



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 430 OF 2014**

**JOSEPHINE KERUBO NYASIMI**

**(Suing as legal representative of the Estate of**

**TERESIA MORAA MOGENDI (Deceased) ..... PLAINTIFF**

**VERSUS**

**JULIUS NYAMWAKA MOGENDI ..... 1<sup>ST</sup> DEFENDANT**

**LINET SABINA NYASANI ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY LAND REGISTRAR, KISII COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiff brought this suit on 10<sup>th</sup> November, 2014 seeking; a declaration that the sub-division of LR No. **West Kitutu/Bogeka/2363** was done illegally and fraudulently by the defendants and an order compelling the 3<sup>rd</sup> defendant to cancel the resultant titles that arose from the sub-division of the said parcel of land namely, **LR Nos. West Kitutu/Bogeka/5287, 5288, 5289 and 5290** so that the land comprised in the said titles can revert to the original title **LR No. West Kitutu/Bogeka/2363**.

2. Together with the plaint, the plaintiff filed an application by way of Notice of Motion application dated 4<sup>th</sup> November 2014 that was brought under order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders:

1. Spent
2. Spent
3. **THAT pending the hearing and determination of this suit an order of injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants either by themselves or, their agents/servants/employees from threatening and/or evicting the plaintiff or in any way whatsoever committing any acts of waste upon the suit land(sic).**
4. **THAT pending hearing and determination of this suit an order of temporary injunction be issued against the defendants restraining them either by themselves or agents/employees/servants from conducting and registering any further transactions with regard to the suit land (sic).**
5. **Costs of the application.**

3. The plaintiff's application was supported by the affidavit sworn by the plaintiff on 4<sup>th</sup> November

2014. In her affidavit, the plaintiff stated that she is one of the legal representative of the estate of one, Teresiah Moraa Mogendi, deceased who passed away on 1<sup>st</sup> October 2004 (hereinafter referred to only as “**the deceased**” where the context so admits). The plaintiff stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have demolished part of the house in which she lives on the suit land and have threatened to evict her therefrom. The plaintiff contended that she will suffer irreparable loss if the orders sought in the application are not granted.

4. The application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants through a notice of preliminary objection dated 19<sup>th</sup> November, 2014 and separate replying affidavits sworn on 24<sup>th</sup> November, 2014. In their notice of preliminary objection, the 1<sup>st</sup> and 2<sup>nd</sup> defendants contended that the plaintiff has no *locus standi* to institute this suit and that the suit discloses no cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> and 2<sup>nd</sup> defendants contended further that the plaintiff has violated the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ constitutional rights. In his replying affidavit, the 1<sup>st</sup> defendant stated that the deceased was registered as the owner of all that parcel of land known as **LR No. West Kitutu/Bogeka/157** (hereinafter referred to as “**Plot No. 157**”) which was ancestral land that the deceased inherited from the 1<sup>st</sup> defendant’s father, one, **David Mogendi** who is also deceased. The 1<sup>st</sup> defendant stated that the deceased had three (3) sons, namely, **Julius Nyamwaka Mogendi** (1<sup>st</sup> defendant), **Kennedy Kebaso Mogendi** and **Joseph Kerandi Mogendi**. The 1<sup>st</sup> defendant has contended that before her death, the deceased sub-divided Plot No. 157 and gave portions thereof to each of her three sons. The 1<sup>st</sup> defendant contended that the suit land, namely, **LR No. West Kitutu/Bogeka/2363** (“**Plot No. 2363**”) was given to him by the deceased as his share of Plot No. 157. The 1<sup>st</sup> defendant contended that his brothers mentioned above were also given their respective shares of Plot No. 157 and each has a title to the same. The 1<sup>st</sup> defendant contended that the plaintiff is one of the widows of his deceased brother, **Kennedy Kebaso Mogendi** to whom the deceased had transferred **LR No. West Kitutu/Bogeka/2362** (“**Plot No.2362**”) as his share of Plot No.157. The 1<sup>st</sup> defendant contended that the plaintiff has no interest whatsoever in Plot No. 2363 that solely belongs to him. The 1<sup>st</sup> defendant contended that the plaintiff and her co-wife one, **Alisi Nyanchoka Kebaso** are entitled only to Plot No. 2362 that was given to their deceased husband as his share of Plot No. 157. The 1<sup>st</sup> defendant contended that the title of Plot No. 2363 was closed upon subdivision that gave rise among others **LR. No. West Kitutu/Bogeka/ 5287** (hereinafter referred to only as “**Plot No. 5287**”) that he sold to the 2<sup>nd</sup> defendant. He contended that Plot No. 2363 is not in existence. On her part, the 2<sup>nd</sup> defendant contended that she is an innocent purchaser for value of plot No. 5287. The 2<sup>nd</sup> defendant contended that before purchasing Plot No. 5287, she conducted an official search on its title that confirmed that the 1<sup>st</sup> defendant was the registered owner thereof. The 2<sup>nd</sup> defendant contended that she is a stranger to the plaintiff who is a trespasser on Plot No. 5287.

5. When the application came up for hearing before me on 25<sup>th</sup> November 2014, I directed that the application and the defendants’ preliminary objection be heard together by way of written submissions. The parties’ respective advocates filed written submissions as directed by the court and the same are on record. I have considered the application together with the affidavit filed in support thereof. I have also considered the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ preliminary objection and affidavits filed in opposition to the application. Finally, I have considered the parties’ respective submissions. The principles for grant of interlocutory injunction are now well settled. In the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, it was held that for a temporary injunction to issue;

- a. **The applicant must satisfy the court that he has a prima facie case with a probability of success.**
- b. **The applicant must demonstrate that he will otherwise suffer irreparable injury which cannot be compensated in damages and**
- c. **If in doubt, the court will determine the application on a balance of convenience.**

In the case of **Mrao Ltd -vs- First American Bank of Kenya Ltd [2003] KLR 125**, it was held 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 court, a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the later.”**

6. On the material placed before me, I am satisfied that the applicant has established a prima facie case against the defendants with a probability of success. The plaintiff is one of the legal representatives of the estate of the deceased. It is not disputed that at all material times the deceased was the registered owner of Plot No. 2363. It is also not in dispute that the deceased died on 1<sup>st</sup> October, 2004. The plaintiff's complaint is that, on 30<sup>th</sup> June, 2008, about two years after the death of the deceased, the 1<sup>st</sup> defendant caused Plot No. 2363 to be transferred into his name from the name of the deceased without following the laid down procedure for the disposition of properties of deceased persons. The plaintiff has contended that after the illegal and fraudulent transfer of Plot No. 2363 to his name, the 1<sup>st</sup> defendant proceeded to sub-divide the said parcel of land into four(4) portions namely, **LR Nos. West Kitutu/Bogeka/5287/5288/5289** and **5290**. The 1<sup>st</sup> defendant retained **LR Nos. West Kitutu/Bogeka/5288/5289** and **5290** in his name but sold and transferred **LR No. West Kitutu/Bogeka/5287**(“Plot No. 5287”) to the 2<sup>nd</sup> defendant. The plaintiff has argued that on the death of the deceased, Plot No. 2363 devolved to her estate and as such could only be dealt with in accordance with the law of succession. The plaintiff has argued that no application for grant of letters of administration had been made with respect to the estate of the deceased and as such the 1<sup>st</sup> defendant could only have acquired Plot No. 2363 fraudulently in contravention of the provisions of the Succession Act, Cap.160, Laws of Kenya.

7. Section 45 (a) of the Law of Succession Act Cap 160 Laws of Kenya provides that:

**“Except so far as expressly authorized by this Act or by any written law, or by a grant of representation under this Act no person shall for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.”**

Section 55 of the said Act provides that:

**“No grant of representation, whether or not limited in its terms shall confer power to distribute any capital assets constituting a net estate or make any division of property unless and until a grant has been confirmed as provided by section 71.”**

In the case of **Re Estate of Nduba Mande (deceased) [2003] Eklr**, Musyoka J. stated that:

**“It is fallacious for a spouse or child to imagine that they cannot be guilty of intermeddling when they handle property belonging to their deceased spouse or parent without a grant or representation. Intermeddling can be committed by any person so long as the handler has no grant of representation.”**

8. I am fully in agreement with that statement. The 1<sup>st</sup> defendant has not contested the fact that he acquired Plot No. 2363 after the death of the deceased. He has also not disputed the fact that no grant of letters of administration in respect of the estate of the deceased had been issued by the court as at the time of his acquisition of the said parcel of land. The 1<sup>st</sup> defendant has not proffered any explanation on how Plot No. 2363 changed hands from the deceased to him. In the absence of such explanation, the contention by the plaintiff that the 1<sup>st</sup> defendant acquired Plot No. 2363 fraudulently is not farfetched. The 1<sup>st</sup> defendant has contended that Plot No. 2363 was given to him by the deceased as his share of Plot No.107 which was ancestral land. The 1<sup>st</sup> defendant has however not explained how and why Plot No. 2363 remained registered in the name of the deceased as at the date of her death if indeed the same had been “given” to the 1<sup>st</sup> defendant during the deceased's life time. Even if Plot No. 2363 was the 1<sup>st</sup> defendant's share of the family land as he claims, he was still under a duty to follow the procedure provided in law for the disposition of properties registered in the name of deceased persons before Plot No. 2363 could be transferred to his name. If the 1<sup>st</sup> defendant acquired Plot No. 2363 illegally and

fraudulently, he had no valid title over the same that he could transfer to the 2<sup>nd</sup> defendant upon sub-division of the said parcel of land. The 2<sup>nd</sup> defendant could not acquire a better title to that of the 1<sup>st</sup> defendant. Although the 2<sup>nd</sup> defendant may not have participated in the fraud, her title having been acquired through a fraudulent and illegal process, the same cannot stand. I am persuaded therefore that the plaintiff has established a prima facie case with a probability of success against the defendants.

9. A part from establishing a prima facie case against the defendants, the plaintiff was also under a duty to demonstrate that she will suffer loss that cannot be compensated in damages unless the orders sought are granted. It is not disputed that the plaintiff is a legal representative of the estate of the deceased. It is also not dispute that Plot No. 2363 was registered in the name of the deceased as at the date of her death and as such formed part of her estate. Plot No. 2363 therefore vests in the plaintiff and her co-administrators for distribution to the heirs of the deceased upon the issuance and confirmation of full grant of letters of administration in respect of the estate of the deceased. I am therefore satisfied that the plaintiff would suffer irreparable loss if the orders sought are not issued to conserve the disputed properties.

10. In conclusion, it is my finding that the application dated 4<sup>th</sup> November, 2013 has merit. The issue that remains for consideration is the nature of orders that should be issued by the court. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' advocates have submitted at length on the vagueness of the prayers sought in the plaintiff's application. I am entirely in agreement with them in this regard. The plaintiff has not provided in her prayers the particulars of the parcels of land in respect of which the orders sought are to be directed. The plaintiff has sought injunction to issue against the defendants in respect of the "suit land". As submitted by the 1<sup>st</sup> and 2<sup>nd</sup> defendant's advocates, "suit land" has been defined in the plaint as **LR No. West Kitutu/Bogeka/2363** (Plot No.2363). This parcel of land does not exist. The title to this parcel of land was closed upon its sub-division on 24<sup>th</sup> January, 2013. An order of injunction cannot therefore attach to a non-existent title. Can this blunder in the drafting of the application deny the plaintiff the injunctive reliefs that she has otherwise demonstrated to be entitled to? I don't think so. To deny the plaintiff an injunction would amount to sacrificing substantive justice at the altar of technicality. Article 159 (2) (d) of the Constitution enjoins this court to administer justice without undue regard to procedural technicalities. In the case of **Macharia Mwangi Muna & 7 Others –vs- Davidson Mwangi Kagiri (2014) eKLR** the court stated as follows:

**“Article 159 (2) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing and equity detests from unjust enrichment. This court is bound to deliver substantive rather than technical and procedural justice. The relief orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.”**

11. I entirely agree with the above statement. There is no doubt from my analysis of the parties' respective cases above that the properties in dispute in this suit are **LR Nos. West Kitutu/Bogeka/5287, 5288, 5289 and 5290**. These are the properties against which the injunctive orders sought herein should have been directed. Doing the best I can for the plaintiff in the circumstances, I would allow the plaintiff's application dated 4<sup>th</sup> November, 2014 on the following terms;

- a. Pending the hearing and determination of this suit the 1<sup>st</sup> and 2<sup>nd</sup> defendants by themselves or through their servants or agents are hereby restrained from evicting the plaintiff from the house or building that she occupies on any one or more of the following parcels of land namely, LR Nos. West Kitutu/Bogeka/5287, 5288, 5289 and 5290.
- b. The injunction granted in (a) above shall not entitle the plaintiff to enter onto or upon LR. Nos. West Kitutu/Bogeka/5287, 5288, 5289 and 5290 or any one or more of them or portion of any one or more of them that was not under her occupation or possession prior to the date of this order.
- c. For the avoidance of doubt, the 1<sup>st</sup> and 2<sup>nd</sup> defendants shall be at liberty to continue occupying and using LR Nos. West Kitutu/Bogeka/5287, 5288, 5289 and 5290 or any one or more of them or

portions thereof as may be registered in their names provided that under no circumstance shall the plaintiff be evicted from the house situated on any of the said parcels of land pending the hearing and determination of this suit.

- d. Pending the hearing and determination of this suit there shall be an inhibition inhibiting the registration of any further dealing with LR Nos. West Kitutu/Bogeka/5287, 5288, 5289 and 5290 or any one of them.
- e. The cost of this application shall be in the cause
- f. The parties shall have liberty to apply.

**Delivered, Signed and Dated at Kisii this 20<sup>th</sup> day of March 2015.**

**S.OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Agure Odero h/b for Sagwa for the plaintiff

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> defendant

N/A for the 3<sup>rd</sup> defendant

N/A Court Clerk

**S.OKONG'O**

**JUDGE**