of her five children 13 acres of land out of L.R NO. Nyeri/Mweiga/976 (which is a sub-division of Nyeri/Mweiga/326) and that she retained the suit land which she charged to equity bank to secure a loan of Kshs. 13 million. She denies having the intention of selling the entire suit land and explains that she intends to sell 5 acres from the suit land to pay off the debt she owes the bank.
4. Contending that the plaintiff has no interest in the suit property and wondering what motive the plaintiff has in bringing this claim, the plaintiff maintains that the plaintiff has no interest in the suit land.

## **Application to strike out the suit:**

5. On **6<sup>th</sup> July 2015** the defendant filed the notice of motion dated **2<sup>nd</sup> July, 2015** seeking the following orders:-

- a) That the application be certified urgent and be heard *ex parte* in the first instance.**
- b) This court be pleased to strike out the plaintiff's suit as the same is frivolous and an abuse of the court process.**
- c) Alternatively, that this court be pleased to order the plaintiff to give security for the costs amounting to Kshs. 20,000,000/= to the defendant.**
- d) That the cost of the application be provided for.**

6. The application is premised on the grounds that the plaintiff/respondent has no valid claim over the suit land; that the plaintiff/respondent has objected to the applicant's application for consent to sub-divide the suit property and sell a portion thereof (6.5) acres to meet her loan obligation to equity bank; that it is necessary that the plaintiff/respondent be ordered to give security for costs and consequential loss that the applicant may suffer on account of these proceedings.

7. The application is supported by the affidavit of the defendant/applicant in which the defendant has reiterated her contention that she does not hold the suit property in trust for the plaintiff and his siblings. She deposes that she petitioned for letters of administration in respect of her deceased husband's estate and was issued with letters of administration vide Nyeri High Court Succession cause No.398 of 2003. She explains that after confirmation of the grant issued to her, she gave the plaintiff and his siblings 13 acres of land each from Nyeri/Mweiga/976 and retained 77.6 acres which make up the suit land. She further explains that she charged the suit property to equity bank to secure a loan facility of Kshs.13 million which she shared with her children, including the plaintiff, in order to assist in their personal growth.

8. Pointing out that she had no difficulties paying the loan because she had leased the suit property to Everest Enterprises Limited at a monthly rent of Kshs.375, 000/-, she explains that the tenancy agreement over the suit property was terminated in 2013 leaving her with no means of meeting her loan obligation to the bank. To avoid overburdening her children with payment of the debt owed to the bank, she requested the bank to allow her sell 6.5 acres from the suit property in order to repay the entire loan.

9. Although the bank acceded to her request, she explains that she is unable to sub-divide and sell the suit land because the plaintiff has objected to her application for land control board consent to sub-divide and sale a portion of the suit land.

10. For the foregoing reasons, she is apprehensive that unless she obtains the consent of the land control board to sell a portion of the suit land so as to enable her meet her loan obligation, the entire suit property, which is valued at Kshs. 64 million, may be auctioned by the bank.

11. Pointing out that none of her other children has alleged that she holds the land in trust for them; the applicant maintains that she does not hold the land in trust for the plaintiff and his siblings.

12. With regard to the plaintiff's claim that he is entitled to possession and occupation of the farmhouse, the applicant explains that the so called farmhouse is her matrimonial home and states that the respondent, who is 45 years old cannot remain in her house forever. The applicant reiterates that she has given the respondent 13 acres of land and for that reason he cannot be heard to say that he has been rendered destitute by being requested to leave the farmhouse.

13. Concerning the order for security for costs, the applicant has deposed that the order is necessary to cushion her against losses that may occur pursuant to the respondent's objection to her dealings

with the suit property.

14. To prove the averments contained in her supporting affidavit, the applicant has annexed the following documents to the affidavit:-

- i. Certificate of confirmation of the grant issued to her vide Nyeri High Court Succession Cause No.398 of 2003;
- ii. Letter from Equity Bank dated 8<sup>th</sup> June 2015 in support of her application for consent for sub-division of the suit land;
- iii. Letter from Kieni West Land Control Board dated 29<sup>th</sup> June, 2015 communicating its refusal to consider her application because of the case herein.
- iv. Valuation report in respect of the suit property.

15. In reply and opposition to the application, the respondent filed the replying affidavit he swore on **10<sup>th</sup> July, 2015** in which he maintains that the original parcel of land (read Nyeri/Mweiga/976) from which the suit property was hived off was acquired solely by his father and registered in the name of his deceased father; that when the applicant applied for letters of administration of the estate of their father, they agreed to have the applicant hold the estate in trust for them as beneficiaries; he explains that the suit property was set apart and left intact because the entire family was sharing the rent proceeds therefrom. He further explains that for purposes of managing the suit property, the family incorporated the company known as Woodland Farm Investment Limited.

16. Pointing out that a sum of Kshs.5 million was repaid using rent proceeds from the suit land and that the property is not under threat of being auctioned by the bank, he deposes that his siblings and himself are able to pay off the debt owed to the bank without selling any land.

17. Arguing that the constitution guarantees him a right to a fair hearing, which includes the right to have adequate time and facilities to adduce evidence in court and to reply to any evidence by defence, he maintains that the suit cannot be struck out because it is neither frivolous nor vexatious.

18. When the matter came up for hearing, counsel for the applicant **M/S Lucy Mwai** submitted that whereas the plaintiff's claim is based on an alleged trust relationship between himself and the applicant no trust relationship is discernable. Referring to the case of **Susan Mumbi Waititu v. Mukuru Ndata & 4 others** Civil case No. 19 of 2007 she submitted that the plaintiff must prove with cogent evidence that the suit premises was ancestral and thus family land.

19. M/S Mwai further submitted that the plaintiff's case against the defendant is unmaintainable because even if trust is established, the plaintiff would only be entitled to 1/6 of the suit property which is only 17 acres.

20. Pointing out that the defendant has explained why she needs to sell a portion of the suit property, M/S Mwai urged the court, if not inclined to strike the suit, to order the plaintiff to provide security for costs to cushion the defendant from further loss.

21. Regarding the proposal that the loan owing to the bank can be shared amongst the plaintiff and his siblings, she stated that the plaintiff has not been cooperative in repaying the money and wondered why the change of heart.

22. Counsel for the plaintiff **Mr. Muthui**, referred to the replying affidavit sworn by the plaintiff and submitted that it is not true that the defendant participated in the acquisition of the suit property. In this regard he argued that if the applicant was a co-owner of the suit property with her husband, it would not have been necessary for her to have been appointed administrator of her deceased husband's estate. He pointed out that during the succession cause, the plaintiff and his siblings agreed to have the estate administered by the applicant as a trustee for them.

23. Explaining that the loan owed to the bank was not being paid by the applicant personally but from

the rent proceeds from the property, now that the lease agreement in respect of the suit property had expired, he opined that the plaintiff and his siblings should be allowed to pay the loan without the property being sold. He reiterated the plaintiff's contention that there is no threat of sale of the suit property by auction.

24. Concerning the prayer that the respondent should be ordered to furnish security of Kshs.20 million, he submitted that the prayer is not justified as the debt owed to the bank is only Kshs. 9 million.

25. Concerning the cases quoted in support of the defendant's application, he submitted that the cases are distinguishable because the children had sued their father who had personally bought it. In the circumstances of this case, he maintained that a trust was created when the succession cause was done.

26. Contending that the grounds on which the application is premised do not constitute grounds for striking out a suit under **Order 2 Rule 15** of the Civil Procedure Rules, Mr. Muthui submitted that the issue of trust cannot be determined at this stage of the proceedings.

27. In a rejoinder, counsel for the applicant submitted that the applicant has demonstrated the difficulty she has encountered in meeting her loan obligations after the lease over the suit property expired.

28. As to whether the applicant has proved her participation in the acquisition of the deceased's estate in respect of which she was made the administrator, Miss Mwai submitted that being a legal wife of the deceased, the applicant need not establish her contribution in the acquisition of the suit property.

29. With regard to the prayer for Kshs.20 million as security for costs, she maintained that the prayer is justified because the period of time the applicant will be subjected to suffering is unknown.

**Law applicable to prayer 2 (striking out pleadings):**

30. The law on striking out pleadings is found in **Order 2 Rule 15** of the Civil Procedure Rules, which provides as follows:-

**At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

**“(1) (a) it discloses no reasonable cause of action or defence in law; or**

**(b) it is scandalous, frivolous or vexatious; or**

**(c) it may prejudice, embarrass or delay the fair trial of the action; or**

**(d) it is otherwise an abuse of the process of the court,**

31. In the current application, although the defendant has not expressly stated so, from her argument it is discernable that she seeks to strike the plaintiff's suit on the ground that it raises no reasonable cause of action against her. The reason for her argument is that no trust relationship is discernable between herself and the plaintiff.

32. Under **Order 2 Rule 15 sub rule 2**, in determining whether there exists any reasonable cause of action against the applicant no evidence is required. All the court requires to do is to consider the grounds on which the allegation is made.

33. In the instant application, although the applicant's application does not state concisely the grounds on which it is made, from the pleadings and the submissions in respect thereof, it is discernable that the

applicant's application is premised on the ground that no trust relationship exists between her and the plaintiff, who is her son.

34. In determining whether the plaintiff's case raises any reasonable cause of action against the defendant, I begin by pointing out that it's not in dispute that the plaintiff and the defendant are a mother and a son respectively. It is also not in dispute that the suit property was part of the estate of the defendant's deceased husband. Before the defendant was appointed the administrator of the estate of her deceased husband's estate, she obtained the consent of her children, the plaintiff included.

35. Concerning administration of the suit property, which there is no doubt, constituted estate of the defendant's husband and the plaintiff's father's estate, regard has to be held to **Section 35** of the Law of Succession Act, Cap 160 Laws of Kenya, which provides as follows:-

**“35. (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to -**

**(a) the personal and household effects of the deceased absolutely;and**

**(b) a life interest in the whole residue of the net intestate estate:**

**Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.**

**(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.....**

**(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re- marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”**

36. Under **Section 37** of the Law of Succession Act a surviving spouse entitled to a life interest under the provisions of **Section 35 or 36**, requires the consent of all co-trustees and all children of full age, or the consent a court, to sell any of the properties subject to that interest. The Section provides:-

**“37. A surviving spouse entitled to a life interest under the provisions of section 35 or 36, with the consent Provided that, in the case of immovable property, of all co-trustees and all children of full age, or with the consent of the court, may, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance: the exercise of that power shall always be subject to the consent of the court.”**

37. A reading of the above sections of the law clearly shows that during the subsistence of her life interest in the suit property, the applicant holds the suit property in trust for herself and her children. For her to lawfully dispose of the suit property during the subsistence of her life interest, the law requires her to obtain the consent of all her children of full age and the consent of the court.

38. In the circumstances of this case, the applicant in violation of the above provisions of the law tried to dispose of the suit property, without obtaining the consent of the court and her children of full age.

39. In view of the foregoing, I find the plaintiff's claim against the applicant to be bona fide, as the law recognizes his right to give consent before immovable properties held by the applicant in her capacity as an administrator of the estate of their deceased father is disposed of.

40. As to whether the plaintiff should be ordered to give security for the costs amounting to Kshs.20,000,000/= to the defendant, having found the applicant to have proceeded in blatant disregard of the law in a bid to sell a portion of the suit property to meet her obligations, I am not persuaded that she has made a case for issuance of the orders sought.

41. The foregoing notwithstanding, in recognition of the problem that the applicant is facing in meeting her obligations to the bank, I direct that the plaintiff and his siblings, within 14 days of delivery of this ruling, show cause why this court should not, in exercise of the powers vested in it under **Section 3A** of the Civil Procedure Act and/or **Section 47** of the Law of Succession Act, allow the applicant to dispose of the portion of the suit property she intends to sell to meet her financial obligations.

42. This being a family dispute, parties will bear their own costs of the application.

43. The upshot of the foregoing is that the application by the defendant/applicant is dismissed with no orders as to costs.

**Dated, signed and delivered at Nyeri this 5<sup>th</sup> day of October, 2015.**

**L N WAITHAKA**

**JUDGE.**

**In the presence of:**

Mr. Muthui for the plaintiff/respondent

Mr.Ng'ang'a h/b for Ms Mwai for the defendant/applicant

Court assistant - Lydia