



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT AND LAND CASE NO.13 OF 2013

WALTER ACHIENG NONDI (Suing as a personal Representative to
the estate of WALTER ARTHUR NONDI (Deceased)).....PLAINTIFF

VERSUS

1. STANDARD CHARTERED BANK (K) LTD
2. DAMARIS AKINYI NONDI.....DEFENDANT

R U L I N G

1. The applicant herein – **WALTER ACHIENG NONDI** – filed this application here against the two respondents – **STANDARD CHARTERED BANK KENYA LIMITED** (1st Respondent) and **DAMARIS AKINYI NONDI** (2nd Respondent) – on 24/1/2013. The application is a Notice of Motion and was contemporaneously filed with a suit in which the applicant is the plaintiff and the two respondents are the defendants.
2. The application is brought under order 40 rule 1 of Civil Procedure Rules, 2010, and Sections 1A, 1B, 3, 3A and 63(c) and (e) of Civil Procedure Act (Cap 21). Prayers 1 and 2 are not for consideration at this stage, having been considered earlier during ex parte hearing. What is for consideration now are prayers 3 and 4, which are as follows:

Prayer 3: That a temporary injunction do issue restraining the defendants/Respondents by themselves, their agents, servants or employees from selling, offering for sale, or in any other manner interfering with applicant's parcel NO.**KISUMU MUNICIPALITY BLOCK 5/76** pending hearing and determination of the suit.

Prayer 4: Costs of the application be provided for.

3. The application is premised on grounds, inter alia, that the land parcel belonged to the applicant's late father – **WALTER ARTHUR NONDI**; that the suit parcel was charged by 2nd respondent to first Respondent; and that unless injunction is granted and the sale stopped, the applicant and the estate of his deceased father stand to suffer irreparably.
4. The supporting affidavit sworn in support of the application shows, inter alia, that the plaintiff's late father died on 10/9/2002 leaving behind a widow and 9 children. The applicant and 2nd Respondent are among the children left behind. According to the applicant, the estate of his late father has never been distributed. In spite of this however, the 2nd Respondent managed to register herself as owner of the suit land and then proceeded to charge it to 1st defendant for various sums of money. The applicant apparently didn't know this until he came across an advertisement in a daily newspaper expressing an intention to sell the suit property.
5. The applicant tried to contact the 2nd defendant. He was unsuccessful and then went to Land's office where he discovered what had happened. It then became necessary to file this suit, which

he did on 24/1/2013.

6. The first Respondent opposed the application vide a replying affidavit filed on 13/2/2013. The fact of advancing monies to 2nd Respondent was admitted. The 1st respondent also deponed, inter alia, that it was never aware that the suit property belonged to anybody else other than 2nd Respondent. It was asserted that the applicant cannot sustain any claim against the 1st Respondent. The suit property is already sold, it was deponed, and the order sought is already overtaken by events.
7. The applicant's submissions were filed on 12/2/2014 and according to the applicant, a prima facie case is established. The applicant is said to have availed a grant ad Litem and also shown he is the son of his late father. The Respondents are said not to have contested this. The 2nd defendant is said to have acquired the land illegally, unprocedurally and/or corruptly.
8. The balance of convenience was said to lie in favour of the applicant since he is the administrator of the deceased's estate and there is need to preserve the suit property. The court was told that if the restraining order is not granted, the suit will be rendered nugatory as the property will be sold.
9. It was pointed out that there is possibility of suffering irreparable loss. According to the applicant, no amount of damage would suffice to compensate the estate of his late father if the property is sold.
10. No decided cases were mentioned in the submissions but it is necessary to point out that two decided cases were attached to the submissions. The cases are:-

- i. **STANLEY MUNGA GITHUNGURI VS JIMBA CREDIT CORPORATION LTD: C.A NO.161/1988, NAIROBI.**
- ii. **E.A. BUILDING SOCIETY LIMITED VS A.C.A D'SOUZ & Another: C.A NO.124/1997, MOMBASA.** The applicant's counsel did not bother to explain the suitability, applicability and relevance of the two authorities to this case. As said earlier, the two authorities are not even mentioned in the submissions. I have however read them. They are Court of Appeal decisions. The facts are very different from those of this case and different considerations went into the decisions that were made.

1. The 1st Respondent's submissions were filed on 10/10/2013. The applicant was said to be undeserving of the prayers sought. He has not, it was submitted, established a prima facie case as he is not the registered owner of the suit property. The registered owner is the 2nd Respondent and the applicant has also not demonstrated that the 1st Respondent acted illegally, fraudulently or corruptly. The decided cases of **TEJPRAKASH SEHM VS PETROAFRIC COMPANY LTD & OTHER (2012) eKLR** and **RACHAEL MUMBI KIGUNDA VS HOUSING FINANCE COMPANY LTD & ANOTHER; (2007) eKLR** were offered to buttress the arguments.
2. It was also said that the plaintiffs will not suffer irreparable loss. The value of the property is known and the 1st Respondent is a solid financial institution that can pay damages. The applicant was also said not to have demonstrated what irreparable loss would be suffered which is not compensable by damages. The decided case of **CHARLES MUTISYA NYAMAI VS HFCK (2007) eKLR** and **JUMA MUCHEMI VS AGRICULTURAL FINANCE CORPORATION: HCC NO.1265/2001**, were offered in support of these arguments.
3. The balance of convenience was also said to lie in favour of the 1st Respondent. The suit property is already sold, it was said, and the plaintiff's application is overtaken by events. The 2nd defendant is in default. The money owed continues to attract interests. Further, the 1st defendant is a public institution. It operates for profit. It has obligations to its share holders and the members of the public. It is therefore fair that the orders sought by the applicant are not granted.
4. The applicant is also said to have behaved in a wanting manner and he is therefore not deserving of the equitable orders he is seeking. For instance, he is said to have misled the court that the suit property was transferred to 2nd Respondent in year 2007. There has also been unexplained delay of over 10 years in taking out letters of administration and, finally, the applicant is said not to have disclosed material facts concerning the assets and liabilities of the estate of his late father.
5. I have considered the application, the replying affidavit and the submissions filed. I have had a look at the suit itself. When this matter was filed, there was an attempt to get a restraining order

- Exparte. The matter was brought before me that same day. I declined to grant the restraining order and observed, inter alia, that there was nothing to show that the suit land belonged to the applicant's late father.
6. Sometime later in the day, a further affidavit was filed with a copy of green card "**WAN 5b**" showing the applicant's late father as the original owner of the land. But the green card also showed something else viz: the 2nd defendant became the owner of the suit land on 29/2/2000. This contradicts the plaintiff's averment at Para 7 of the plaint that the 2nd defendant transferred the land to herself in year 2007. That averment is still there in the plaint and it is a lie. That paragraph also tells another lie namely: that the 2nd defendant required succession papers to transfer the land to herself. A look at the annexure shows that the 2nd defendant became the registered owner when the applicant's late father was still alive. The death certificate of the applicant's late father is availed as one of the documents (**WAN-1**) and shows that the father died on 10/9/2002. The 2nd defendant became the registered owner of the land on 29/2/2000. she certainly did not require any succession papers.
 7. I also need to take issue with the time and manner the suit is instituted. First, the plaintiff's suit is not one claiming ownership of that land though he wants the court to believe that the 2nd defendant is not the owner. He has no suit against the 2nd defendant claiming ownership and I say this because para 3 of the verifying affidavit accompanying the plaint says there are no suits pending between the plaintiffs and the defendants. In effect, therefore, even when the suit herein is ultimately decided, the suit land, barring any other change that has or is likely to take place, continue being owned by 2nd defendant. That raises a question; why does the Applicant want a restraining order when he is not pursuing the issue of ownership? Even if the Applicant gets a restraining order, what would prevent the 2nd defendant, as registered owner, from charging the land to financial institutions other than the defendant?

Quite clearly, the applicant is labouring under some misdirection.

8. The time factor is also another consideration. Lets assume this suit, would solve the issue of ownership or that probably another one will be filed to pursue that issue. Consider this: the 2nd defendant became registered owner in the year 2000. The suit for recovery of land is supposed to be filed within 12 years from when the cause of action accrues. Isn't this suit, or any other to be filed, caught by the Limitation of Actions Act (Cap 22). I seem to think that the suit may run into legal headwinds and may not survive.
9. There is an averment by the 1st defendant's side that the property is already sold. That averment was raised in the replying affidavit. It is an issue that remains uncontroverted. The plaintiff could have responded to it by way of a further affidavit. He didn't do so. The plaintiff's counsel could have referred to it in the submissions. He did not do so. The averment then becomes one that I have to believe. And that being the case, what would a restraining order achieve in the circumstances? I need to point out here that courts of law are never willing to grant orders in vain.
10. It seems to me that one of the arguments raised by the Applicant in support of prima facie case is that he already has a Grant. It is necessary to observe that according to the copy of Green Card availed by the applicant himself, the 2nd defendant became owner of the suit land before the applicant's late father had passed on. Can the grant issued then be said to cover such property. The answer is obviously **NO**. The suit land was never part of the deceased's assets at the time of his death. It cannot therefore be covered by any grant issued later.
11. There is also the innocence of the 1st defendant to consider. It is very clear that the 1st defendant had no way of knowing that the suit property had other parties claiming interests. The 2nd defendant was the registered owner. The 1st defendant acted with due diligence. What wrong did it commit to the applicant or the estate of the applicant's late father? If there was any wrong committed, is it not by 1st defendant? I think the proper person to pin down for any wrong done or perceived to be done is the 2nd defendant, not an innocent party like 1st defendant.
12. And is it true that the Applicant is likely to suffer irreparable loss? I am not persuaded by the arguments raised by the applicant. The value of the suit property is known or knowable. The 1st defendant is a flourishing financial institution with a sound capital base. Should the suit herein ultimately turn in favour of the applicant, adequate damages can be paid.

13. What about the balance of convenience? I have already said the Applicant has told a few lies. The 1st defendant is an innocent party. It has not been shown or even suggested that it connived or colluded with the 2nd defendant. It lent money. There was default. Losses may continue to escalate. Bearing all this in mind, I find that the 1st defendant will be the more inconvenienced party. The Applicant has the option of pursuing the issue with the 2nd defendant. The 1st defendant stands to make total loss.
14. And now the decision: If what I have said at paragraphs 15,16,17,18,19,20,21,22 and 23 of this ruling is considered, it will be realized that my position is that the application herein is for dismissal. My decision therefore is that the application is unmeritorious and I dismiss the same with costs.

A.K. KANIARU – JUDGE

29/1/2015

29/1/2015

A.K. Kaniaru Judge

Diang'a George – court Clerk

No party present

Lore for Applicant

Odeny (absent) for 1st Respondent

Interpretation: English/Kiswahili

COURT: Ruling on application filed here on 24/1/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days

A.K KANIARU – JUDGE

29/1/2015