



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.238 of 1986
IN THE ESTATE OF KASSIM HASSAN MALAMBU (DECEASED)

RULING

1. The application coming up is the Originating summons dated 23rd April 2015. The application is brought under Order 1 Rules 3 & 5, Order 1 Rule 25 and sections 3 and 3A of the Civil Procedure Act. The applicant seeks the following orders;

- i. That the Honorable court seeks to enjoin R.K. Kalama, the District Land Registrar of Kajiado North District as a 3rd respondent in this suit.
- ii. That this honorable court does enjoin Geoffrey Njunge Nganga the Transferee of Ngong/Ngong/31984 as the 4th respondent in this suit.
- iii. That this honorable court does enjoin Elizabeth Wanjiru Njunge the Transferee of Ngong/Ngong/31984 as the 5th respondent in this suit.
- iv. That the title deed to Ngong/31984 issued to Geoffrey Njunge Nganga & Elizabeth Wanjiru Njunge be revoked forthwith.
- v. That the 3rd, 4th and 5th intended respondent herein be held in contempt of court.

2. That the application be heard viva voce in the 1st instance while the application dated 10th July 2014 be in abeyance pending conclusions of the present application. The application is based on grounds that. On 21st July 2014 A. O. Muchelule issued an injunctive court order against the following parcels of land the subject matter of this suit;

NGONG/NGONG/31984

NGONG/NGONG/44288

NGONG/NGONG/62326

NGONG/NGONG/62327

3. That the said court order was served on the Kajiado North District Land Registry on 14th August 2014 and 21st August 2014. That on 14th August 2014 a restriction was lodged against the following titles pursuant to the court order issued on 21st July 2014.

4. That the searches conducted on 24th of February 2015 and 26th February 2015 showed that; the aforementioned properties were transferred to Geoffrey Njunge Nganga on 8/10/2014 and later on 16/10/2014 the aforementioned properties had been transferred to Elizabeth Wanjiru Njunge. That Mr. R. K, Kalama the District Land Registrar of Kajiado North District, the 1st and 2nd respondents had intermeddled with **Ngong/Ngong/31984** and extracted an illegal title.

5. The applicant in her supporting affidavit was joined in issue by Lucy Kassim Malambu and Fatuma Kassim Malambu reiterated grounds on the face of the application adding that upon the issuance of the said order of 21st July 2014 her advocates on 14th August 2014 did a letter to the District Land Registrar requiring them to register a restriction on the aforementioned properties and the same was lodged but the Land Registry conveniently refused to stamp the said restriction until a formal complaint was lodged by her advocates vide their letter dated 15th August 2014. On 23rd February 2015 she received communication that one of the properties had been transacted on and transferred to 3rd parties this led her to instruct her advocates to conduct a search on 24th and 26th February 2015 which confirmed that the aforementioned properties were transferred to Geoffrey Njunge Nganga on 8/10/2014 and later on 16/10/2014 the aforementioned properties had been transferred to Elizabeth Wanjiru Njunge and the search made no mention of the injunctive Court order of 22nd July 2014 which indicated that; No dealings to be registered until the succession cause no. 238 of 1996 is finalized. The Land Registry on their part claim that they were served with the said order in August. In her view she suspects there is interference from the land Registry as the said restriction had been lifted by the Land Registrar R. K. Kalama.

6. The respondent in their replying affidavit filed on 12th May 2015 opposed the said application. Elizabeth avers that the she and her husband Geoffrey Njunge Nganga bought the parcel of land in question in the year 2004 from the duly appointed administratrix of the Estate Kassim Hassan Malambu one Mirriam Kassim Malambu. That before entering into a sale agreement carried out due diligence. The Land Control board consent was issued on 1st November 2005. That the transfer was delayed when her husband who was working with Kenya Power & Lighting Company Limited but was later completed in 2008 and they moved in. That when the husband visited the Land's office in Ngong and was informed that there was a restriction registered on the title on 7th February 2010 and a further restriction was filed on 7th February 2010. That civil case no. 1 of 2009 was dismissed by Hon. Karanja on 14th October 2011 and her husband raised a complaint with the District Land Registry. That the applicants also moved the Khadhi's Court vide Succession Cause No. 157 of 2012 the matter was heard and a ruling delivered on 31st August 2012. She avers that the said matter had been determined by the High Court Succession No. 238 of 1986. That on 7th September 2014 the Assistant County Commissioner wrote to the District Land Registrar to have her husband's complaint and that the applicants were on a fishing expedition and in the process abusing their rights to appear and be heard.

7. Fatuma Kassim Malambu in a father affidavit sought to point out that the main issue raised in the said application was the issue of illegal lifting of the Court order dated 21st July 2014, extraction of the title deed while there is in force a court order and contempt proceedings supposedly on the basis of the ruling of Civil Case No. 1 of 2009. That a restriction was lodged on the said title **Ngong/Ngong/24755** which upon subdivision on 29/3/2010 gave rise to numbers **Ngong/Ngong/31983/31984/31985** and **31986**. That after the said restriction there were other restrictions which were subsequently put on the said properties and which the respondents had been procedurally removed.

8. The matter was heard on 15/6/2015. The applicant in support of their request for the matter to be heard viva voce is to explain how the title deed was extracted in the presence of a court order. The respondent on their part oppose the enjoining of the 4th and 5th respondent claiming that no legal basis had been laid and they were not part of the order and had not been served with the said court order and this being a family matter their cannot be dragged into it.

9. It is not in dispute that there was a court order issued on 21st July 2014 by Justice Muchelule, to the effect that, to enable the estate properties to be protected, injunction order be and is hereby issued

against **Ngong/Ngong/31984, 44288,62326 and 62327**. There was a letter dated 12th August 2014 instructing that the said restriction be lodged the same was accompanied by an application to register a restriction and a receipt evidencing payment for the same. This appears to have been done as evidenced by the applicant's certificate of official search dated 14th August, 2015 showed the said restriction. However it appears despite the registration of the said restriction there was transfer of the suit parcel of land to the said Geoffrey Njunge Nganga the intended respondent. In the existence of the said court order which is not denied any dealing with the suit land is invalid and as such transfers to the intended respondent cannot stand. Parties to be taken to the initial position as had been ordered by the court pending the hearing and conclusive determination of the suit in regards to the suit properties.

10. The 2nd and 3rd intended respondent claim to be purchasers for value without notice. I find that the two would be essential parties to the determination of the matter regarding the ownership of the suit parcel of land and as such it is important to include them as parties for that purpose. For this reason this court finds that it would be prudent to hear the parties' viva voce in order for them to shed light on the acquisition or lack thereof of the said title to the suit land.

11. The applicants claim that the respondents were in contempt of the orders issued on 21st July 2014. To establish a claim for contempt of Court one has to establish clearly and precisely what the Respondent was in contempt of, that the actual contempt took place in utter disregard of the Court's order. The standard of proof applied is beyond reasonable doubt see the case of **Dean -v- Dean [1987] 1 FLR 517** held inter alia; '*.....that proceedings for contempt of court are criminal or quasi criminal in nature and the standard of proof to be applied is the criminal standard.*'

The 2nd and 3rd intended respondents were not parties in the said suit and were also not served with the said order as such I find that they could not be said to be in contempt of orders they were not aware of and as such I cannot grant the applicant's prayer to find the respondent in contempt. Prayers 1, 2 and 5 of the application dated 23rd April 2015 are granted. The applicant to serve the said parties forthwith. Prayer 4 on revocation shall be dealt with once directions are given .I decline to grant prayer 5. Cost in the cause. It is so ordered.

Dated, signed and delivered this 25th day of **September** 2015.

R. E. OUGO

JUDGE

In the presence of:

..... **For the Applicant**

..... **For the Respondents**

Ms. Charity

Court Clerk