



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
SUCCESSION CAUSE NO. 321 OF 2003
BETTY MUINDI WILSON
STANLEY KASYOKA.....ADMINISTRATORS/RESPONDENTS
VERSUS
MATHEW NDUNDA WILSON.....INTERESTED PARTY
AND
STEPHEN MBITHI
GEORGE MATENJWA GACHUA
TAFUTA DEVELOPMENT CO. LTD.....OBJECTORS/APPLICANTS
ELECTRO BROTHERS & GENERAL CONTRACTORS.....1ST DEFENDANT
AND
PAUL KIMOTHU NJOKI AND 17 OTHERS.....INTERESTED PARTIES

RULING

1. This is a ruling on an application for injunction by Notice of Motion dated 8th March 2016 expressed to be brought under Order 40 Rule 1, 2, and 3 of the Civil Procedure Rules, sections 1, 1A, 3, 3A and 63 (e) of the Civil Procedure Act and sections 71, 76, 86 and 94 of the Law of Succession Act for Orders principally:

“That pending the hearing and determination of the Summons for revocation of Grant dated 5th October 2015, this Honourable Court be pleased to issue a temporary injunction order restraining the objectors together with their agents, servants or workmen from trespassing, selling, wasting, disposing off, selling or interfering or in any manner whatsoever dealing with the deceased estate the subject matter of this suit.” (sic)

2. The application is based upon grounds set out in the application and supported by the affidavit of the 2nd Administrator, Stanley Kasyoka Wilson sworn on 8th March 2016 deponing to material facts as follows:

2. That on March 2016 we visited with my siblings the land which comprised of 299 plots listed in the schedule to 'Amended' Certificate of Confirmation of Grant. Annexed and marked 'SKW1' is a true copy of the Certificate of Confirmation of Grant.

3. That I found out that there are strangers we have never sold that land to and have come up with structures and placed beacons on the said plots without our consents. Annexed and marked 'SKW2, a, b.c, and d are rue copies of photos showing what we found on the site.

4. That upon further inquiries, the strangers who declined to disclose their names indicated that they purchased the plots from Tafuta Development Company the company belonging to the objectors herein.

5. That we were surprised that the Objectors could go ahead and sell land that does not belong to them.

6. That the Objectors have filed the summons fro revocation of Grant and the Court is yet to determine if they are entitled to any portion of the Dec ceased estate.'

3. The Objectors filed Grounds of Opposition dated 17th March 2016 and a Replying Affidavit by the 1st Objector Stephen Mbithi sworn on 18th March 2016. The Objectors relied on a Sale Agreement dated 15th July 1995 allegedly entered with the deceased and which contained a clause under Special Condition 3 that 'the purchaser can advertise, sell and erect beacons on the signing of this agreement...' and averred that they had upon subdivision of the property on 4/11/1997 sold the plots to third parties to some of whom the deceased during his life had transferred the plots. The Objector further deponed that

'7. That there are also many other purchasers in possession and with permanent development whose plots and titles are comprised in the Estate as listed as the deceased died before transferring all the titles but had surrendered possession to us and therefore to the purchasers, with longstanding developments on the various plots since 1995 when we purchased from the deceased and offered for sale to various persons.

8. That accordingly, the application is in bad faith and calculated to harass and annoy valid legal and beneficial owners as such properties ceased to be part of the net intestate estate of the deceased.'

4. I have considered the application and submissions thereon by Counsel for the Adminstrators, Mrs. Rotich supported by Counsel for the 1st Interested Party, Mr. Mugwimia and Counsel for the Objectors, Mr. Mbithi.

5. I take the view that although Order 40 of the Civil Procedure Rules which provides for injunctions is not one of the provisions of the Civil Procedure Rules directly incorporated by reference by rule 63 of the Probate and Administration Rules, the Court has inherent jurisdiction to order an injunction to prevent injury, waste or damage to property the subject of succession pending hearing and determination of a dispute thereon. This must be the corollary of general jurisdiction of the Court under section 47 of the Law of Succession Act that –

“47. Jurisdiction of High Court

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees **and make such orders therein as may be expedient:**

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

6. However, it is a cardinal principle of law that an order may not be made against a person who is not a

party to the suit without having been heard. The Administrators accept that the strangers on the suit parcels of land claimed to have bought the land from the objectors. To the extent that these may be bona fide purchasers for value without notice who have already acquired legal or beneficial interest in the parcel of land, they must be heard by the court before an adverse order is made against them as sought by the Administrators. The strangers on the ground cannot, as purchasers, be taken to be agents or servants of the objectors who may be bound by an order of court so worded. They are independent persons who ought to be joined as necessary parties and heard, if they so wish, before an order is made against them.

7. The Civil Procedure Rules has provisions for joinder of necessary or interested parties, and by virtue of section 89 of the Civil Procedure Act, “the procedure provided in [the Civil Procedure] Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.”

8. Accordingly for the reason set out above, the Administrators’ application for temporary injunction dated 8th March 2016 is dismissed with costs to the Objectors.

DATED AND DELIVERED THIS 28TH DAY OF APRIL 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

.....for the Administrators/Applicant

.....for the Objector/Respondent

Mr. Otieno for the Interested Party

Ms. Doreen - Court Assistant.