



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 886 OF 2013

MARGARET NDUTA NJOROGE.....PLAINTIFF

VERSUS

JOSEPH MATHIA

NGINA MANGA MUGWE

(Sued as the Personal Representatives of the

Estate of BEATRICE NYAKIO MATHIA).....1ST DEFENDANT

NGINA MANGA MUGWE.....2ND DEFENDANT

RULING

The Plaintiff herein filed an application by way of a Notice of Motion dated 22nd July 2013, seeking orders for a temporary injunction restraining the Defendants from removing, evicting and/or ejecting the Plaintiff or her tenants from all that property known as L.R. No. 4953/46/IX situated in Thika Municipality (hereinafter referred to as the “suit property”), and from interfering in any manner whatsoever with the Plaintiff’s quiet enjoyment of the said property pending the hearing and determination of this suit.

The grounds for the application are that the Plaintiff is the duly registered proprietor of the suit property, having acquired title to the same on 18th July 2006 pursuant to a transfer in her favour by the 2nd Defendant who was the then registered proprietor thereof. Further, that the Plaintiff is therefore a purchaser for value without any notice of any irregularity in the acquisition of the suit property by the 2nd Defendant from the estate of the late Beatrice Nyakio Mathia.

The Plaintiff in her supporting affidavit sworn on 22nd July 2013 states that she entered into an agreement with the 2nd Defendant on 19th January 2006 for the sale of the suit property for the sum of Kshs.5,300,000/=, which sum she paid in full and the said property was subsequently transferred to her and a title deed to the property issued in her name. Further, that she then took possession of the suit property and has extensively developed it over the years. The Plaintiff attached the said sale agreement, her title to the suit property and a valuation report showing the suit property to be valued at Kshs 43,350,000/=.

The Plaintiff contended that she only became aware of the succession dispute with respect to the estate of the late Beatrice Nyakio Mathia who was initially the registered proprietor, and of the proceedings in High Court Succession Cause No. 519 of 1986 seeking revocation of a Grant of letter of Administration

intestate issued to the 2nd Defendant, after being served with a court order on 31st July 2012. The said court order issued in Thika Chief Magistrates Court Civil Suit 614 of 2012 declared that the suit property belonged to the 1st Defendant, and sought to restrain the Plaintiff from interfering with the said property. The Plaintiff stated that upon her application the said suit was withdrawn and orders discharged for want of jurisdiction on the part of the said Magistrate's Court.

Lastly, the Plaintiff averred that she moved the court in High Court Succession Cause No. 519 of 1986 to review its ruling and to exclude the suit property from the distributable assets of the said estate, however that her application was dismissed on 12th July 2013 on the grounds that she was not a proper party to apply for review. Further, that following the delivery of the said ruling the Defendants having been calling her and threatening to evict her and her tenants from the suit property.

The 1st Defendant opposed the Plaintiff's application in a replying affidavit sworn on 1st August 2013. He stated that the application is an abuse of the court process as this matter was exhaustively finalized by Nambuye J. (as she then was) in her ruling dated 14th October, 2011 in High Court Succession Cause No. 519 of 1986. Further, that the Plaintiff is seeking similar orders to those she had sought in Succession Cause No. 519 of 1986, which orders were dismissed by the Hon. Justice Musyoka on 27th June 2013. The 1st Defendant contended that the Plaintiff's only recourse is to proceed to the Court of Appeal to challenge the orders of the Nambuye J. (as she then was) and the Musyoka J., and he annexed copies of the said rulings and orders given by the two Honourable judges.

The 1st Defendant further stated that his Co-Administrator Ngina Manga Mugwe who is the 2nd Defendant herein fraudulently took out letters of administration to the estate of their deceased mother Beatrice Nyakio Mathia, by concealing material facts to the court, which included the fact that some of the beneficiaries were minors at the time and that the deceased left a total of (4) four beneficiaries surviving her who were entitled to share the estate equally.

Further, that the said letters of administration were confirmed to Ngina Manga Mugwe in 1986, and the 1st Defendant applied for the revocation of the grant in the year 2004 which proceedings were concluded by a ruling delivered by Nambuye J. (as she then was) on 14th October 2011, in which the court ordered the suit property herein be distributed afresh between the 1st and 2nd Defendants as joint tenants. Further, that the Court also ordered that the said sale of the suit property to the Plaintiff was null and void, and the same could not be defended as it was done without a court order, and that the Plaintiff has therefore been in occupation of the suit premises and has remained thereon unlawfully and illegally.

The 2nd Defendant in her replying affidavit sworn on 12th August 2013 admitted selling and transferring the suit property to the Plaintiff, and stated that upon the said sale and transfer she never questioned the Plaintiff's proprietorship to the suit property. The Plaintiff also stated that she was not a party to the proceedings at Thika CMCC No. 614 of 2012, and was aware of the proceedings and rulings in High Court Succession No. 519 of 1986. Further, that throughout the said proceedings, she disclosed the sale and transfer of the suit property, and contended that the same was not available as an asset for distribution. She denied interfering with the Plaintiff's possession and enjoyment of the suit property and averred that she had not done anything to warrant the orders of the court against her.

The parties were directed to file written submissions. The Plaintiff's counsel filed submissions dated 29th August 2013 and argued that the Plaintiff had demonstrated that she had met the conditions for the grant for an injunction, and had shown a *prima facie* case as she is the registered proprietor of the suit property, having been so registered on 18th July 2006. Further, that the manner in which she acquired the said property is not disputed by the Defendants.

The counsel relied on section 26 (1) of the Land Registration Act (Act No 3 of 2012) and the decisions in **Dr. Joseph N.K. Arap Ng'ok vs Justice Moiwo ole Keiwa & Others (1977) eKLR, Nairobi Permanent Markets Society & Others vs Salima Enterprises and Others (1995-1998) 1 E.A. 232 and Gitwany Investment Limited vs Tajmal Limited & Others (2006) EA 76** for the position the Plaintiff

was thereby the absolute and indefeasible owner of the suit property. Further, that there have been no allegations in the suit herein or in High Court Succession Cause No. 519 of 1986 that the Plaintiff was party to any irregularities or fraud in her acquisition of the suit property, and that she was an innocent purchaser for value without notice of any irregularities affecting the title at the time of purchase.

The Plaintiff's counsel also submitted that since the Plaintiff acquired the suit property in 2006 she has used her and husband's other assets to extensively developed the same, and the property has appreciated in value having been valued at Kshs 43,350,000/= as at 4th August 2012. Further, that the suit property is occupied by tenants, and that the Plaintiff and her family will incur financial loss and in reputation and goodwill that cannot be adequately compensated by an award of damages. Lastly, that the Plaintiff was in possession of the suit property, a commercial property which she has let out to tenants, and that the balance of convenience therefore was in her favour.

The Plaintiff's counsel also submitted that the rulings of the Family Division in High Court Succession Cause No. 519 of 1986 had nothing to do with the title to the suit property, and that the issue before the court was revocation of the grant made to the 2nd Defendant and review of the orders made in this regard. Further, that the only court with jurisdiction to determine issues of land is the Environment and Land Court under Article 162(2) of the Constitution section 13 of the Environment and Land Court Act of 2011.

The 1st Defendant's counsel filed submissions dated 4th November 2013 in which he interrogated the issue whether the Plaintiff was a *bona fide* purchaser for value without notice and set out the law that applies in this regard. He submitted that the Plaintiff knew of the existence of a succession cause going on in court as there were entries against the title registered on 30th September 1992 as to the grant of letters of administration, and court orders made in High Court Succession Cause No. 519 of 1986. Further, that the Plaintiff had not established a *prima facie* case in light of the rulings made in the said succession cause, and the fact that the 1st Defendant had not filed any eviction proceedings. The counsel submitted that the rent collected from the suit property ought to be remitted to court pending the hearing of the suit and that the *status quo* maintained without any party interfering with the suit property.

The 2nd Defendant's counsel conceded in submissions dated 8th October 2013 that the ruling in High Court Succession Cause No. 519 of 1986 did not nullify the Plaintiff's proprietorship of the suit property, and that section 93(10) of the Succession Act protects a purchaser such as the Plaintiff. Further, that there is no basis to grant orders against the 2nd Defendant as she poses no risk to the Plaintiff's ownership of the suit property and in fact supports the said ownership.

I have read and carefully considered the pleadings, annexed evidence and submissions made. I will start by addressing the preliminary issue of whether this court has jurisdiction to hear and determine this suit and application. The Constitution in Article 162 (2) (b) provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and shall determine the jurisdiction and functions of these courts. The jurisdiction of the said courts is found in section 13 of the Environment and Land Court Act of 2012 which provides that the court shall hear disputes relating to :

(a) environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) compulsory acquisition of land;

(c) land administration and management;

(d) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

The jurisdiction given to the Environment and Land Court under the said section is very wide, including to hear and determine the prayers sought by the Plaintiff in the suit and application herein.

This fact and finding notwithstanding, it is also the case that under section 47 of the Law of Succession Act, the High Court has concurrent jurisdiction to hear and determine disputes of succession relating to land. I also refer in this regard to the **Practice Directions on Proceedings relating to the Environment and the use and Occupation of, and Title to Land** issued by the Chief Justice dated 9th November 2012 and published in Gazette Notice No. 16268, which direct in Practice Direction No. 5 that all cases under the Law of Succession Act shall continue to be filed and heard by the High Court or the Magistrates Courts.

In this respect I note from the Plaint filed herein on 22nd July 2013 that one of the prayers sought by the Plaintiff is a declaration that she is the lawful registered proprietor of the suit property. I have perused the ruling delivered by Nambuye J. (as she then was) in High Court Succession Cause No. 519 of 1986 dated 14th October 2011 on an application by the 2nd Respondent dated 15th June 2006 for revocation of the grant to the 1st Defendant. A finding was made as to the ownership of the suit property in the said ruling by the Honourable Judge as follows:

“...Thika plot No. LR. NO. 4953/46/IX has been admitted by both sides that it belonged to the deceased. As at the time of the initiation of the revocation proceedings it was alleged to be registered in the name of the Respondent/petitioner and in her replying affidavit to the summons for revocation admitted that she was holding it as trustee and the income generated there from was being utilized for the benefit of the estate. It’s therefore follows that the alleged sale of the same cannot be defended as the same was done without court order and as submitted by the objectors counsel if indeed it was disposed off then the same was done with the sole aim of defeating the revocation proceedings and it cannot be protected. Further the purpose for its disposal cannot be protected because the same was meant to benefit persons not beneficiaries to the estate of the deceased as deponed. Lastly no documentary proof has been exhibited to prove the sale, prove amount realized, how applied and existence of the short fall if any....”

The said judge proceeded to list the suit property as forming part of the distributable properties of the estate of the deceased Betrice Nyakio Mathia.

Further, the Plaintiff herein raised similar arguments as those raised herein as to her ownership of the suit property in her application for the review of the orders granted by Nambuye J. (as she then was), and Musyoka J. in his ruling on the said application dated 27th June 2013 stated as follows in this regard :

“...The applicant says she bought Thika L.R. No. 4953/46/IX from the administrator. The fact of this sale was brought to the attention of the court and the court made its final orders only with this fact in mind. It cannot therefore be argued that the court made its first was in ignorance of the fact of sale... “

The issue of ownership of the suit property was therefore effectively decided by Nambuye J. (as she then was) when she ruled that it formed part of the estate of the deceased in in High Court Succession Cause No. 519 of 1986, to be redistributed fairly among the beneficiaries therein. It is not the place of this court to determine whether or not the rulings by the said judges were correct or to overrule the said rulings, as it is a court of the same status as the High Court. Further, section 7 of the Civil Procedure Act further prohibits this court from hearing and determining an issue that has been finally determined by a court of competent jurisdiction. The only recourse for the Plaintiff in the circumstances is to appeal the rulings made in in High Court Succession Cause No. 519 of 1986, and to move the Court of Appeal for interlocutory relief pending the hearing of their appeal.

For these reasons I find that the Plaintiff has not established a *prima facie* case, to the extent that the issue of the Plaintiff’s ownership of the suit property is *res judicata* as explained in the foregoing. The Plaintiff’s Notice of Motion dated 22nd July 2013 accordingly fails, and the Plaintiff shall meet the costs

of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 24th day of January, 2014.

P. NYAMWEYA

JUDGE