



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.129 OF 2011

JACOB JOSEPH WAMBAYA.....PLAINTIFF

VERSUS

MARY WAMBAYA.....DEFENDANT

RULING

1. This ruling follows the filing of submissions by both sides on application dated 27/10/2013 and filed on 28/11/2013. The application is a Notice of Motion brought by the defendant seeking to restrain the plaintiff, by himself, his agents, servants or anybody else from selling Land Parcel number **KISUMU/NYALENDA”B”/978** until the suit is heard and determined. Provision for costs is sought also.
2. The application is brought under Sections 1A, 1B and 3A of Civil Procedure Act (Cap 21) and order 40 Rules 1(a), 2, 4 and 8 of the Civil Procedure Rules and is premised on the grounds that the plaintiff intends to sell land parcel No. **KISUMU/NYALENDA “B” 978** (hereafter the suit land) having illegally transferred it to himself after causing de-registration of the plaintiff. The transfer is said to be in bad faith and an abuse of the court process. The defendant says she will suffer irreparable loss and damage.
3. There is a supporting affidavit to the application where the defendant asserts, inter alia, that she was the registered owner of the suit land prior to recent developments leading to registration of the plaintiff as owner. She takes issue with that registration saying that this suit itself is seeking the registration that has now taken place.
4. It would appear that there was a caution whose removal the plaintiff also caused and the defendant now fears that the plaintiff might sell the property.
5. The plaintiff filed a response vide a replying affidavit filed here on 9/12/2013. He admitted the defendant was the previous registered owner but terms that registration fraudulent. And fraud is said to arise because the defendant misrepresented to the land's office that she had a court grant vide **ELDORET HIGH COURT SUCCESSION CAUSE NO.123/04**. That succession cause is said to relate to different parties and estate. The Land Registrar later discovered this and de-registered the defendant.
6. According to the plaintiff, the suit property was inherited by his late mother vide Succession cause No.6 of 1997 at Kitale. The plaintiff said he does not intend to sell the property. He said he wants to develop it and this application by the defendant is delaying his development plans.
7. The plaintiff's response elicited a response by the defendant by way of a further affidavit. In the affidavit, the defendant denied that her registration as owner was fraudulent. She caused the registration, she said, to preserve it especially after the death of her co-administrator – **ESPERANCE PERSIDE WAMBAYA**.
8. The defendant also said that in order to secure registration in her name she used documents issued in **ELDORET HIGH COURT SUCCESSION CAUSE NO.123 OF 1994** and not **ELDORET SUCCESSION CAUSE NO.123 OF 2004** as the plaintiff alleges. She said that the 1994

Succession Cause was later transferred to **HIGH COURT, KITALE**, where it became **SUCCESSION CAUSE NO.6 of 1997**.

9. NOT to be outdone, the plaintiff also filed a further replying affidavit in which, inter alia, he reiterated allegations of fraud on the part of the defendant and also explained how the succession cause at Eldoret was moved to Kitale. He gave the background of the dispute too and explained the outcome of the dispute at Kitale.
10. The defendant had indicated that she is challenging the outcome of the dispute at Kitale by way of review but the plaintiff denied this saying he is a party to that dispute and has not been served with any papers.
11. The defendant's submissions were filed on 7/4/2014. After citing the decided case of **GIELLA VS CASSMAN BROWN & CO. LIMITED (1973) EA 358** and explicating the principles arising therefrom, the defendant then went on to assert that she has made out a prima facie case, having registered herself as owner of the suit land by dint of documents issued in **ELDORET SUCCESSION CAUSE NO.123 OF 1994** which was transferred to Kitale to become Succession cause No.6 of 1997.
12. The Plaintiff is accused of misleading the Land's office by talking of Succession Cause No.123 of 2004. The confusion arising as a result led to de-registration of the defendant as owner.
13. The defendant also said that the succession cause at Kitale is coming up for review. She said that if the orders sought are not granted, she will suffer irreparable loss.
14. The plaintiff filed his submissions on 14/3/2014. Largely, he reiterated what he stated in both his replying affidavit and the further replying affidavit.
15. I have looked at the pleadings concerning the main suit as filed by both sides. I have also looked at the documents accompanying the pleadings. I have looked too at the application filed by the defendant, her further affidavit, the plaintiff's two replying affidavits and submissions from both sides.
16. It is clear to me that the defendant and the plaintiff's mother had the same husband. The husband died and the defendant alone started succession proceedings at the High Court, Eldoret. The plaintiff's mother got to learn of it and mounted a successful challenge. The end result was annulment of the proceedings and whatever had been issued. Other proceedings, this time involving both the defendant and plaintiff's mother started. The proceedings – **ELDORET SUCCESSION CAUSE NO.123/1994** – were subsequently transferred to Kitale where they became **SUCCESSION CAUSE NO.6 OF 1997**.
17. The Succession Cause at Kitale was concluded with the estate ultimately being distributed vide decree dated 20/2/2004. According to documents availed, the defendant registered herself as owner of the suit land on 22/6/2011. By her own assertion, she got herself registered to preserve the suit property particularly having regard to the fact that her co-wife had also passed on. By her own admission too, she used the documents issued in the Succession cause at Eldoret to get herself registered. It is clear that when the plaintiff got to learn of the registration, he instituted not only this suit but also urged his case at the Land's office. While this case was still pending here, the plaintiff was successful at the Land's office and the defendant was de-registered as owner of the suit property.
18. The application herein is rather unusual because it is the defendant, rather than the plaintiff, who has brought it. It is usually the other way round.
19. The story as told by the defendant leaves a few things that don't add up. In fact, after considering what she said, the impression created is that she is being less than honest. And here is why: The defendant got herself registered on 22/6/2011. She presented for registration purposes documents issued in annulled grant. By the time she was doing so, a decree distributing the estate of her late husband had already been issued at Kitale. She knew all this. Her own story vouches for her awareness of these developments. Question: Why would she present documents of an annulled grant to the Land Registrar? Why wouldn't she disclose of the existence of the case at Kitale? There is possible guile and deception here.
20. The defendant contends that she got herself registered as owner of the suit property in order to preserve it? She did this fully aware of the decree issued at Kitale distributing the property of her

- deceased husband. In that decree, the suit property is clearly allocated to the mother of the deceased. If, as she says, her interest was to preserve the property, how come she was not interested in preserving several other properties also allocated to the mother of the plaintiff and whose details are also very clear in the decree?
21. And am I supposed to believe her bearing in mind that she had by-passed her co-wife and proceeded alone to file a succession cause at Eldoret? And when she talks of the plaintiff misrepresenting to the Land's office that the Succession cause was No.123/04 at Eldoret, was the plaintiff present when, on 22/6/2011 the Land Registrar registered her as owner of the suit property, and further recorded, on her representation too, that the registration was based on the outcome of case No.123/04?
 22. When all this is considered, the defendant clearly emerges capable of intrigue and deception: She is obviously lying concerning her intentions of registering the suit property in her name.
 23. The defendant would have the court believe that she has a prima facie case. My considered view is that she has not established one. It is clear that her fear is that the suit property might be sold. The plaintiff says he is not selling the suit property. What is the basis of her fears that the property will be sold? Has she seen people coming to view the property to buy it? Is she privy to any agreement of sale? All this is not clear. And it is noteworthy that she has not availed any evidence to show that on balance, it is her, and not the plaintiff, who is entitled to the suit property. Infact, from what has been going on in courts, it appears that it is the plaintiff, not her, who has the upper hand at present.
 24. The plaintiff alleged that she will suffer irreparable loss. The nature of that loss was not articulated. What would be the nature of her damage? Isn't that damage compensable? I think it is and if it is not, she was duty bound to explain. It is not for the court to start surmising. And I think it, would do the the some good to undertake to pay damages should the plaintiff ultimately succeed. It is usual in these kinds of applications to give such undertaking. Although it is not a given that an applicant will succeed after giving such undertaking, it nevertheless boosts the chances of success in an application.
 25. The defendant is seeking an equitable remedy. As we have seen, she is telling untruths. He who comes to equity must come with clean hands. The defendant's conduct comes across as questionable. In **Thathy Vs MIDDLE EAST BANK (K) LTD & ANOTHER: 1 KLR 595**, Ringera J (as he then was) observed as follows:

“ An injunction is an equitable remedy and the court may decline to grant the same if it is shown that the applicant's conduct pertinent to the subject matter of the suit does not meet approval of a court of equity”.

And in **MOSES NGENYE KAHINDO VS AGRICULTURAL FINANCE CORPORATION: HCC NO 1044/01, NAIROBI**, the same judge observed:

“And of course it requires no stressing that as an injunction is a discretionary equitable remedy, if the applicant's conduct in relation to the subject matter of the suit is shown not to meet the approval of a court of equity, the relief may not be granted however meritorious the case may otherwise have been”.

26. The defendant's application fails largely because of her manifested conduct. But its also clear that she has failed to establish a prima facie case. She has failed too to give any undertaking in payment of damages should she loose the case. And she has failed to demonstrate that any loss she may suffer is not compensable. It is for all these reasons that I hereby dismiss her application with costs.

A.K. KANIARU – JUDGE

29/1/2015

29/1/2015

A.K. Kaniaru – Judge

Dian'ga G. - Court clerk

No party present

Interpretation – English/Kiswahili

Aboge for Respondent/plaintiff

M/s Sichele for Masika for defendant/Applicant

COURT: Ruling on application dated 27/10/2013 read and delivered in open **COURT.**

Right of Appeal – 30 days

A.K. KANIARU -JUDGE

29/1/2015

AKK/vaa