



**REPUBLIC OF KENYA**

**High Court at Kerugoya**

**Environmental & Land Case 202 of 2013**

**JOSPHAT NJERU NGARI .....PLAINTIFF**

**VERSUS**

**JACOB NTHIGA NGARI ..... 1<sup>ST</sup> DEFENDANT**

**PETERSON NDATHI NGARI ..... 2<sup>ND</sup> DEFENDANT**

**PETER NJIRU NGARI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

By his Notice of Motion dated 28/5/2012, the applicant JACOB NTHIGA NGARI who is the 1<sup>st</sup> defendant in the main suit and the 1<sup>st</sup> plaintiff in the counter claim seeks the following orders against the defendants/respondents in the counter claim i.e. JOSPHAT NJERU NGARI and MARKSON NYAGA NGARI:-

- a) Spent
- b) Spent

c) That this Honourable Court do issue a temporary injunction restraining the defendants/respondents by themselves, their agents and/or anybody acting under the respondents instructions from evicting the plaintiffs/applicants in the counter claim, selling, transferring charging to financial institutions and/or in any other way dealing with land parcels numbers NTHAWA/SIKAKAGO/3702, 3703, 3704, 3705, 3606 and 3707 which are the resultant sub-divisions of the original land parcel number NTHAWA/SIKAKAGO/1765 pending the hearing and determination of this suit.

d) That this Honourable Court do issue orders of inhibitions inhibiting the registration of any dealings in respect of land parcels numbers NTHAWA/SIKAKAGO/3702, 3703, 3704, 3705, 3706 and 3707 pending the hearing and determination of this suit.

e) That costs be provided for.

The application is brought under the provisions of **Section 63 (c) and (e) of the Civil procedure Act, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules** and **Section 68 and 69 of the Land Registration Act.** It is supported by the affidavit of JACOB NTHIGA NGARI also dated 28/5/2012 and also sworn on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants.

The application is opposed and the two respondents i.e. JOSPHAT NJERU NGARI and

MARKSON NYAGA NGARI have both filed replying affidavits. Since the 1<sup>st</sup> respondent JOSPHAT NJERU NGARI is acting in person, I directed that the application be canvassed by way of oral submissions which was done on 26/3/2013 with Mr. Okwaro appearing for the 1<sup>st</sup> applicant and Ms Ndongoro appearing for the 2<sup>nd</sup> respondent.

I have considered the submissions by counsels and the 1<sup>st</sup> respondent.

All the parties herein are brothers and it is the case of the applicants that MARKSON NGARI the 2<sup>nd</sup> respondent herein being the eldest son was registered as proprietor of NTHAWA/SIAKAGO/1765 so as to hold in trust for the other brothers and which was to be shared amongst them, as indicated in the supporting affidavit of the applicant. However, in breach of that trust, the 2<sup>nd</sup> respondent has had the land sub-divided into NTHAWA/SIAKAGO 3702 to 3707 which he intends to transfer to his immediate family and has transferred NTHAWA/SIAKAGO/3704 to the 1<sup>st</sup> respondent herein and has threatened to evict the applicants from their portions which they have been living on for over 40 years.

It is the 2<sup>nd</sup> respondent's case that the parcel NTHAWA/SIAKAGO 1765 was registered in his names in 1978 and he has never held it in trust for anybody because even by then, he was still a minor and therefore not in a position to hold the land in trust for anybody. Indeed, the 2<sup>nd</sup> respondent sold parcel No. 3704 to the 1<sup>st</sup> respondent which is a demonstration that the land belonged to the 2<sup>nd</sup> respondent and further, the green card shows that all the parcels of land 3702 to 3707 belong to the 2<sup>nd</sup> respondent.

On his part, the 1<sup>st</sup> respondent also opposed the application stating that he bought NTHAWA/SIAKAGO/3704 in 2011 from the 2<sup>nd</sup> respondent and that the land did indeed belong to 2<sup>nd</sup> respondent. He annexed a copy of the title.

As stated earlier in this ruling, all the parties herein are brothers. It is also not in dispute that land parcel No. NTHAWA/SIAKAGO/1765 is registered in the names of the 2<sup>nd</sup> respondent herein and from the copy of the register and the replying affidavit of the 2<sup>nd</sup> respondent, this registration was done in 1978 when the 2<sup>nd</sup> respondent was still a minor. The 2<sup>nd</sup> respondent is the eldest of the brothers and by his own admission in his replying affidavit, the land was given to him by the clan but he denies that it was given to him to hold in trust for his brothers.

This application now before me is for the grant of temporary injunction and order of inhibition. The parameters within which this court must determine such an application are clearly set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A. 358** and these are that the court must be satisfied that:-

1. The applicant has a prima facie case with a probability of success.
2. That the applicant would suffer irreparable injury which is uncompensable in damages if the remedy is not granted and
3. If in doubt, the court will decide the application on a balance of convenience.

On the basis that the land parcel No. NTHAWA/SIAKAGO/1765 being registered in the names of the 2<sup>nd</sup> respondent and also the land parcels No. NTHAWA/SIAKAGO/3702 to 3707 being the resultant sub-divisions of the original NTHAWA/SIAKAGO/1765, it would appear, prima facie, that the 2<sup>nd</sup> defendant is the absolute proprietor of the resultant sub-divisions of NTHAWA/SIAKAGO 1765 of which he has sold NTHAWA/SIAKAGO/3704 to the 1<sup>st</sup> respondent. On that basis alone, one would argue that the applicants have not surmounted the first hurdle in the **GIELLA** case (supra).

However, there is evidence from the replying affidavit that in fact the 2<sup>nd</sup> respondent was registered as proprietor of NTHAWA/SIAKAGO/1765 in trust for his brothers who are the parties herein

and even a mode of distribution of this property was arrived at with each of the six brothers being given a share of the resultant sub-divisions. The land NTHAWA/SIKAGO/1765 was given to the brothers by their maternal uncle one NDATHI KANIKI and registered in the 2<sup>nd</sup> respondent's names to hold in trust for his brothers. I have seen the statement of the said NDATHI KANIKI dated 23/12/2011 in which he states that indeed he gave the land No. NTHAWA/SIKAGO/1765 to his late sister Penina Ngari the mother of the parties herein because she and her husband had no land and although the land ought to have been registered in the names of the parties' father, he was an alcoholic and irresponsible so it was feared he would sell it and leave the family destitute. The land could also not be registered in the names of the parties mother Penina Ngari because under Customary Law then, she could not own land. Ndathi Kaniki himself got the land from the Ikandi clan of which he was chairman and so he gave it to his sister and it was registered in the names of the 2<sup>nd</sup> respondent then a minor to hold in trust for his brothers.

This material is relevant and therefore, whereas the 2<sup>nd</sup> respondent has shown that infact the land designated as parcel No. NTHAWA/SIKAGO/1765 was registered in his names in 1978 and so too the resultant sub-divisions of NTHAWA/SIKAGO/3702 to 3707, and although also the 1<sup>st</sup> respondent says he bought NTHAWA/SIKAGO/3704 from the 2<sup>nd</sup> respondent, there is evidence that infact the land parcel No. NTHAWA/SIKAGO/1765 was originally owned by the Ikandi clan which gave it to the parties' uncle who gave it to the parties' mother and it was registered in names of 2<sup>nd</sup> respondent in trust. Although the 1<sup>st</sup> respondent says he bought the parcel No. NTHAWA/SIKAGO/3704 from the 2<sup>nd</sup> respondent in 2011, the **proprietorship Section** of the title does not disclose any such transaction and neither was any Land Control Board Consent shown to the court. The applicants are therefore claiming entitlement to the suit land by virtue of the 2<sup>nd</sup> respondent having been registered as the owner thereof in trust for them.

The title to the suit property was issued under the **Registered Land Act Cap 300 Laws of Kenya** (now repealed) and was therefore subject to **Sections 28 and 30** of the said **Registered Land Act** and in **GATHIBA VS GATHIBA 200 1 2 E.A 342, Justice Khamoni** (as he then was) stated that registration under the provisions of the **Registered Land Act** does not relieve a proprietor from any duty or obligation to which he is subject as a trustee. The court of Appeal in **MUKANGU VS MBUI K.L.R (E & L) 1 at Page 622** approved the findings in the **GITHIBA** case (supra). It is instructive to note that in their defence and counter claim to the original suit filed by the 1<sup>st</sup> respondent herein, the applicants are claiming ownership of the suit property by virtue of trust and also alleging collusion on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The new **Land Registration Act 2012** states as follows in **Section 28:-**

***“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interest as may for the time being subsist and affect the same, without being noted on the register –***

- (a) -
- (b) ***Trusts including customary trust”***

Customary rights are therefore recognized as overriding interests under the new Land Registration Act and the applicants are claiming that notwithstanding the registration of the dispute properties in the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the properties were actually held in trust for them. This right is recognized by statute and in my view, on the evidence available to me, I find that the applicants have established a prima facie case as required in the **GIELLA** case (supra). It is clear to me that in the circumstances of this case, the court would be doing an injustice if it was to find otherwise than that a prima facie case is indeed made out.

On the issue of irreparable injury which is uncompensable in damages, the supporting affidavit of the 1<sup>st</sup> applicant and which is sworn on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants states that the applicants all live on the parcel of land that was previously NTHAWA/SIKAGO/1765 and on which land their parents are buried. They now face threats of eviction therefrom which would amount to a breach of trust on the part of the respondents. That would be ultra vires the duty of the 2<sup>nd</sup> respondent as a trustee and

the court has a duty to restrain such acts should it turn out that indeed the 2<sup>nd</sup> respondent is acting against the law. As was stated by ***Justice Waki*** (as he then was) in ***MOHAMED VS COMMISSIONER OF LANDS & FOUR OTHERS H.C.C.C No. 423 OF 1996 MOMBASA***, no amount of money can compensate the infringement of a right or transgressions against the law. On the basis of the above, I am satisfied that the applicants have satisfied the second limb of the ***GIELLA*** case (supra).

And if I was in doubt, (which I am not), and was to decide the application on a balance of convenience, I would do so in favour of the applicant. This is because, the applicants have stated in their supporting affidavit that they live on the dispute property which is “***their only home***” and they would suffer “***great loss and damage***” if they were to be thrown away from the land. This was never controverted by the 2<sup>nd</sup> respondent who infact confirmed the applicant’s averment because in paragraph 17 of his replying affidavit, he talks of having given the plaintiffs “***licence to live on my land.....***” The applicants are therefore in occupation of the dispute property and the balance of convenience favours them. It would be an act of great injustice if the applicants are evicted from their only known homes should it turn out that their claims are justified.

Ultimately therefore, upon consideration of all the material before me, I am satisfied that the applicants have made out a case for the grant of the orders sought in their Notice of Motion dated 28/5/2012. I grant those orders. Each party shall bear their own costs of this application.

**B.N. OLAO**

**JUDGE**

**18/4/2013**