



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 113 OF 2019

ROSE WANJIRU.....1ST PLAINTIFF

LINUS KABIGA.....2ND PLAINTIFF

VERSUS

JOHN GICHUKI.....1ST DEFENDANT

ELIJIDIAH WANJIKU CHEGE.....2ND DEFENDANT

GEORGE MUGO CHEGE.....3RD DEFENDANT

ESTATE OF PAULINE WANJJIRU KIRUTHU.....4TH DEFENDANT

BILHA MUTHONI CHEGE.....5TH DEFENDANT

CHARLES GACHERU CHEGE.....6TH DEFENDANT

NANCY WANJIRU CHEGE.....7TH DEFENDANT

PRICILLA WANGARI CHEGE.....8TH DEFENDANT

GERALD MUHORO CHEGE.....9TH DEFENDANT

LINUS KAFIGA CHEGE.....10TH DEFENDANT

RULING

1. In their Notice of Motion application dated 24th May 2019 and filed on 27th May 2019, the Plaintiffs sought orders that the Defendants, their agents, their servants, relatives, employees or other public officers acting on their behalf or any other persons under their instructions from dealing, interfering, intermeddling with the property belonging to the Estate of Anna Muthoni Chege (hereinafter referred to as “the deceased”) pending the hearing and determination of the suit herein, that the Defendants account for the monies collected from the tenants to the date of filing the present application and that the Officer Commanding Pangani Police Station ensure compliance of the said orders. The said application was supported by the Affidavit of the 1st Plaintiff herein on her own behalf and on behalf of the 2nd Plaintiff herein. She swore a Further Affidavit on 26th June 2019. The same was filed on 28th June 2019.

2. The Plaintiffs stated that the Defendants were harassing tenants residing in Plot No 26/1/311 (hereinafter referred to as the “subject premises”) by collecting rent and threatening to evict them without any colour of right or court order. They added that they were charged in **Criminal Case No 2440 of 2018 Republic vs John Gichuki Chege and Philip Kagio Kiruthi** which was awaiting determination.

3. They denied that there were Succession proceedings for the Estate of the deceased. It was their contention that unless the Defendants, who were intermeddlers in her estate were restrained, they would suffer irreparable damages. They thus urged this court to allow their application as prayed.

4. In opposition to the said application, on 17th June 2019, the Defendants filed Grounds of Opposition of even date. They termed the

application an abuse of the court process as there were other pending cases relating to the same matter, incurably defective, malicious and averred that they were unnecessary parties in the proceedings herein.

5. On 1st July 2019, the 1st Defendant swore a Replying Affidavit on his own behalf and on behalf of the Defendants herein. The same was filed on 3rd July 2020.

6. They pointed out that the Plaintiffs and the Defendants were children of one Chege Muhoro who died on 16th February 2018 and that the deceased was his wife. They averred that the subject premises had been listed as part of the assets of the said Chege Muhoro and that the Plaintiffs filed **Succession Cause No 1579 of 2018 In the matter of Estate of Anne Muthoni Chege** which they later withdrew.

7. It was their contention that no administrator had been appointed in the Estate of the said Chege Muhoro and consequently, no party could control the subject premises. They were emphatic that the Plaintiffs were forum shopping and urged this court to dismiss the present application.

8. The Plaintiffs relied on the cases of **Giella vs Cassman Brown & Co Ltd [1973]** (sic), **East Africa Industries Ltd vs Trufoods Ltd [1992] EA** and **Kisimani Holdings Ltd & Another vs Fidelity Bank Ltd [2013] eKLR** to argue that they were entitled to an injunction.

9. On the other hand, the Defendants placed reliance on the cases of **In Re the Estate of Mwangi Ng'ang'a [2005] eKLR**, **Charles Kyathe Ndeke vs Mutunga & 2 others [2015] eKLR** and **Succession Cause No 410 of 2015 (Nyeri)** (sic). They did not, however, demonstrate the relevance of these cases to the arguments they were setting out.

10. Notably, the matter herein was hotly contested and it took almost nine (9) months before this court could reserve its Ruling herein. In between, the Plaintiff filed a Notice of Motion application dated on 9th December 2019, on even date citing the Defendants for contempt. This application was not heard as advocates for the Plaintiffs and those of the Defendants opened a joint interest earning account for the deposit of the rent pending the hearing and determination of the present application. The court was informed of this position on 19th February 2020. The opening of the said account was pursuant to this court's order of 14th November 2019.

11. On the said date of 19th February 2020, the Plaintiffs' advocates requested the court not to give a Ruling date of the present application. As per their request, this court directed the Plaintiffs to fix a hearing date of their Notice of Motion application dated and filed on 9th December 2019 at the Registry. The Ruling of the present application was kept in abeyance awaiting the hearing and determination of the contempt application.

12. On 30th July 2019, the matter was listed for mention before this court. The Plaintiffs' advocates were not present online on the said date which had been given by the DR High Court of Kenya Milimani Law Courts Civil Division. As the Defendants' advocates who were present online informed the court that the contempt of court application had been overtaken by events, this court reserved its Ruling of the present application as it could not continue holding this matter in abeyance.

13. This court had due regard to the cases the Plaintiffs and the Defendants relied upon and in particular to the case of **Giella vs Cassman Brown & Co Ltd (1973) EA 358** where the criteria to be met before an order for injunction can be given was set out. These were **THAT:-**

- a) **The applicant must demonstrate that he has established a *prima facie* case with a probability of success;**
- b) **The applicant must demonstrate that he will suffer irreparable loss that cannot be compensated by way of damages if the interlocutory injunction is not granted;**
- c) **If the court is in doubt, then it should grant an interlocutory injunction on a balance of convenience.**

14. Taking into account the said criteria vis a vis the affidavit evidence the Plaintiffs relied upon in support of their case, this court was not persuaded that they had demonstrated that they had met the conditions of being granted an injunction.

15. Indeed, this court noted that there was contestation of whether the subject premises formed part of the Estate of Chege Muhoro or that of the deceased's estate. This clearly pointed to this matter being in the wrong forum. Indeed, the prayers the Plaintiffs had sought against the Defendants were in respect of intermeddling, which was within the purview of the Law of Succession Act. Notably, the Plaintiffs had sought remedies under Section 3, 45, 47 and 55 of the Law of Succession Act Cap 160 (Laws of Kenya).

16. The Plaintiffs' prayer for injunction under Section 63 (e) of the Civil Procedure Act Cap 21 (Laws of Kenya) and Order 40 of the Civil Procedure Rules, 2010 was therefore misplaced.

DISPOSITION

17. For the foregoing reasons, the upshot of this court's decision was that the Plaintiffs' Notice of Motion application dated 27th May 2019 and filed on 28th May 2019 was not merited and the same is hereby dismissed with costs to the Defendants herein.

18. It is so ordered

DATED and DELIVERED at NAIROBI this 28th day of October 2020

J. KAMAU

JUDGE