



Japhet Kaimenyi M'ndatho v M'ndatho M'mbwiria

REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Suit 161 of 2011

JAPHET KAIMENYI M'NDATHOPLAINTIFF/APPLICANT

VERSUS

M'NDATHO M'MBWIRIA DEFENDANT/RESPONDENT

RULING

The applicant by an application dated 1st February 2012 seeks the following orders:-

- 1. That this application be certified urgent and be heard ex parte in the 1st instance.*
- 2. That this Honourable Court to be pleased to issue an order of inhibition against parcels No. Nyaki/Munithu/2609, 2610, 2611 & 2612 until the determination of this suit.*
- 3. That this order be served upon the District Land Registrar Meru for compliance. That this honourable Court be pleased to issue further or better orders as may meet the ends of justice.*
- 4. That the costs of this application be borne by the defendant/respondent.*

The application is supported by annexed affidavit of the application and on the following grounds:-

- 1. That the plaintiff/applicant is the beneficial and licensee over the original parcel No. Nyaki/Munithu/397 which was sub divided into new Nos. Nyaki/Munithu/2609, 2610, 2611 and 2612.*
- 2. That the plaintiff/application has been in occupation, cultivating and constructed permanent house and other houses in a portion of land measuring 1 ½ acres being part and parcel of the original land reference No. Nyaki/Munithu/397.*

The applicant in his affidavit dated 1st February 2012 averred that the respondent/defendant is his father and at all material times the registered proprietor of the original land No. Nyaki/Munithu/397 measuring 2.2. hectares which land is ancestral land and which land was left by applicant's grandfather M'Mbwiria Fikara. That the suit land was registered in the respondent's name to hold in **TRUST** for the entire members of the family. That on 11th October 2007 and 6th April 2011 the respondent applied for consent of the Land Control Board to sub divide the original No. reference No. Nyaki/Munithu/397 but the applicant objected to the granting of the consent to subdivide but later secretly and without applicant's knowledge the respondent managed to obtain letter of consent of the Land Control Board to sub divide the original land. That subdivision was effected and new titles were issued being Nos. Nyaki/Munithu/2609, 2610, 2611 and 2612. The applicant annexed to the affidavit the Green Cards and marked them as 'JK1', 'JK2', 'JK3', 'JK4' and 'JK5'. That the applicant averred that the respondent is proposing and boasting that he shall sell the portion occupied by the applicant and leave him destitute and landless. That unless inhibition orders are placed against parcel Nos. Nyaki/Munithu/2609, 2610, 2611 and 2612 the applicant has stated that he shall suffer irreparable damage.

The respondent in reply to the applicant's application filed replying affidavit dated 13th March 2012. The respondent stated that he is biological father to the applicant and owner of the parcels of land stated/mentioned in the application. He averred that the entire application and the suit is frivolous, vexatious and an abuse of court process meant to drag the respondent in to court. The respondent averred that the applicant is misleading the court by claiming that the suit land was held by the respondent in trust for the applicant. He averred the land held in trust is Nyaki/Munithu/722 and not Nyaki/Munithu/397. That Nyaki/Munithu/397 was subdivided into four portions to which subdivision the applicant objected and filed this suit. That Nyaki/Munithu/397 after sub division the respondent distributed the portions of land amongst his sons as follows:-

- a) **2609 of 1 ¼ acres to John Gakubi**
- b) **2610 of ¼ acre to John Gakubi**
- c) **2611 of 2 ½ acres to Silas Murerwa**
- d) **2612 of 1 ½ acre to M'Ndatho M'Mbwiria**

That plot Nos. 2609 and 2610 allocated to John Gakubi make 1 ½ acres. That Silas Murerwa was allocated plot No. 2611 of 2 ½ acres as he agreed to be taking care of the respondent and his wife during their lifetime. For that reason the respondent surrendered his one (1) acre to Silas Murerwa. That L.R. No. 2612 was reserved for the applicant but he started disrespecting the respondent, who has stated that in the alternative he is willing to give the same to the applicant's four sons in equal shares being Edward Kinoti Kaimenyi, Martin Kiambi Kaimenyi, Douglas Mutethia Kaimenyi and Erick Gitonga Kaimenyi. The respondent on the other hand stated that the applicant is the one intending to sell the land offered to him. The respondent stated if orders sought are granted, it would cause a lot of prejudice to the respondent's entire family. He further stated that no prejudice would be caused to the applicant if the application is refused as the applicant was catered for even in his absence.

When the application came up for hearing, the applicant reiterated the contents of his supporting affidavit. He added that on 5.5.2010 he had cautioned the suit property but it was removed in August 2011 and the land sub divided creating the new titles, hence he filed the present suit.

The respondent on his part opposed the application. He averred that the land was shared in a family meeting and all agreed to proceed to obtain consent of the Land Control Board to effect transfer. That applicant was called to attend Land Control Board for consent to subdivide the land but he refused. That Nyaki/Munithu/397 was sub divided into plot Nos. 2609, 2610, 2611 and 2612. That plot 2612 was reserved for the applicant but remained in the name of the respondent awaiting applicant to meet his part of sub division and transfer fees. The respondent objected to issuing of inhibition orders against plot Nos. 2609, 2610 and 2611 which the respondent stated are no longer his properties but properties of his sons namely Cyrus Murerwa M'Ndatho, Grace Mwari and John Gakubi M'Ndatho. He averred that the parcels

of land Nos. 2609, 2610 and 2611 above mentioned have been transferred into the names of his children.

On Nyaki/Munithu/2612 reserved to be transferred to the applicant or his children he stated that he has no objection to inhibition orders being issued. Section 28 of the Registered Land Act provides:-

“28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b) unless the contrary is expressed in the register, to such liabilities, rights and interests and affect the same and are declared by section 30 not to require noting on the register;

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The respondent's rights as a proprietor are not liable to be defeated except as provided in the Registered Land Act and such rights are free from all other interests and claims, whatsoever, but subject to lease, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register and unless the contrary is expressed in the register, to such liabilities, rights and interest and affect the same and are declared by Section 30 of the Land Registered Act not to require noting in the register. The applicant's claim Nyaki/Munithu/397 was registered in the respondent's name to hold in **TRUST** for the entire family is not supported by Green Card annexure 'JK5' as there is no entry showing that the respondent was registered as a trustee for the applicant and others.

The respondent under paragraph 4 of his replying affidavit dated 13th March 2012 has denied that he held Nyaki/Munithu/397 in trust and stated the land in which it is held under trust is Nyaki/Munithu/722. The contents of the respondents' affidavit have not been controverted or challenged in any way by the applicant.

The applicant in his application has averred that he has been in occupation, cultivation and has constructed a permanent house and other houses in a portion of land measuring 1 ½ acres being part of original land reference Nyaki/Munithu/397. This assertion by the applicant has not been denied or controverted by the respondent. The respondent is now registered as proprietor of Nyaki/Munithu/2612 measuring 1 ½ acres. The respondent though registered stated that he is holding the same for the applicant awaiting his payment of subdivision and transfer fees. It would be unfair and unjust awaiting transfer to refuse to grant order of inhibition to protect the interest of the applicant who is in occupation and has his home on the said parcel of land. Refusing to grant inhibition order would be putting the suit property at the risk of being alienated or sold. That if the suit property is alienated or transferred the applicant's suit would be rendered nugatory and the applicant would be prejudiced.

The applicant is in occupation of the suit land, cultivates there and has a permanent home. The applicant has therefore established that he has arguable case, whether he would succeed or not is not material at this stage, and as such orders of inhibition ought to be granted.

In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions:-

a) That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued.

b) That the refusal to grant orders of inhibition would render the applicant's suit nugatory.

c) That the applicant has arguable case.

The court has power to grant orders of inhibition against a suit land restricting registration of any dealing with suit land for a particular time or until the occurrence of a particular even or generally until further orders. Section 128 (1) and (2) of the Registered Land Act provides:-

“128. (1) The court may make an order (hereinafter referred to as inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge.

(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected thereby, shall be sent to the Registrar, who shall register it in the appropriate register, and no inhibition shall bind or affect the land, lease or charge until it has been registered.”

In the circumstances, I make the following orders:-

1. An order of inhibition be and is hereby issued against parcel land No. Nyaki/Munithu/2612 registered in the name of the respondent until the hearing and determination of this suit.

2.A copy of the order of inhibition under the seal of this court, with particulars of land be served upon the Land Registrar, Meru for its registration in the appropriate register.

3.An order of inhibition be and is hereby refused against land parcels of land No. Nyaki/Munithu/2609, 2610 and 2611.

4.That the applicant did not succeed fully and the dispute involves father and son, I order each party to bear his own costs.

Dated and delivered at Meru this 8th day of May 2012.

**J.A. MAKAU
JUDGE**

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Delivered in open court in the presence of:-

- 1. Applicant in person present/absent**
- 2.Respondent in person present/absent**

**J.A. MAKAU
JUDGE**