



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 425 OF 2013

MIRIAM WANGARE WAITARA..... PLAINTIFF

-VERSUS-

ELLEN WAMBUI(sued as the administrator of the estate of

Reuben Mugane Waitara- deceased).....1ST DEFENDANT

THE LAND REGISTRAR KIAMBU.....2ND DEFENDANT

RULING

The Plaintiff has moved the court by way of a Notice of Motion dated 2nd August 2013 as amended on 13th February 2014, brought under Section 1A, 1B, 3, 3A, 63(e) and 80 of the Civil procedure Act and Order 40 of the Civil Procedure Rules. The Plaintiff is seeking a temporary injunction to restrain the Defendant, her servants, agents, anybody or any authority from selling, disposing of or in any other manner interfering with subdivision parcel no. Lari/Kijabe/576 subdivided and excised from the mother title known as Lari/Kijabe/168 pending the hearing and determination of the suit.

The application is supported by an affidavit sworn by the Plaintiff on 3rd April 2013 where she has deposed that she bought a portion of 1 acre out of LR No. Lari/Kijabe/168 from her brother **Reuben Mugane Waitara (Deceased)** in 2001 whereof she paid an amount of Kshs 200,000/-. The Plaintiff has contended that the purchase price was paid in installments in the form of school fees for her brother's children. A copy of a sale agreement dated 22nd February 2001 has been exhibited as evidence of the sale transaction.

The Plaintiff has averred that her brother died on 30th June 2008 before a transfer was effected and further that at the time of his death, his brother had received the entire purchase price. The Plaintiff alleges that the 1st Defendant took out letters of administration for her late brother's estate and that in the confirmation of grant, the 1st Defendant acknowledged that she was holding 1.6 acres on her behalf and on behalf of the Plaintiff and a copy of a certificate of confirmation grant dated 25th July 2012 has been annexed to the application.

The Plaintiff contends that the 1st Defendant wrote to her a letter dated 25th July 2011 annexed to the plaintiff's affidavit and marked "MWW3", requesting the Plaintiff to inform all tenants cultivating on

L.R. Lari/Kijabe/168 to stop with effect from 31.10.2011 to enable the 1st Defendant commence the subdivision process. The Plaintiff avers that in the said letter, she was required to pay Kshs 30,000/- to facilitate the subdivision and transfer. It is alleged that despite the Plaintiff's confirmation of willingness to pay the said amount, the 1st Defendant has failed to take steps to transfer the parcel to her. The Plaintiff states that the 1st Defendant has offered her (plaintiff's) portion for sale and the Plaintiff is apprehensive that she will suffer irreparable loss unless the court intervenes.

The Plaintiff vide a copy of a letter dated 31st January 2013 from her advocate annexed to her affidavit and marked "**MWW4**" states that she requested the 1st Defendant to transfer the portion of 1 acre to her but the Defendant has refused to respond and has instead asked the Kiambu Land Registrar to remove a caution placed by the Plaintiff on the title. The plaintiff is apprehensive that the Defendant is intent on denying her the parcel of land which rightfully belongs to her.

In a further affidavit sworn on 13th February 2014, the Plaintiff states that following the letter dated 25th July 2011 through which the Defendant requested a transfer fee of Kshs 30,000.00, she paid Kshs 15,000/- by Mpesa and the balance was to be paid upon issuance of title. It is the Plaintiff's claim that without her being notified, the 1st Defendant subdivided the entire original parcel into LR No. **Lari/Kijabe/576, 577 and 578**. According to the Plaintiff, indication by the 1st Defendant on title no. LR No. **Lari/Kijabe/576** that she holds the parcel in trust for the plaintiff is a confirmation by the 1st Defendant of the Plaintiff's entitlement to the 1 acre portion that she purchased. It is the Plaintiff's case that her interest is in the portion to the original title that the 1st Defendant holds in trust for her and the Plaintiff seeks an order to restrain the 1st Defendant from parting with possession of LR No. **Lari/Kijabe/576**

The application is opposed by the 1st Defendant who in a replying affidavit sworn on 12th June 2013 states that she had no contractual relationship with the Plaintiff and further, that she became the administrator of the estate of her deceased husband **Reuben Mugane Waitara** on 8th November 2010 and a grant as well as a certificate of confirmation of grant dated 8th November 2010 and 25th July 2012 respectively have been annexed as evidence.

The 1st Defendant avers that the estate of the deceased which comprised of **LR No. Lari/Kijabe/168** as the only asset which was shared out to the beneficiaries in accordance with the Law of Succession Act and further, that the beneficiaries included the 1st Defendant and her two sons namely James Chege Mugane and Gladys Wairimu Mugane. The Defendant has annexed as evidence titles to the subdivisions known as **Lari/Kijabe/576, 577 and 578** and has contended that upon subdivision, LR No. Lari/Kijabe/168 ceased to exist and therefore, that the orders sought by the Plaintiff are in vain as they have been overtaken by events. It is the 1st Defendant's averment that since she did not sell or have any contractual relationship with the Plaintiff, the Plaintiff has no cause of action against her.

While stating that there was no evidence that the agreement exhibited by the Plaintiff was ever completed or that the entire purchase price was paid, the 1st Defendant has asserted that only **Kshs 38,000/-** was paid. It is her case that according to the agreement, the purchaser was to take possession after payment of the entire purchase price which has not been done. According to the 1st Defendant, the agreement is void for want of performance and is also barred by the statute of limitation since it ought to have been enforced within a period of 6 years from its making. It is the Defendant's case that the Plaintiff would only be entitled to a refund of **Kshs 38,000/-**. The Defendant denied knowledge of any other payments made towards school fees as asserted by the Plaintiff.

Through a further replying affidavit sworn on 28th February 2014, the 1st Defendant contended that there was no evidence of payments made to her late husband. The 1st Defendant averred that since the title Lari/Kijabe/576 which she owns and holds in trust for the Plaintiff measures 1.596 acres, it is not just that she be compelled to transfer 1 acre claimed by the Plaintiff. The 1st Defendant denied allegations of her intentions to dispose off the suit parcel stating that since the parcel was held in trust for the Plaintiff, the

parcel cannot be legally disposed off without the Plaintiff's consent.

While stating that the Plaintiff had materially altered her claim from one of contract as pleaded in the amended Plaintiff, the 1st Defendant averred that the amended notice of motion lays a claim for trust rendering it procedurally and substantively defective and liable for striking out as being an abuse of the court process. It was further argued by the 1st Defendant that no Land Control Board Consent was sought and therefore, that the contract is unenforceable since it became void by operation of the law.

The 1st Defendant in her further affidavit admits that parcel no. **Lari/Kijabe /576** is held by her for her own benefit and in trust for the Plaintiff for her one acre portion and therefore, that there is no cause of action against the her. Lastly, the 1st Defendant denied having ever been requested or funded by the Plaintiff to procure the subdivision and states that the process of subdivision of **Lari/Kijabe/168** began long before the instant suit was commenced.

The application was canvassed by way of written submissions and the Plaintiff filed submissions dated 13th February 2014 where she reiterated the facts and argued that the issue of lack of Land Control Board Consent to transfer does not arise since the 1st Defendant admitted and included the Plaintiff in the certificate of confirmation of grant and in the petition for grant of letters of administration as being entitled to a share in the deceased's estate.

Counsel for the Plaintiff argued that the 1st Defendant was holding 1.6 acres for herself and in trust for the Plaintiff and he urged the court to enforce the certificate of confirmation of grant and the agreement where the Plaintiff purchased one acre. It was contended that since the 1st Defendant already acknowledges that the Plaintiff purchased the land, the issue of trust does not arise.

While submitting that a case for the granting of an injunction as established in the case of **Giella -vs- Cassman Brown** (1973) EA 358 had been laid out, Counsel argued that a prima facie case with a high chance of success had been made and that the Plaintiff stood to suffer irreparable loss if the orders sought were denied and the suit parcel disposed off and the plaintiff became successful at the trial. The Plaintiff contended that such loss cannot be compensated by damages since the value of the property has appreciated since it was purchased. Counsel for the Plaintiff submitted that the balance of convenience lies in favour of the Plaintiff who has been utilizing the land by cultivating since she purchased the same.

The 1st Defendant filed submissions dated 28th February 2014 where she argued that the Plaintiff had not provided any evidence that she applied for and obtained the Land Control Board Consent in respect of the transaction as required by law. Counsel for the 1st Defendant submitted that the agreement is over 6 years old and therefore, that its enforcement was time barred under the provisions of the Limitations of Actions Act Cap 22 Laws of Kenya. It is the 1st Defendant's submission that the Plaintiff's only remedy would be in an action for breach of contract or damages against the 1st Defendant and not injunctive orders.

In further submission, the 1st Defendant stated that the Plaintiff appeared to be claiming under trust which is a departure from her main claim as contained in the amended Plaintiff where the cause of action is under contract. Counsel contended that since the parcel is held by the 1st Defendant for herself and in trust for the Plaintiff whose interest is one acre out the 1.6 acres, no transfer without the consent of the beneficiary can be made. It is the 1st Defendant's submission that whereas the Plaintiff claims that she wants the parcel subdivided, no requests or attempts for procuring the subdivision have been shown.

While submitting that the Plaintiff has not proved a prima facie case with a probability of success, Counsel stated that the agreement sought to be relied on was null and void for want of consent from the Land Control Board and further, that the Plaintiff was barred under the Limitation of Actions Act in enforcing a contract that was more than 6 years old. Reliance was placed on section 7 of the Limitation of Actions Act, section 6 of the Land Control Act as well as case of **Giella -vs- Cassman Brown & Co. Ltd (1973)EA 358**. Lastly, it was submitted that since equity follows the law, the court cannot sanitize a void transaction and therefore cannot issue equitable remedies of injunction where the Land Control Board

consent was not obtained.

The foregoing are the rival contentions, arguments and submissions between the parties and the issue for determination by the court is whether on the facts and evidence placed before the court the plaintiff has established a prima facie case to entitle the court to grant her a temporary injunctive relief.

On whether a prima facie case with probability of success has been established, the Plaintiff has argued that she has a purchaser's interest in parcel no. **Lari/Kijabe/576** registered in the 1st Defendant's name and which is a resultant subdivision out of title number no. **Lari/Kijabe/168** in respect of which she entered into a sale agreement for the purchase of a portion of one (1) acre. Evidence of the sale agreement dated 22nd February 2001 as well as a certificate of confirmation of grant dated 25th July 2012 showing that the Plaintiff had an interest in the estate of the late **Reuben Mugane** who was the vendor have been exhibited. The 1st Defendant vide her letter dated 25/7/2011 in fact acknowledged the plaintiff's entitlement to a portion of one (1) acre out of title number **Lari/Kijabe/168**. The 1st Defendant upon petitioning for grant of letters of administration to her late husband's estate acknowledged the plaintiff's entitlement to a share of the estate to the extent of one (1) acre out of the said parcel of land. The 1st Defendant's submission that the claim is time barred is misplaced since section 4(a) of Limitation of Action's Act provides that actions founded on contract may not be brought after the end of six years **from the date on which the cause of action accrued**. Since, the 1st Defendant has acknowledged the Plaintiff's interest and has caused the issuance of title to parcel no. Lari/Kijabe /576 which reveal that she holds the parcel for herself and on behalf of the Plaintiff, the issue of limitation does not arise. Indeed if any period of limitation was to accrue it would be from the date when the 1st Defendant acknowledged the plaintiff's claim which she actually did vide her letter of 25/7/2011.

In respect to the lack of consent from the Land Control Board, the 1st Defendant submitted that the transaction was void. In my view, there is a constructive trust in favour of the Plaintiff over parcel no. **Lari/Kijabe/576** as demonstrated by the title. On her part, the Plaintiff argued that the issue of consent does not arise since her claim was already acknowledged by the 1st Defendant and the same now flows from the succession proceedings.

The court of appeal in **Nyeri Civil Appeal no 6 of 2011 consolidated with CA no.s 26 & 27 of 2011, Macharia Mwangi & 87 Others -vs- Davidson Mwangi Kagiri (2014)eKLR cited with approval the cases of Mwangi & another -vs- Mwangi, (1986) KLR 328 and Gatimu Kinguru – vs- Muya Gathangi (1976) KLR, 253** where it was held that the creation of a trust over agricultural land situated in a land control area, does not constitute any “**other disposal or dealing**” with the land within the meaning of *Section 6 (1) (a)* of the Land Control Act and therefore, that the consent of the local Land Control Board is not required. I agree with the holding by the court of appeal and it is my holding that in the present matter the 1st Defendant has admitted and acknowledged she holds land parcel number **Lari/Kijabe/576** in trust for herself and the plaintiff following the subdivision of the original title number **Lari/Kijabe/168** and thus the plaintiff has a proprietary interest in the said parcel of land title number **Lari/Kijabe/576**.

As it is not apparent that the 1st Defendant holds the land in trust for herself and the plaintiff subject to any conditions the plaintiff in my view would be entitled to seek for the dissolution of the trust and to have her entitlement of one acre out of the land transferred to her.

I am therefore satisfied the plaintiff has demonstrated and established she has a prima facie case with a probability of success. Having regard to the circumstances of this matter I am also persuaded that damages would not be an adequate remedy were the 1st defendant to dispose of the suit property and the plaintiff is successful at the trial.

In the premises I find that the plaintiff's application has merit and I grant an order of injunction in terms of prayer NO. (3) of the amended Notice of Motion dated 13th February 2014.

I direct that the costs of the application be in the cause.

Ruling dated, signed and delivered this.....14th.....day of...July.....2014.

J. M. MUTUNGI

JUDGE.

In presence of:

..... For the Plaintiff

..... For the Defendant