



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. E012 OF 2021

PHOEBE MUKUI MUTUNE.....PLAINTIFF

VERSUS

BEN EGO.....1ST DEFENDANT

MARGARET MUIRURI.....2ND DEFENDANT

COSMAS MUEMA MWALUKO & DAMIAN MUSYOKA.....THIRD PARTIES

DAVID NJUGUNA GATHIGI & 38 OTHERS.....INTERESTED PARTIES

RULING

What is before Court for determination are two Notice of Motion Applications dated, 11th February, 2021 and 21st October, 2021 respectively. In the Notice of Motion Application dated the 11th February, 2021, which is brought under Order 51, Rule 1, and Order 40, Rule 1 of the Civil Procedure Rules, as well as Section 3A of the Civil Procedure Act, the Plaintiff seeks for the following Orders:

a) That this court be pleased to issue an order of injunction restraining the Respondents/Defendants whether by themselves, their agent, servants, sons, daughters or anybody acting under their authority from trespassing, committing act of wanton destructions, entering upon, interfering, quarrying, erecting structures, constructing, building or otherwise from interfering with the Plaintiff's use and possession of land parcel Number Mavoko Town Block 3/4954 otherwise known as Mavoko Town Block 3/86738 pending the hearing and determination of this application.

b) That this court be pleased to issue an order of injunction restraining the Respondents/Defendants whether by themselves, their agent, servants, sons, daughters or anybody acting under their authority from trespassing, committing act of wanton destructions, entering upon, interfering, quarrying, erecting structures, constructing, building or otherwise from interfering with the Plaintiff's use and possession of land parcel Number Mavoko Town Block 3/4954 otherwise known as Mavoko Town Block 3/86738 pending the hearing and determination of this suit.

c) That the cost of this Application be provided for.

The Application is premised on the grounds on the face of it and supported by the affidavit of Phoebe Mukui Mutune who deposes that she is the registered owner of land parcel number Mavoko Town Block 3/4954 otherwise known as Mavoko Town Block 3/86738 hereinafter referred to as "the suit land". She avers that the respondents had unlawfully invaded the suit land, caused destruction by constructing/building. Further, that her efforts to restrain them through the police has been in vain and unless they are restrained by an order of this court, she stood to suffer irreparable loss including damage.

The 1st and 2nd Defendants opposed the Application by filing a Replying Affidavit dated the 29th March, 2021 sworn by Margaret Muiruri where she averred that together with her late husband, they legally purchased a 3-acre parcel of land which was a subdivision of Mavoko Town Block 3/2034 in 2006 from one Cosmas Muema Mwaluko that had purchased the same from the late Boniface Mutisya Kilungu who was the husband to the Plaintiff herein. Further that the said land is a subdivision of land parcel No. Mavoko Town Block 3/2034, which was registered in the Plaintiff's mother in law's name Monicah Kanini Kilungu, but later subdivided into land parcel No. Mavoko Town Block 3/86737 and Mavoko Town Block 3/86738 respectively by the Plaintiff. She claimed the suit land was sold to one Cosmas Muema Mwaluko, by the Plaintiff's late husband herein one Boniface Mutisya Kilungu who also sold to other purchasers. Further, that the Plaintiff's husband who is deceased had filed a succession cause being Machakos HC Succession No. 458 of 2010 which was awaiting confirmation of Grant, wherein one Damian Musyoka was to be given the whole of the suit land on behalf of all the other purchasers as per the mode of distribution filed in court. She reiterated that when the late Boniface Mutisya Kilungu passed on, the Plaintiff herein went to court and substituted her

deceased husband under the aforementioned Succession Cause, then proceeded with it, but concealed crucial information from court on the proposed mode of distribution. She contended that in 2019 after obtaining Grant of Letters of Administration, the Plaintiff went ahead and transferred the title for the suit land into her name and later on in 2020 subdivided it into Mavoko Town Block 3/4954, 3/86737 & 3/86738 respectively. Further, she later issued the respondents with eviction orders and started demolishing their properties. She insisted that they had been staying in their respective parcels of land for a period of over 15 years without the Plaintiff raising any issue and that they were genuine purchasers of their portions.

The Third Parties filed their replying affidavit dated 21st September, 2021 and averred that they signed a sale agreement on 12th August, 2010 for the sale of the suit land and upon payment of the purchase price proceeded to subdivide the said land to the 2nd Defendant who has lived thereon for a period of 15 years and developed it. They contended that they were not aware of the 1st Defendant in this matter since they did not transfer to him any interest in the suit land.

The Interested Parties' opposed the Plaintiff's application dated the 11th February, 2021 by filing a replying affidavit sworn by DAVID NJUGUNA GATHIGI where he confirmed that together with the 2nd Defendant they had purchased various portions of the suit land from COSMAS MUEMA MWALUKO and DAMIAN MUSYOKA who had initially bought the same from the Plaintiff's late husband. Further, that the suit land is a subdivision of Mavoko Town Block 3/2034 which initially belonged to the Plaintiff's mother in law Monicah Kanini Kilungu. They contended that the Plaintiff's late husband had filed a succession cause being Machakos HC Succession No. 458 of 2010 which was awaiting confirmation of Grant, wherein one Damian Musyoka was to be given the whole of the suit land Mavoko Town Block 3/4954, on behalf of all the other purchasers as per the mode of distribution filed in court. They reiterated that when the late Bonface Mutisya Kilungu passed on, the Plaintiff and one Mutio Wambua substituted the late Bonface Mutisya Kilungu under the aforementioned Succession Cause, then proceeded with it, to the exclusion of the purchasers and the said Damian Musyoka who represented them. Further, that in 2019 after obtaining Grant of Letters of Administration, the Plaintiff went ahead and transferred the title for the suit land into her name and later on in 2020 subdivided it into Mavoko Town Block 3/4954, 3/86737 & 3/86738 respectively. They confirmed that in 2021 the Plaintiff issued notices to some of the purchasers claiming they were trespassers and directed them to vacate the suit land. Further, she started demolishing some of the structures on the suit land. They insist that they have lived on the parcel of land for over 15 years and some of the parties herein have buried their loved ones thereon. Further, that they were genuine purchasers for value of the suit land, a fact that the Plaintiff is well aware of.

The Interested Parties filed a further affidavit dated 27th September, 2021 where they further reiterated that the Third Parties herein purchased the suit land from the Plaintiff's husband when his mother to whom the suit land herein belonged was still alive and even authorized the said sales.

The Plaintiff filed a further affidavit, reiterating her previous averments, denying knowledge of the sale of suit land and insisting this amounted to intermeddling with the estate of a deceased person.

In the Notice of Motion application dated 21st October, 2021 which is brought pursuant to Article 159 (2) (d) of the constitution, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act and Order 38 & 51, Rule 1 of the Civil Procedure Rules 2010, the Third Parties seek the following Orders:

a) That this Honourable court be pleased to stay any further proceedings in this suit and/or matter pending the hearing and determination of this Application.

b) That there be a stay of any further proceedings in this matter, pending the hearing and determination of the Application and/or Summons for Revocation of Grant under Succession Cause No. HC No. 458 of 2010.

c) That the costs of this Application be provided for.

The said application is premised on the grounds on the face of it and supported by the affidavit of Damian Musyoka the 2nd Third Party where he deposes that the suit land LR No. Mavoko Town Block 3/4954 originally belonged to the late Monica Kanini Kilungu. Further, that as third parties they have purchasers' interest as the said land was sold by the Plaintiff's late husband Bonface Mutisya Kilungu with permission from his mother. He explains that the Plaintiff's husband had filed a succession cause and awaiting confirmation to which the deponent was to be registered as the owner of the whole parcel of land on behalf of the third parties, after which he would transfer a portion to them as captured in the mode of distribution. Further, the dispute herein arose after the Plaintiff substituted her late husband and acquired a title for the suit land vide Machakos HC Succession Cause No. 458 of 2010. He contends that they were not satisfied with the process of substitution and how the succession process was undertaken especially the manner in which the Plaintiff herein acquired the Grant of Letters of Administration in respect to the estate of the late Monicah Kanini Kilungu. Further, that they had filed an application to have the Grant revoked and the same was listed for hearing on 25th November, 2021 which may significantly affect this court's decision and/or determination of the entire suit. He deposes that unless the court stays the proceedings herein, they stood to suffer irreparable loss and the Plaintiff would suffer no prejudice should the application be allowed.

The Plaintiff filed a replying affidavit dated 5th November, 2021 and averred that the deceased in her life time did not sell any land to the Applicants and therefore they are not beneficiaries of the deceased estate. She contended that a deceased's estate cannot be sold before Grant is confirmed and therefore the purported sale amounts to intermeddling with the deceased's estate. She contended that the alleged objection in the Succession Cause was therefore filed to scuttle the hearing of this matter and the Interested Parties could only complain to the person they engaged with. Further, that the application is a waste of the court's precious time and should be dismissed with costs.

Both applications were canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the two Notice of Motion applications including the respective affidavits, annexures and rivaling submissions, the following are the issues for determination:

a. Whether the Plaintiff is entitled to orders of temporary injunction in respect to the suit land pending the outcome of the suit.

b. Whether the proceedings herein should be stayed pending the hearing and determination of the Application and/or Summons for Revocation of Grant under Machakos Succession Cause No. HC No. 458 of 2010.

The Plaintiff/Applicant in her submissions to the application dated the 11th February, 2021 reiterated her averments in the respective affidavits and contended that she had established a prima facie case to warrant the orders of injunction sought. To buttress her averments, she relied on the following decisions: **Giella Vs Cassman Brown and Co. Ltd (1973) EA 358**; **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** and **Nguruman Limited V Jan Bonde Nielsen & 2 Others (2014) eKLR**. To the application dated the 21st October, 2021 she submitted that the third parties were not parties in these proceedings. Further, no application for summons for revocation of Grant had been annexed and this application is an abuse of the court process. She reiterated that the purported Sale Agreements were executed when the owner of the suit land had died.

The Defendants/Interested Parties/Third Parties/ Respondents in their submissions insisted the Plaintiff had not established a prima facie case to warrant the grant of orders of injunction as sought. They explained how they acquired the suit land and reiterated their averments as per the respective affidavits. They insisted that they had a purchasers' right over the suit land. To support their arguments, they relied on the following decisions: **Johnson Muinde Ngunza & Another V Michael Gitau Kiarie & 12 Others (2018) eKLR**; **Mpatininga Ole Kamunye Vs Meliyo Tipango & 2 Others (2017) eKLR**; **Giella Vs Cassman Brown and Co. Ltd (1973) EA 358**; **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** and **Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR**.

As to whether the Plaintiff is entitled to orders of temporary injunction in respect to the suit land pending the outcome of the suit. I will rely on the principles set in **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** and definition of a prima facie case as stated in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** to determine whether the Plaintiff has established a prima facie case to warrant the orders of injunction sought. The Plaintiff claims she is the registered owner of the suit land which the respondents have unlawfully invaded, caused destruction thereon by constructing and building on it. The 2nd Defendant in their affidavit to oppose the Plaintiff's application insisted that together with her late husband, they legally purchased a 3 acre parcel of land hived from the suit land, which was a subdivision of Mavoko Town Block 3/2034 in 2006 from one Cosmas Muema Mwaluko who had purchased the same from the late Boniface Mutisya Kilungu who was the husband to the Plaintiff. She explained that the suit land is a subdivision of land parcel No. Mavoko Town Block 3/2034, which was initially registered in the Plaintiff's mother in law's name Monicah Kanini Kilungu. Further, that it is the Plaintiff who later subdivided it, into land parcel No. Mavoko Town Block 3/86737 and Mavoko Town Block 3/86738 respectively. It emerged that the Plaintiff's deceased husband Bonface Mutisya Kilungu entered into respective Sale Agreements with the Respondents herein and later filed Machakos HC Succession No. 458 of 2010 in respect to his late mother's estate that owned the original parcel of land, wherein one Damian Musyoka was to be given the whole of the suit land on behalf of all the other purchasers as per the mode of distribution filed in court. It further emerged that the late Bonface Mutisya Kilungu passed on, and the Plaintiff and one Mutio Wambua substituted him in the said Machakos High Court Succession No. 458 of 2010 and proceeded to confirm the Grant by concealing crucial information from court on the proposed mode of distribution. Further, in 2019 after obtaining the said Grant of Letters of Administration, the Plaintiff proceeded to transfer the title for the suit land into her name and later on in 2020 subdivided it into Mavoko Town Block 3/4954, 3/86737 & 3/86738 respectively. She later issued the respondents with eviction orders and started demolishing their properties.

I have had a chance to peruse the respective annexures herein and noted that the Plaintiff has not controverted the fact that there was a distribution list in the succession cause and that the Respondents had been residing on the suit land for over 15 years without her late mother in law or husband evicting them. It is trite the injunctive reliefs are equitable remedies and from the averments from the respective parties herein, it is my considered view that even though the Plaintiff has proprietary rights over the suit land, this court cannot disregard the fact that the Respondents have been on it for over 15 years, which land they claim to have bought from the Plaintiff's late husband. I opine that since there is a related aforementioned succession cause which is dealing with the dispute herein, it is important to maintain the obtaining status quo, wherein no one should interfere with the occupants on the suit land, pending the determination of this suit.

As to whether the proceedings herein should be stayed pending the hearing and determination of the Application and/or Summons for Revocation of Grant under Machakos Succession Cause No. HC No. 458 of 2010.

The legal provision governing stay of proceedings is contained in Order 42, Rule 6 (1) of the Civil Procedure Rules which stipulates that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. (2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** Ringera J as he then was heard this to say on staying proceedings;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed

from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

In the instant case I note there is an Application and/or Summons for Revocation of Grant under Machakos Succession Cause No. HC No. 458 of 2010, which Grant had been issued to the Plaintiff and Mutio Wambua in respect to the suit land. The said Succession Cause is in respect of the estate of Monica Kilungu who was the Plaintiff's mother in law and owner of the suit land. It further emerged that the Respondents purchased their respective portions of the suit land from the Plaintiff's deceased husband when his mother was alive, which fact the Plaintiff opposed. Further, that the said purchasers took possession of the portions of land allegedly purchased. I further note that the Plaintiff's husband had included one Damian Musyoka in the said succession proceedings and it is the said Damian Musyoka and Cosmas Muema Mwaluko that sold the respective parcels to some of the Respondents herein. Insofar as I concur with the Plaintiff that the Interested Party cannot apply for substantive orders in this suit, however based on the facts before me while associating myself with the decision cited herein, I find that it is in the interest of justice if the proceedings herein were stayed until the dispute in the aforementioned succession cause was determined by Court on whether the Respondents were indeed entitled to any share of the deceased estate. Further, since the suit land emanated from the deceased estate, it is my view that the issues emanating therefrom should be dealt with first, before the Plaintiff's prayers in the Plaint are determined.

It is against the foregoing that I find the two Notice of Motion applications compromised and will proceed to make the following final orders:

- a. Prevailing Status Quo be and is hereby maintained where no party should interfere with the other parties' possession or occupation of the suit land pending the outcome of this suit.*
- b. The proceedings herein be and are hereby stayed pending the hearing and determination of the Application and/or Summons for Revocation of Grant under Machakos Succession Cause No. HC No. 458 of 2010.*
- c. Costs of the two applications will be in the cause.*

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 24TH DAY OF MARCH, 2022

CHRISTINE OCHIENG

JUDGE