



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 81 OF 2016

IN THE MATTER OF THE ESTATE OF JOHN WACHIRA WANJAU (DECEASED)

ANDREW MURIUKI WACHIRA1ST PETITIONER/APPLICANT

DAVID MWANGI WAGACHA2ND PETITIONER/APPLICANT

VERSUS

DAVID MWANGI WAGACHA.....RESPONDENT

RULING

1. The Applicants are Co-Petitioners for letters of administration in the estate of John Wachira Wanjau who died intestate. They have approached seeking certain injunctive orders against the Respondent with respect to a parcel known as Title No. Ndumberi/Riabai/1513 (“Subject Property”).
2. It is not disputed that the Subject Property is part of the estate of the Deceased and is still registered in his name. Letters of administration with respect to the estate are yet to be issued although the process is well under way.
3. The Co-Petitioners are children of the Deceased.
4. What, then, is the Respondent’s claim to the Subject Property? It is not disputed that the Respondent entered into an Agreement for sale of the Subject Property on 30/07/2015. The purported Agreement entered into between the Respondent as the Purchaser and one, Ann Muthoni Wachira as the vendor.
5. It is clear that Letters of Administration had not been issued when the purported Agreement for Sale was entered into. It is, therefore, obvious that Ann Muthoni Wachira had no capacity to enter into the purported Sale Agreement or convey the property. It is equally clear that the Respondent was well aware of this incapacity: the purported Agreement for Sale clearly identifies and describes Ann Muthoni Wachira as “the Proposed Personal Representative to the Estate of the Late John Wachira Wanjau.”
6. Pursuant to the purported Agreement for Sale, the Respondent paid part payment of Kshs. 1 Million which was received by Ann Muthoni Wachira as down payment. He also took possession of the property.
7. It is at that point that the other beneficiaries to the estate, namely the children of the deceased, knew of the purported sale. They objected to it. It appears that the parties tried to resolve the issues before the area

Chief and they appear to have come to some agreement that the sale be permitted to go on. This appears from a document attached to the Affidavit of the Respondent and marked as “Annexure DMW 4.”

8. The agreement by the parties to proceed with the sale appears to have been short-lived. Thereafter, all the beneficiaries appear to have agreed to have consented to having the Co-Petitioners file for Letters

9. The legal history of the succession matter appears to be convoluted because of the original petitions and cross-petitions filed. Suffice it to say that as things stand, the two Co-Petitioners are the sole Co-Petitioners representing the interests of the estate. It in that capacity that they have brought the Application dated 22/09/2016.

10. The Applicants position is fairly straightforward:

a. They argue that the purported Agreement for Sale is null and void and without any legal effect whatsoever since it was entered into by a person who did not have capacity to dispose off the property of the Deceased.

b. And that, consequently, the continued possession of the Subject Property by the Respondent is unlawful.

11. The Respondent’s argument is that he took rightful possession of the Subject Property and began to erect a perimeter wall on it. It is therefore wrong, he argues, to refer to him as an intermeddler since he is an innocent purchaser for value “after getting confirmation from Anne Muthoni Wachira being the widow [of] the Late John Wachira Wanjau that she had authority to sell the suit property.”

12. The Respondent argues that he has placed a caveat on the Subject Property in the Succession Matter in the lower Court (which has since been transferred to this Court.). Further, the Respondent argues that section 79 of the Law of Succession Act clothes an Administrator all the rights the Deceased had over his estate including the power to enter into an Agreement for Sale.

13. Finally, the Respondent argues that he has made substantial developments on the Subject Property and that the Subject Property is now valued at Kshs. 10,300,000/=. It would, therefore, be unfair and unjust for the Applicants to refund him only the down payment he had paid especially considering that he had taken overdraft facility from a bank to pay that deposit.

14. This is a straightforward case despite understandable efforts by the Respondent to complicate it. Let us begin here. The Respondent cites section 79 of the Law of Succession Act which he says permits a Personal Representative to enter into a Sale Agreement. He is right. This is what the section says:

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

15. Unfortunately for him, the person he entered into an Agreement for Sale with is not the Administrator to the estate of the Deceased. Ann Muthoni Wachira is not and never was an Administrator to the estate.

16. It does not help the Respondent to claim that he was an innocent purchaser from Ann Muthoni Wachira who assured him that he was the Administrator. For one, that assertion is demonstrably false: the purported Agreement for Sale – attested by an Advocate – is quite clear that Ann Muthoni Wachira is the Proposed Personal Representative to the Estate of the Late John Wachira Wanjau.” That description appears on the cover of the Agreement for Sale and is, again, repeated in the representations section of the Agreement. In the face of this, it is disingenuous for the Respondent to claim to be “an innocent purchaser.” The Respondent knew exactly what he was doing and he knew the purported vendor was under legal disability to enter into the purported Agreement for Sale.

17. Perhaps the Respondent’s lawyer should have cited for him section 80(2) of the Law of Succession

Act. It provides that: A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant.

18. What about the fact that the Respondent took possession of the Subject Property and developed it? It is to no avail. An Agreement for Sale purportedly entered into by a party that has no capacity to do so is incapable of conveying any property rights. Any possession taken pursuant to the purported Agreement of Sale is thus, unlawful and cannot be termed as rightful.

19. What the Respondent and Ann Muthoni Wachira did comes within the classic definition of intermeddling in the Deceased's estate as defined in Section 45 of the Law of Succession Act. The intervention by the Chief would have been useful in settling the live dispute out of court but it cannot change the statutory position: a purported disposition by a beneficiary who was not the Personal Representative of the estate at the time of the purported disposition is null and void. In this case, the equities of the case would not even favour the Respondent since he was clearly in the know that what he was engaged in was premature disposition of the Deceased's estate. He even came armed with lawyers who surely must have so advised him.

20. In terms of legal principles enunciated in the iconic of *Giella v Cassman Brown [1973] EA 358*, a party seeking the drastic remedy of an interlocutory injunction bears the burden of demonstrating:

- a. A likelihood of success on the merits in the substantive suit;
- b. The prospect of irreparable injury if the provisional relief is not granted; and
- c. That the balance of equities is in favor of the Applicant.

21. In the specific circumstances of this case, I am satisfied that the Applicants have easily met the tripartite *Giella* standard. Following my findings above, it is fairly obvious that the Respondent has no colour of right to remain in the possession of the Subject Property. He may have a claim against Ann Muthoni Wachira in damages – but he has no right to the Subject Property which is part of the estate of the Deceased. Ann Muthoni Wachira had no capacity to enter into the purported Agreement for Sale and no property interests whatsoever were conveyed by it. Possession without a right to enter does not confer any proprietary rights either. Neither does development pursuant to a purported Agreement for Sale which is a nullity.

22. As for the second element in the *Giella* test, it is fairly obvious that if the Respondent keeps possession of the property and continues to develop the property as he is currently doing, it will cause irreparable harm to the beneficiaries of the estate of the Deceased since his purported claim is squarely against their interests in the estate.

23. Finally, as I stated above, the balance of equities is against the Respondent.

24. It also follows therefore, that the prayers 3, 4, 5 and 6 in the Chamber Summons dated 22/09/2016 are merited and are hereby granted.

25. Orders accordingly.

Dated and delivered at Kiambu this 23rd day of March, 2017.

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JOEL NGUGI

JUDGE