



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C MISC. APP. 41 OF 2017(O S)

IN THE MATTER OF LAND PARCEL NO. LOC.10/KAHUTI/387

AND

**IN THE MATTER OF REGISTRATION OF MAINA WAITHAKA (DECEASED) AS TRUSTEE FOR
FRANCIS WAITHAKA AND SERAH WAMBUI**

AND

IN THE MATTER OF AN APPLICATION BY FRANCIS WAITHAKA AND SERAH WAMBUI

RULING

1. The Applicants Francis Waithaka and Serah Wambui filed an Originating Summons under Section 45 & 57 of the Trustees Act Cap 167, Order 37 rule 1, 2 & 12 of the Civil Procedure Rules seeking Orders that the Court declares that the trust bestowed on Maina Waithaka (deceased) be dissolved and the land vest in Benson Waithaka Maina and Serah Wambui alias Sarah Mugure Waithaka as proprietors in common in proportions of 2/3 and 1/3 shares respectively.
2. The background leading to this application is that LR No. Loc.10/Kahuti/387 was registered on 3/12/96 in the name of Maina Waithaka as Trustee for the Applicants Francis Waithaka and Serah Wambui. It is averred that Maina Waithaka died on 3/11/08 and no letters of administration were taken out on his estate. It is further pointed out that the beneficiaries of the trust are adults of sound mind and would like the trust to be terminated and LR No. Loc.10/Kahuti/387 vested in their joint names as common proprietors.
3. Both Applicants have sworn affidavits in support of the application, copies of the title and official search of the title have been attached to the application marked as FMWI & FMW2. Francis Waithaka Maina and Serah Wambui are son and sister of the late Maina Waithaka who died on 3/11/08 aged 77 years. A copy of the death certificate is attached in support of the application.
4. When the application came up for hearing on 10/10/17 the Learned Counsel for the Applicants informed the Court that the Applicants will rely on the sworn affidavits filed on record.
5. I have read and considered the said affidavits, and the supporting documents and observe as follows;

- a. The LR No. Loc 10/Kahuti/387 is registered in the names of Maina Waithaka as trustee for Francis Waithaka and Serah Wambui;
- b. The Trust document creating the trust has not been annexed for the Court to appreciate the nature of the trust envisaged as well as the proportionate holding of each trustee in the trust asset, if any;
- c. The nature of tenure for the beneficiaries on the share proportion is not indicated on the title;
- d. There are two official searches in respect to Loc.10/Kahuti/387 dated 7/11/14 and filed on 18/10/17 which indicate entries on the proprietorship section as

“5. 3/12/96 - Maina Waithaka (in trust for Francis Waithaka & Serah Wambui.)”

7. 3/12/96 -Title deed issued.

- e. The second official search for the said Loc.10/Kahuti/387 and dated even date (7/11/14) contains the following entries;-

“5. 3/12/96 Maina Waithaka (in trust for Francis Waithaka and Serah Wambui.)”

6.3/12/96- Title deed issued.

13/3/97 – Court Order dated 7/3/97 maintaining status quo Civil Case No. 350/96, until final determination”

- f. The certified photostat copy of the green card was not annexed to the application to enable the Court appreciate the transactions on the title.

g. It is also telling that the application was filed in August 2017 and a search dating back to 2014, 3 years ago has been annexed to the application. One would have expected a correct or recent official search of the title to be annexed to the application.

h. The application mentions one Benson Waithaka Maina as a beneficiary of the trust together with Serah Wambui. I note that the beneficiaries stated in the title does not include Benson Waithaka Maina.

6. Section 45 of the Trustees Act Cap 167 states as follows;

“In any of the following cases—

(g) where land or any interest therein is vested in a trustee, whether by way of mortgage or otherwise and it appears to the Court to be expedient, the Court may make an Order (in this Act called a vesting Order) vesting the land or interest therein in any such person in any such manner and for any such estate or interest as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.”

7. The Applicants have come to this Court seeking a vesting Order of the suit property into their names in the proportions of 2/3 and 1/3 to Francis Maina Waithaka and Serah Wambui respectively. I note that the entry on the title is silent on the proportions of the holding of the intended trustees. In the absence of a trust document directing how the suit property should be vested and in what proportions, it is extremely difficult for this Court to grant a vesting Order as prayed. The reason is that if the Court were to so grant

the Order it could be divesting land to the beneficiaries in total noncompliance of the trust, if any. In the absence of agreement by the beneficiaries it cannot grant the Orders as sought. The onus rested on the Applicants to place the relevant documentation before the Court to support their application. I note that this application is non-contentious. However, the Court does not have a basis or foundation to abrogate rights in land in the absence of cogent evidence. From the observations given above there appears to be on record a Court Order maintaining status quo until the civil case Number 350 of 1996 is determined. No material was placed before the Court as to whether this case has been determined or not.

8. In the end I hold and find that the application must fail. It is dismissed with no Orders as to costs.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 18TH DECEMBER 2017.

J.G. KEMEI

JUDGE



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