



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 395 OF 2013

DORIS AUMA

PAULINE AUMA OCHIENG ODONGO

Suing as the administrators of the estate of

JOSHUA OCHIENG ODONGO KISIANPLAINTIFFS

-VERSUS-

HITAN C. MAJEDVDIA.....DEFENDANT

RULING

The application before the court is a Notice of Motion by an Intended Interested Party (“the Applicant”) dated 13th May 2013 seeking orders to be joined in this suit as an interested party, and also that the court do nullify all the sale agreements and or any other transactions entered between the Plaintiffs and the Defendant with regard to the land reference No. 18113 I.R No. 675291 Nyari Nairobi (hereinafter referred to as “the suit property”), which is registered in the name of Joshua Ochieng Odongo Kisia (Deceased) (hereinafter referred to as “the Deceased”). The application is supported by an affidavit and supplementary affidavit sworn by the Applicant on 13th May 2013 and 3rd June 2013 respectively. The Plaintiffs also supported the said application in a replying affidavit and supplementary affidavit sworn by one of the Plaintiff’s, Pauline Auma Ochieng Odongo, on 20th May 2013 and 3rd June 2013 respectively.

The Applicant claims he is the son of, and beneficiary of the estate of the Deceased, and that the Plaintiffs entered into the initial agreement for the sale of the suit property with the Defendant without having letters of administration and without his consent. Further, that they subsequently entered into various supplemental sale agreements, and that the said sale transactions cannot be completed because the agreements keep on changing to the advantage of the purchasers. He attached copies of the said sale agreements and and of the confirmation of grant of representation to the Plaintiffs issued in Nairobi High Court Succession Cause No. 806 of 2010.

The Applicant also stated that the Defendant is not in possession of the suit property, and that his siblings have withdrawn their consent to the sale transactions because the Defendant and Plaintiff went against the terms and conditions that made them give their consent. He attached affidavits sworn by the said siblings withdrawing their consent.

The Plaintiffs reiterated the averments by the Applicant in their response, and stated that since it had become impossible to complete the sale transaction, they had written various rescission letters to the Defendant, which they attached. They also claimed to have received a deposit of only Kshs 300,000/=

from the Defendant.

The Defendant opposed the said Notice of Motion in a replying affidavit sworn on 30th May 2013. He stated that the Applicant's interests are properly taken care of by the Plaintiffs who are administrators of the estate of the Deceased. Further, that if the Applicant is aggrieved by the conduct of the Plaintiffs in the administration of the Deceased's estate or by the consent order granted by the succession court, the right forum would be to make an application in Succession Cause No. 206 of 2010 to apply to set aside the said consent order and to seek damages from the administrators.

The Defendant stated that the sale agreements are alive, and that he was not aware of any hostile correspondence or mutation of terms as alleged. Further, that he had honoured his part of the agreement and was ready to complete the transaction once the Plaintiffs obtain title to the property. He averred that the delay in completing the sale transaction was occasioned by the Plaintiffs and Applicant who gave a forged title document, which matter is being investigated. Further, that it would be untenable to expect him to pay the balance of the purchase price when the Plaintiffs have no title documents. The Defendant also claimed to have paid the Plaintiffs over Kshs.3,330,000/= and to be in possession of the suit property, and stated that the Applicant's claim can only lie in seeking the balance of the purchase price after producing all the completion documents.

The parties were directed to file written submissions. The Applicant's counsel filed submissions dated 10th June 2013 and 6th August 2013, wherein he submitted at length over the dispute between the Plaintiffs and the Defendant. On the prayer for joinder, counsel submitted that the Applicant had demonstrated that he is a beneficiary of the estate of the deceased and ought to be joined in the suit. The counsel submitted with respect to the prayer for nullification the sale transactions that this court was the right forum to address the interest of the Applicant for reasons that he was disputing the sale and not objecting to the administration of the estate by the Plaintiffs.

It was the Applicant's counsel's submission that the agreements entered into by the Plaintiffs and Defendant prior to the letters of the administration being obtained are illegal and ought to be nullified. Further, that the Applicant, being a beneficiary to the Deceased's estate is required by statute to give his consent to the sale agreements as the Plaintiffs were transacting on his behalf. The counsel relied the provisions of sections 45 and 55 of the Law of Succession Act, and the Court of Appeal decisions in **Esther Njoki Rurigi v Patrick Gathenya Civil Appeal No. 128/2002** and **Elly Odhiambo Onyuka v Ayub Odhiambo Migwalla Civil Appeal No. 81/2002** for the position that a person who has not taken out letters of administration has no capacity to enter into a sale agreement.

The Defendant's counsel filed submissions dated 29th July 2013. He submitted that the application was frivolous and an abuse of the court process, and that the Applicant's joinder to the suit is misconceived for reasons that he is not an administrator of the deceased's estate and that his interest are well represented. Further, that no priority should be given to him over other beneficiaries of the estate. Counsel also submitted that the Applicant's recourse, if aggrieved by the powers of the administrator, lay in seeking revocation under section 76 of the Law of Succession Act.

It was further submitted that the Applicant has never been directly involved in the transaction thus cannot allude to anything either based on facts or law. In respect to the prayer for nullification of the sale agreements entered into between the Plaintiffs and Defendant, the counsel submitted that the same is final and mandatory in nature and cannot be granted at an interlocutory stage.

I have carefully read and considered the pleadings and arguments made by the parties herein. There are two issues before the court. The first is whether the Applicant is a necessary party to these proceedings and can therefore be joined as an interested party, and secondly, whether this court can nullify the sale agreements and other transactions entered into between the Plaintiffs and Defendant with respect to the suit property herein.

On the first issue of joinder, the applicable law is Order 1 Rule 10(2) of the Civil Procedure Rules which provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

The suit herein was commenced by the Plaintiffs by way of a Plaint dated 20th March 2013 in which they are claiming a declaration that the sale agreements they entered into with the Defendant have been rescinded, a permanent injunction against the Defendant restraining him from dealing with the suit property, and a mandatory injunction to compel him to return original documents given to him by the Plaintiff. It is not disputed that the Plaintiffs are administrators of the estate of the Joshua Ochieng Odongo Kisia (Deceased), and that they are the ones who entered into the sale agreements sought to be rescinded.

The Applicant is a third party to, and is not privy to the said sale agreements, and has no legal capacity to act for or represent the estate or interests of the Deceased, which power lies in the administrators pursuant to the provisions of sections 79 and 82 of the Law of Succession Act. It is thus my view that for these reasons the Applicant will be of no assistance to this court in resolving the dispute herein. I am in this regard persuaded by the decision in **Werrot and Company Ltd and others v Andrew Douglas Gregory and others, Nairobi (Milimani) High Court Civil Case No. 2363 of 1998 (1998) LLR 2848 (CCK)** where Ringera J. (as he then was) held as follows:

“For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”

I also agree with the Defendant’s submissions in this regard that if the Applicant is aggrieved as a beneficiary of the Deceased’s estate, and arising from the acts of the administrators of the estate, then the right forum to ventilate his grievances is in the succession cause in the High Court, and not in this court. This is for the reason that administration of estates of deceased persons are governed by the Law of Succession Act, which under section 47 gives the High Court jurisdiction to deal with any matter arising under the Act. The High Court in this regard has concurrent jurisdiction to hear and determine disputes of succession relating to land. The Applicant’s prayer for joinder as an interested party herein is therefore denied.

On the second issue of annulment of the sale agreement entered into by the Plaintiffs and Defendant, given that the Applicant has not been made a party to this suit and that he is not a party to the said sale agreements, he cannot be granted the said prayer. Even if he were to be a party in this suit, the prayer sought is in the nature of a mandatory injunction and final in nature, and cannot be granted at this stage. It was held by the Court of Appeal in this regard in in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** that for a mandatory injunction to issue, there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

In the present application not only has the Applicant not shown a *prima facie* case for the reasons already given in the foregoing, there are also issues raised by the Plaintiffs as to the rescission of the sale agreements, and by the Defendant as to performance of the said agreements that can only be determined after examination of further evidence at a full hearing.

The Applicant’s Notice of Motion dated 13th May 2013 accordingly fails for the foregoing reasons, and he shall bear the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____30th____ day of ____January____, 2014.

P. NYAMWEYA

JUDGE