



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 152 OF 2015

MARTIN NJEMA KAMAU (CHAIRMAN) DANIEL KURIA NJOGU (TREASURER)

on behalf of JOKIMANGA SELF HELP GROUP.....PLAINTIFF/APPLICANT

VERSUS

LEAH RUGURU WATHIGA.....DEFENDANT/RESPONDENT

RULING

The issue for my determination in the plaintiff's application for injunctive relief dated 1st December 2015 is really whether a party who is not a personal representative of a deceased person has the capacity to sell any immovable property belonging to that Estate.

On 1st November 2013, the defendant herein **LEAH RUGURU WATHIGA** entered into an agreement to sell to the plaintiff one (1) acre of land parcel No. **MUTITHI/STRIP/271** at a consideration of Ksh. 620,000 out of which Ksh. 570,000 was paid at the signing of the agreement and the balance of Ksh. 50,000 was to be paid upon transfer. It would appear from the plaint filed herein on 27th

November 2015 that the defendant has now sold the land to a third party. The plaintiff therefore seeks orders to restrain the defendant, her agents or employees from trespassing and/or constructing structures on the said parcel of land No. **MUTITHI/STRIP/271 (the suit land)**. The plaintiff has also filed the Notice of Motion dated 1st December 2015 and which is the subject of this ruling seeking orders restraining the defendant, her agents or servants from alienating, sub-dividing or in any manner whatsoever infringing on the plaintiff's proprietary rights to the suit land pending the hearing and determination of this suit. The said application is supported by the affidavit of **MARTIN NJEMA KAMAU** in which it is deponed, inter alia, that the plaintiffs and defendant entered into an agreement to purchase the suit land but the defendant has refused to fulfill her part of the agreement.

In a replying affidavit filed by the defendant **LEAH RUGURU WATHIGA**, it is deponed, inter alia, that at the time the said agreement was being signed, the suit land was registered in the names of **JOHN GACENGE RUBUCHI Alias GACHENGE RUBUCHI** (deceased) and is the subject of **KERUGOYA SUCCESSION CAUSE No. 337 of 2012** which is still pending determination. The defendant therefore had no legal capacity to enter into the sale agreement subject of this suit. Further, that there is no evidence that the defendant has sold or intends to sell the suit land and in any event, the plaintiffs are in breach of the sale agreement.

Submissions have been filed by counsel for the parties.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by counsel.

This is an application for temporary injunction and the principles that guide a Court considering such applications were set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358.** These are:-

- (a) The applicant must show that he has a prima facie case with a probability of success at the trial.***
- (b) The applicant must demonstrate that unless the order for injunction is granted, he might suffer irreparable injury that cannot be compensated by an award of damages, and;***
- (c) If in doubt, the Court will determine the application on the balance of convenience.***

As to what is a prima facie case, the Court of Appeal defined it in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) e K.L.R** as follows:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

Lastly, as was held in the case of **FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALES LTD 1986 3 ALL E.R 772,** the Court in considering such an application will take the course that appears to carry the lower risk of injustice.

Turning to the facts of this case and applying the above principles, the first question to address is whether the plaintiffs have disclosed a prima facie case with a probability of success at the trial. It is not in dispute that at the time when the parties herein entered into the agreement for the purchase of the suit land, the same was registered in the names of one **JOHN GACENGE RUBUCHI Alias GACHENGE RUBUCHI** now deceased. The defendant who was the vendor in the said agreement has no legal capacity to enter into any contract in relation to the suit land which, as at the time of this application, was the subject of **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 337 of 2012** which is still pending confirmation of grant. Under Section 82 of the Law of Succession Act, no immovable property can be sold by a personal representative before confirmation of the grant. In this case, there is even no evidence to suggest that the defendant was a personal representative of the deceased **JOHN GACENGE RUBUCHI Alias GACHENGE RUBUCHI**. Indeed **Section 45 (1) of the Law of Succession Act** makes it an offence for any person to take possession of or dispose the property of a deceased person. That is called intermeddling and is punishable with a fine of upto Ksh. 10,000 or to a term of imprisonment not exceeding one year or to both such fine and imprisonment. It is clear from the application for confirmation of grant in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 337 of 2012** which is the defendant’s annexure **LRW 1** that the same was coming up for hearing on 7th November 2014 a year after the signing of the agreement sought to be enforced in relation to the suit land. Clearly, therefore, the said agreement is illegal by dint of the provisions of **Section 82 of the Law of Succession Act** as neither the defendant who is named as the vendor therein nor **ANGELICA MUTHONI JOHN** who is the applicant in the said Succession Cause had obtained any confirmation of grant in respect of the Estate of the deceased **JOHN GACENGE RUBUCHI Alias GACHENGE RUBUCHI** which includes the suit land. It follows therefore that since the defendant had no capacity to sell the suit land as she was not the personal representative of the deceased, she was only intermeddling with the Estate of the deceased when she entered into the agreement to sell the suit land to the plaintiffs. Her act was unlawful and the agreement she signed with the plaintiffs is an illegal contract. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations that arise out of a contract or transaction which is illegal – **MISTRY AMAR SINGH VS SERWANO WOFUNIRA KULUBYA 1963 E.A 408.** See also **HEPTULLA VS NOORMOHAMED (1984) K.L.R 580** where the Court held:-

“No Court ought to enforce an illegal contract where the illegality is brought to its notice and if

the person invoking the aid of the Court is himself implicated in the illegality”

In the circumstances of this case, therefore, the contract sought to be enforced by the plaintiffs is illegal. It is my finding therefore that the plaintiffs have not established a prima facie case with a probability of success at the trial which is the first hurdle that they had to surmount to justify the granting of the injunctive relief orders as set out in the **GIELLA** case (supra).

Having found that the plaintiffs have not established that they have a prima facie case with a probability of success, I need not consider the other two conditions for the grant of a temporary injunction. This is because the three conditions are sequential and so when there is a failure to establish the first condition, then there is no need to consider the other conditions – **KENYA COMMERCIAL FINANCE CO. LTD VS AFRAHA EDUCATION SOCIETY 2001 E.A 86.**

In the circumstances therefore, the plaintiffs amended Notice of Motion filed herein on 2nd December 2015 is dismissed. As the defendant is equally to blame for the state in which the parties find themselves in, I order that each party meet their own costs of this application.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016

Ruling dated, delivered and signed in open Court this 30th day of September 2016.

Mr. Mwangi for Mr. Mutali for Applicant present

Mr. Nduku for the Respondent absent.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016