



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA T KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 273 OF 2014

RICHARD NYAMWEMBE AUKA1ST PLAINTIFF

GILBERT ONGAGA AUKA2ND PLAINTIFF

ZACHARY OMWOYO AUKA 3RD PLAINTIFF

VERSUS

JOSEPHINE MOTAROKI 1ST DEFENDANT

HARON ONG’OA 2ND DEFENDANT

LAND REGISTRAR, NYAMIRA 3RD DEFENDANT

RULING

1. The 1st and 2nd plaintiffs are the sons of the 3rd plaintiff and the 1st defendant. At all material times, the 3rd defendant was the registered proprietor of all that parcel of land then known as **LR No. West Mugirango/Siamani/6172** (hereinafter referred to only as “**Plot No. 6172**”). On 5th February 2009, the 3rd defendant caused plot No. 6172 to be transferred to the 1st defendant. The 1st defendant was issued with a title deed on the same day. On 16th October 2013, the 1st defendant sold to the 2nd defendant a portion of Plot No. 6172 measuring 50feet by 100feet at a consideration of kshs. 900,000/=. Following this sale transaction, the 1st defendant sub-divided Plot No. 6172 into two portions namely LR Nos. West Mugirango/Siamini/7443 and 7444 (hereinafter referred to as “Plot No. 7443 and Plot No. 7444” respectively). After the subdivision, the 1st defendant retained Plot No. 7443 in her name and transferred Plot No. 7444 to the 2nd defendant on 21st November 2013. The 2nd defendant was issued with a title deed for Plot No. 7444 on the same day namely, 21st November 2013.
2. The plaintiffs brought this suit on 14th July 2014 claiming that the 3rd plaintiff had transferred Plot No. 6172 to the 1st defendant to hold in trust for the 3rd plaintiff’s children, the 1st and 2nd plaintiffs included. The plaintiffs have contended that the sale and transfer of a portion of Plot No. 6172 namely, Plot No. 7444 by the 1st defendant to the 2nd defendant was in breach of the said trust and as such null and void. The plaintiffs have contended further that the subdivision of Plot No. 6172 and transfer of a portion thereof namely Plot No. 7444 to the 2nd defendant was carried out fraudulently by the defendants through forgery and manipulation of land records. In their plaint dated 14th July 2014, the plaintiffs have sought the following reliefs;-

- a. **A permanent order of injunction restraining the defendants jointly and severally, their agents, employees, workers or persons acting on their behalf and by whatever name called from in any way interfering with, entering onto, taking possession, dealing with or in any way seeking to occupy or transfer the land parcel West Mugirango/Siamani/6172 or West Mugirango/Siamani/ 7443 and West Mugirango/Siamani/7444.**
 - b. **A declaratory order that the title West Mugirango/Siamani/7443 and West Mugirango/Siamani/7444 are borne of forgery or fraudulently obtained and of no legal consequence.**
 - c. **A declaratory order that the 1st defendant is/was the registered owner of title number West Mugirango/Siamani/6172 to hold in customary trust for the benefit of her children who include the 1st and 2nd plaintiffs in equal shares.**
 - d. **Further and in the alternative to prayers a, b and c the property West Mugirango/Siamani/6172 and or its subdivisions West Mugirango/Siamani/7443 and West Mugirango/Siamani/7444 be shared equally amongst the seven children of the 1st defendant in protection of their individual entitlements.**
 - e. **That the honourable court do invoke the provisions of section 157 (1) a, b, c, d of the Land Act, 2012 in furtherance of the justice of this case.**
 - f. **Costs of this suit.**
 - g. **Any other relief this court deems fit to grant.**
3. Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 14th July 2014 seeking a temporary injunction to restrain the defendants from encroaching or entering upon, interfering with, taking possession of, transferring or developing Plot No. 7443 and/or Plot No. 7444 pending the hearing and determination of this suit. In the alternative the plaintiffs have sought a temporary injunction to restrain the defendants from selling, transferring, encroaching upon or in any way dealing with Plot No. 7443 and 7444 pending the hearing and determination of this suit. The plaintiffs' application was supported by the affidavit of the 1st plaintiff in which he deposed that; the 3rd plaintiff held Plot No. 6172 that was ancestral land in customary trust for the benefit of his children. The 3rd plaintiff who is polygamous transferred Plot No. 6172 to the 1st defendant to hold the same in customary trust for her own benefit and for the benefit of her children with the 3rd plaintiff including 1st and 2nd plaintiffs. The 1st defendant breached her responsibility as trustee in that she proceeded without the consent of the beneficiaries of the trust that was bestowed upon her to sub-divide Plot No. 6172 and to sell and transfer a portion thereof namely Plot No. 7444 to the 2nd defendant. The 1st plaintiff has deposed further that the 1st defendant did not have capacity to deal with Plot No. 6172 in the manner she did without the consent of all the beneficiaries of the said property and the 3rd plaintiff. The 1st plaintiff contended that the sub-division of Plot No. 6172 and the transfer of a portion thereof to the 2nd defendant was illegal and if allowed to stand, would defeat the interests of the beneficiaries of the said parcel of land.
 4. The plaintiff's application was opposed by the 1st and 2nd defendants through separate replying affidavits sworn on 30th July 2014 and filed in court on the same date. In her affidavit, the 1st defendant admitted that Plot No. 6172 was hitherto registered in the name of the 3rd plaintiff before the same was transferred to her. The 1st defendant deposed that her matrimonial homestead was situated on Plot No. 6172. The 1st defendant contended that after the 3rd plaintiff had transferred Plot No. 6172 to her, her relationship with the 3rd plaintiff deteriorated and the 3rd plaintiff declined to pay school fees and college fees for her children including the 1st and 2nd plaintiffs. The 1st defendant deposed that in order to keep her children in school and in college, she incurred debts from the monies she borrowed from various sources. The 2nd plaintiff who is now in 2nd year at Jomo Kenyatta University of Agriculture and Technology is a testimony of her efforts to educate her children. The 1st defendant deposed that in view of the financial difficulties that she faced, she was constrained to sell a portion of Plot No. 6172 to pay debts that she had incurred. She sold the said portion of Plot No. 6172 to the 2nd defendant. Plot No. 6172 was thereafter sub-divided into Plot No. 7443 and Plot No. 7444. She retained Plot No. 7443 on which

- she has her homestead and transferred to the 2nd defendant Plot No. 7444. The 2nd defendant has since taken possession of Plot No. 7444 on which he has put up a pit latrine and a store house.
5. The 1st defendant has contended that the injunction sought cannot issue against her in that the court cannot restrain her from entering her homestead. The 1st defendant contended further that Plot No. 7443 is registered in her name as the proprietor thereof and as such she cannot be restrained from dealing therewith. In his response to the application, the 2nd defendant contended that before she purchased a portion of Plot No. 6172, he confirmed that the said parcel of land was registered in the name of the 1st defendant. After he entered into an agreement for sale with the 1st defendant, the 1st defendant sub-divided Plot No. 6172 and transferred to him a portion thereof namely Plot No. 7444 in respect of which he was issued with a title deed. The 2nd defendant contended that he acquired Plot No. 7444 from the 1st defendant lawfully and that his ownership of Plot No. 7444 has bestowed upon him exclusive rights to occupy and use Plot No. 7444. The 2nd defendant contended that he acquired Plot No. 7444 for value without notice of any 3rd party claims. The 2nd defendant contended that after the sale and transfer of Plot No. 7444 to him by the 1st defendant, he took possession thereof and fenced the same.
 6. On 30th July 2014, I directed that the plaintiff's application be argued by way of written submissions. The advocates for both parties filed their submissions and the same are on record. I have considered the plaintiff's application and the affidavits filed by the 1st and 2nd defendants in opposition thereto. I have also considered the submissions filed by the advocates for the plaintiffs and the advocates for the 1st and 2nd defendants and the case law cited. The plaintiff's application being one for a temporary injunction, the same shall be considered on the well established principles that were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**. For the plaintiffs to succeed in the present application, they have to satisfy the court that they have a prima facie case with a probability of success and that unless the orders sought are granted, they will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience. The plaintiff's case is based on breach of customary trust and fraud. The plaintiffs' contention is that Plot No. 6172 was ancestral land and that it was held by the 3rd plaintiff in trust for his children.
 7. The plaintiffs have contended that the 3rd plaintiff transferred Plot No. 6172 to the 1st defendant to hold in customary trust for her children with the 3rd plaintiff and that the 1st defendant in breach of that trust proceeded to sub-divide Plot No. 6172 into two portions and sold a portion thereto namely Plot No. 7444 to the 2nd defendant. The plaintiffs have also contended that the transaction was shrouded in secrecy such that fraud cannot be ruled out. The existence or not of a customary trust is a matter of fact. The alleged trust must be pleaded particularized and proved. See order 2, rule 10 of the Civil Procedure Rules, 2010. Section 25 (2) of Land Registration Act, 2012 provides that the rights conferred by registration of a person as proprietor of land does not relieve such proprietor from any duty or obligation to which such person is subject as a trustee. Under section 28 (b) of the Land Registration Act, 2012, customary trust is classified as an overriding interest which means that it may affect registered land although it does not appear in the register.
 8. It follows from the foregoing that if the 1st defendant was registered as the proprietor of Plot No. 6172 to hold under customary trust for her benefit and for the benefit of her children with the 3rd defendant then such registration did not relieve her of her duty to act as a trustee of the said parcel of land. It was not open to her, to deal with the property contrary to the terms of the said trust. It is also not open for the 2nd defendant to argue that since the plaintiffs' alleged interest in the suit property was not registered against the title of Plot No. 6172 as an encumbrance, the same cannot defeat the 2nd defendant's interest that he acquired from the 1st defendant. It is not in dispute that the 3rd plaintiff is a polygamist. It is also not in dispute that he was at all material times the owner of a parcel of land known as **LR No. West Mugirango/Siamani/5000 ("Plot No. 5000")** and that he caused the said parcel to be sub-divided into three (3) portions namely, LR No. West Mugirango/6172 ("Plot No. 6172") which he transferred to the 1st defendant who is his second wife, LR No. West Mugirango/Siamani/ 6173 that he sold to a third party and LR No. West Mugirango/ Siamani/6174 that he transferred to his first wife.

9. The plaintiffs have contended that Plot Nos. 6172 and 6174 were transferred by the 3rd plaintiff to his two (2) wives to hold in customary trust for themselves and for their respective children. This sort of customary trust is not unusual. In the case of **John Gitiba Buruna & Another –vs- Jackson Rioba Buruna**, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003, (unreported), the court upheld the existence of Kuria Customary Law that provides that **“a Kuria polygamist is bound by customs to share his land among his wives (houses): that sons of his wives would share between themselves all the land that their mother would have been allocated by their father...”**. The 1st defendant has not denied that the 3rd plaintiff is her husband and that the 1st and 2nd plaintiffs are his sons. The 1st defendant has not denied that the 3rd plaintiff transferred Plot No. 6172 to her by virtue of her status as his wife. The 1st defendant has not denied the 1st and 2nd plaintiffs contention that Plot No. 6172 was transferred to her by the 3rd plaintiff to hold for the benefit of her children with the 3rd plaintiff. I am satisfied on the material before me that the plaintiffs have established on a prima facie basis that the 1st defendant held Plot No. 6172 in trust for herself and her children and as such she had no capacity to deal with the said parcel of land in breach of that trust. The plaintiffs have also established on a prima facie basis that the sale of a portion of the said parcel of land namely Plot No. 7444 to the 2nd defendant was in breach of that customary trust.
10. Having held that the 1st and 2nd plaintiffs were beneficiaries of Plot No. 6172 under the trust aforesaid, there is no doubt that they would suffer irreparable loss if the parcels of land that came from the sub-division of Plot No. 6172 namely Plot No. 7443 and 7444 are alienated. I am satisfied therefore that the plaintiffs have satisfied the conditions for granting a temporary injunction. I have noted from the material on record that the 1st defendant has her matrimonial home or house on Plot No. 7443 and that the 2nd defendant has already taken possession of Plot No. 7444 and carried out some developments thereon. In the circumstances I would not grant injunction in terms prayed for by the plaintiffs.
11. The upshot of the foregoing is that the plaintiffs’ application dated 14th July 2014 is allowed on the following terms. There shall be injunction restraining the 1st defendant by herself or through her agents, servants or employees from leasing, selling, transferring, or charging all that parcel of land known as LR No. West Mugirango/Siamani/7443 or any portion thereof pending the hearing and determination of this suit or further orders by the court. There shall also be an injunction restraining the 2nd defendant by himself or through his agents, servants or employees from leasing, selling, transferring, charging or developing all that parcel of land known as LR Nos. West Mugirango/Siamani/ 7444 pending the hearing and determination of this suit or further orders by the court. The costs of the application shall be in the cause.

Delivered, signed and dated at KISII this 19th of December, 2014.

S. OKONG’O

JUDGE

In the presence of:-

Mr. Mose L. for the plaintiffs

Mr. Ochwang’i for the 1st and 2nd defendants

N/A for the 3rd defendant

Mr. Mobisa Court Clerk

S. OKONG’O

JUDGE