



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ELC CASE NO. 320 OF 2015

KHADIJA MOHAMED1ST PLAINTIFF/APPLICANT

ANISSA MOHAMED.....2ND PLAINTIFF/APPLICANT

FUADI MOHAMED.....3RD PLAINTIFF/APPLICANT

VERSUS

MARY NJERI MOHAMED.....1ST DEFENDANT/RESPONDENT

MOHAMED ALI.....2ND DEFENDANT/RESPONDENT

RULING

The plaintiffs/applicants are siblings and children of the 2nd defendant/respondent herein with his deceased first wife while the 1st defendant/respondent is the second wife to the 2nd defendant with whom they have since separated. In 1977, the 2nd defendant's first wife perished in a road accident and he was compensated for her death and used the proceeds to acquire land parcel No. EMBU/MUNICIPALITY/498 (suit property) which he registered in the joint names of himself and the 1st defendant for their own benefit and as custodian of the plaintiffs/applicants who were minors at that time. Since the 1st defendant/respondent had no employment or financial capacity to develop the suit property, the 2nd defendant/respondent used the remaining accident compensation proceeds to develop it by constructing a commercial building thereon. Unknown to the plaintiffs/applicants, the 1st defendant/respondent filed **MERU H.C.C.C No. 297 of 1993** (later **EMBU H.C.C.C No. 156 of 2012**) seeking orders to sub-divide the suit property into two equal parts and separate titles be issued to the two defendants/respondents. The 1st defendant/respondent secured a default judgment against the 2nd defendant/respondent in 1994 and meanwhile the plaintiffs/applicants secured jobs and started contributing towards the development of the suit property which was occupied by tenants who would deposit rent in a joint account held by the 1st and 2nd defendant/respondents for the benefit of the entire family. However, when the defendants/respondents disagreed and separated, the 1st defendant/respondent stole a number of documents from the plaintiffs/applicants and the 2nd defendant/respondent, went ahead to forge documents and signatures and accessed the family account which she swept clean and that matter is pending trial in **EMBU CHIEF MAGISTRATE'S COURT CRIMINAL CASE No. 37 of 2013**. The 1st defendant/respondent also transferred a number of other parcels of land in which the plaintiffs/applicants had an interest into her names and disposed them to third parties. Those transactions are also subject of Court cases pending at **KERUGOYA** and **EMBU COURTS**.

The 1st defendant/respondent has now laid claim to half of the suit property and served the tenants with notices to deposit the rent in her personal account otherwise she will levy distress. It is the plaintiffs/applicants case that the 1st defendant/respondent's notices has no basis in law as the order

which she seeks to rely on is statute barred and even if it was enforceable, it is silent on the issue of rent from the flats and it only addresses the issue of sub-division of the suit property. The plaintiffs/applicants also aver that by virtue of their subsequent financial contribution towards the improvement of the suit property, to which the 1st defendant/respondent never contributed, their financial interest in the suit premises is in equal share to that of the defendants/respondents. That plaintiffs/applicants aver therefore that the defendants/respondents' attempt to sub-divide the suit property between the two of them in equal shares behind their back is fraudulent and is intended to disenfranchise them of property in which they have a direct financial interest. Particulars of fraud have been levelled against the defendants/respondents and by their suit filed herein on 7th August 2015, the plaintiffs/applicants seek judgment against the defendants/respondents in the following terms:-

- a. ***A declaration that the plaintiffs/applicants have a valid claim on the entire suit property since the 2nd defendant/respondent used the money he held in trust for their benefit to acquire and develop the suit property.***
- b. ***A declaration that the plaintiffs/applicants have a proportionate share arising from their own subsequent financial contribution to the improvement of the suit property.***
- c. ***A declaration that the order of the Court delivered in 1994 is statute barred and is of no legal effect.***
- d. ***An order that the defendants/respondents immediately transfer the suit property to the plaintiffs/applicants.***
- e. ***Costs of this suit.***
- f. ***Interests on (d) and (e) above.***

Simultaneously with the filing of the plaint herein, the plaintiffs/applicants filed a Notice of Motion under **Order 45 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules, Sections 1A 1B and 3A of the Civil Procedure Act** and all other enabling provisions of the law seeking the following orders:-

1. ***Spent.***
2. ***That there be a stay of execution of any Court order in respect of land reference EMBU/MUNICIPALITY/498 and particularly emanating from EMBU CIVIL CASE No. 156 of 2012 until the applicant's case is heard and determined.***
3. ***That the status quo of the suit premises be maintained until the plaintiffs' case is heard and determined.***
4. ***That the costs of this application be provided for.***

The application is premised on the grounds set out therein and supported by the affidavit of **KHADIJA MOHAMED** the 1st plaintiff/applicant herein sworn on behalf of the 2nd and 3rd plaintiffs/applicants which is basically a rehash of their pleadings set out above.

The 1st defendant/respondent filed a replying affidavit in response to the Notice of Motion in which she averred, inter alia, that the plaintiffs/applicants have no locus standi as no grant of letters of administration in respect of their purported mother's Estate whose name is not even disclosed, that there is no evidence that the suit property was developed with the application of the proceeds of compensation allegedly made in respect of the Estate of their purported mother, that the plaintiffs/applicants have not explained the delay in instituting these proceedings, that the plaintiffs/applicants are agents of their father the 2nd defendant/respondent assigned the role of obtaining orders that were denied in **EMBU H.C.C.C No. 156 of 2012** through the back door, that the plaintiffs/applicants did not contribute towards the development of the suit property and no proof has been set forth. The 1st defendant/respondent further depones that the Criminal proceedings have no bearing to **EMBU H.C.C.C No. 156 of 2012** in which the issues as to whether she should enjoy the fruits of the judgment and decree issued therein were fully addressed and by the time she married the 2nd defendant/respondent, he was not living with any other wife and apart from herself, no other person made any input towards the development of the suit property.

On his part, the 2nd defendant/respondent filed a replying affidavit in which he averred that when his first wife died in 1977 in a road accident, he was compensated and used the proceeds to put up a commercial building on the suit property for the benefit of the family and especially the plaintiffs/applicants who were

still minors. That he used his own money without any help from the 1st defendant/respondent with whom they are now separated and who went to live in Kitengela after withdrawing all the money from their joint account. That the plaintiffs/applicants helped him finalize the development of the suit property when they became of age and are therefore legal beneficiaries of the same.

That Notice of Motion is the subject of this ruling and submissions have been filed by the firm of **SIMIYU, OPONDO, KIRANGA ADVOCATES** for the plaintiffs/applicants and **NYAMU & NYAMU ADVOCATES** for the 1st defendant/respondent. The firm of **AJIAMBO LUANDE ADVOCATES** for the 2nd defendant/respondent did not file any submissions.

I have considered the application, the rival affidavits and the submissions by counsel.

The following facts can be gleaned from the pleadings herein and are not really in dispute:-

1. **The plaintiffs/applicants are siblings and the children of the 2nd defendant/respondent by his first wife who died in a road accident in 1977.**
2. **That the defendants/respondents cohabited as man and wife but have since separated.**
3. **That the defendants/respondents litigated over the suit property in MERU H.C.C.C No. 297 of 1993 (later EMBU H.C.C.C No. 156 of 2012) and a decree was issued on 8th March 1994 following a judgment by KULOBA J (as he then was) directing that the suit property be subdivided into two equal portions with the 1st defendant (as plaintiff) taking the front portion and the 2nd defendant taking the rear portion.**
4. **ONG'UDI J, by a ruling dated 4th April 2014 dismissed an application by the 2nd defendant/respondent seeking among other orders, the setting aside of the judgment by KULOBA J (as he then was) dated 8th March 1994.**
5. **The plaintiffs/applicants were not parties to MERU H.C.C.C No. 297 of 1993 and later EMBU H.C.C.C No. 156 of 2012.**

Although the application cites **Order 45 Rule 1 of the Civil Procedure Rules** as one of the provisions on which it is founded, I do not see anything in the body of the application to suggest that it seeks a review of the decree or order issued in **MERU H.C.C.C No. 297 of 1993** (later **EMBU H.C.C.C No. 156 of 2012**) which is what **Order 45 Rule 1 of the Civil Procedure Rules** provides for. The application seeks an order of stay of execution of that decree and maintenance of the status quo until this case is heard and determined.

In my view, the issue for determination herein is whether in fact the plaintiffs/applicants have the locus standi to file this application. As is clear from the pleadings in both **MERU H.C.C.C No. 297 of 1993** and later **EMBU H.C.C.C No. 156 of 2012**, the plaintiffs/applicants were not parties in that dispute and neither was it filed on their behalf. The dispute in that case was between the 1st defendant/respondent (as plaintiff) and the 2nd defendant/respondent (as defendant). That dispute concerned the ownership of the suit property which was ordered to be shared equally between the defendants/respondents. There appears to have been no appeal from that decision by **KULOBA J** (as he then was) dated 8th March 1994 nor from the ruling of **ONG'UDI J** dated 4th April 2014. Although counsel for the 1st defendant/respondent has submitted that the plaintiffs/applicants have no locus standi to institute this suit and the application in respect of the Estate of their purported mother as they have not obtained a grant of letters of administration in respect to that Estate, the plaintiffs/applicants have in fact moved this Court not as legal representatives of their late mother's Estate but rather, in their own capacity as persons who have a valid claim to the suit property on the basis that it was developed through money held in trust for their benefit. They also claim that they contributed towards the development of the suit property and seek to have the judgment delivered in 1994 as statute barred. The above notwithstanding, do the plaintiffs/applicants have the locus standi to seek the orders in their Notice of Motion or indeed in the main suit itself?

LOCUS standi is defined in **BLACK'S LAW DICTIONARY 9TH EDITION Page 1026** as "**the right to bring an action or to be heard in a given forum**". While it is true that the promulgation of the 2010 Constitution enlarged the scope of locus standi especially Article 22 and 258 thereof which

empowers a person to move the Court claiming infringement of the Bill of rights, the plaintiffs/applicants herein are essentially seeking to enforce private proprietary rights in a matter where those rights have in fact already been determined by a Court of competent jurisdiction over the twenty (20) years ago in a dispute to which they were not parties. The plaintiffs/applicants not being parties to the **MERU H.C.C.C No. 297 of 1993** later **EMBU H.C.C.C No. 156 of 2012**, it is not clear to me which of their rights were adversely affected by the judgment and decree issued in that case in relation to the suit property.

Even assuming that the plaintiffs/applicants' rights have been infringed, no evidence has been placed before this Court to demonstrate what the plaintiffs/applicants contributed towards the development of the suit property or even the proceeds of compensation of their mother's death which the 2nd defendant/respondent used in developing the same. In any case, any application for stay of execution can only be properly made in **EMBU H.C.C.C No. 156 of 2012** and not by filing a fresh suit.

With regard to the prayer for maintenance of the status quo, this Court has not been addressed on what exactly is the status quo obtaining on the suit property. A Court cannot issue orders in vacuo.

In the circumstances therefore, and having considered all the issues raised herein, I find no merit in the plaintiffs/applicants Notice of Motion filed on 7th August 2015. The same is accordingly dismissed with no order as to costs.

B.N. OLAO JUDGE

9TH JUNE, 2016

Ruling delivered, signed and dated in open Court this 9th day of June 2016.

Ms Ndorongo for Nyamu for the 1st Defendant/Respondent present

1st Plaintiff/Applicant present in person

No appearance by the 2nd and 3rd Plaintiffs/Applicants

No appearance by the 2nd Defendant/Respondent.

B.N. OLAO

JUDGE

9TH JUNE, 2016