



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
LAND AND ENVIRONMENT CASE NO. 19 OF 2013

ANDREW WANYONYI SIMIYU PLAINTIFF

VERSUS

ROBAI NAKHUMICHA SIMIYU.....1ST DEFENDANT

GEORGE BARASA MUZEE.....2ND DEFENDANT

RULING

1. In a Notice of Motion dated 23rd April 2013 brought pursuant to the provisions of Section 3 & 3A of the Civil Procedure Act and Order 2 Rule 151 (b), (c) & (d) of the Civil Procedure Rules the Defendants seek orders that this court be pleased to strike out the plaint with costs. The motion is premised on the grounds on the face of it and the supporting affidavit sworn by James Wafula advocate.
2. The Defendants/Applicants contend the suit is filed by a Plaintiff who has no letters of administration and the orders sought had already been made by Kitale High Court which is equal in jurisdiction as this court therefore this court cannot make orders that cancel the orders already issued by the High Court sitting at Kitale.
3. The application is opposed. The Plaintiff/Respondent has sworn a replying affidavit in opposing the motion. He depones that the Applicants got registered as owners of land L.R. No. Elgon/Kaptama/487 and left L.R. No. Kimilili/Kamukuywa/91 to the Respondent and the entire family. In paragraph 8, He depones this court can challenge the orders issued by the High Court sitting in Kitale as the orders were obtained secretly.
4. According to the Respondent, the issues raised in the application can only be determined in a substantive suit in a full hearing. The Respondent depones further that infact it is the Applicants who have inter-meddled with the estate of the deceased. He also depones this application lacks merit, is premature, frivolous and an abuse of the court process. He urged the court to dismiss the motion.
5. Both parties filed written submissions. In a one page written submissions, the Applicants urged the court to allow the motion relying on section 45 of the Succession Act cap 160 of the Laws of Kenya and the Ugandan case of **Najeno vs. Serwanga [1974] E.A. 323**. Similarly the Respondent in their one page written submissions argue this suit was filed to preserve the estate of the

deceased as the Applicants are keen to dispose off the suitland to 3rd parties. Secondly the Applicants are hell bent on evicting the Plaintiff/Respondent yet he is a beneficiary of the estate of Aggrey Simiyu-deceased.

6. I have considered the pleadings alongside the submissions filed by the parties. From the plaint, the lands in dispute are L.R. Nos. Elgon/Kaptama/487 and Kimilili/Kamukuywa/91. There are two different certificates of official searches annexed by Respondent. The certificate of searches annexed in his replying affidavit dated 9th November 2007 shows the land Kaptama/487 is in the name of Aggrey Simiyu and Kamukuywa /91 dated 5.3.12 also in the name of Aggrey Simiyu.

7. In his supporting affidavit to the injunction application, the Respondent annexed certificate of official searches dated 20.12.12 showing L.R. Kimilili/Kamukuywa/91 as registered in name of Robai N. Simiyu, George B. Muzee, Richard Nyongesa Simiyu, Solomon Simiyu Aggrey and Caleb Pepela Simiyu.L.R kaptama/487 is in name of Robai Nakhumicha Simiyu & George Barasa Muzee (Applicants) jointly registered on 24.8.12.

8. The Respondent contends the Applicants secretly applied to administer the estate of Aggrey Simiyu- deceased and later on transferred the parcels into their names with intention to disinherit him. The Respondent prayed in his plaint for orders;

“Restraining the Defendants by themselves, their agents or servants otherwise from selling, disposing, encroaching or doing any development on the said land in dispute and revocations or cancellation of titles pending the hearing and determination of the suit plus costs and interest at court rate (underline mine for emphasis).

9. From the official searches annexed and the Respondents own pleadings it is clear the Applicants got registered as owners of the two suit parcels on the strength of letters of administration obtained from High Court sitting at Kitale. The Applicants annexed a copy of the grant of letters of administration intestate issued on 2nd October 2009. The Respondent alleges the succession was carried out secretly by the Applicants. He annexed copy of the certificate of grant in his own list of documents. The Respondent has not however shown this court any document challenging the grant issued to the defendants now that he became aware of the status of the property.

10. Since the Defendants procured registration by way of transfer by transmission. That registration can only be cancelled by the same court that issued and confirmed the grant in respect of the estate of Aggrey Simiyu-deceased who was the previous registered owner of the suit property. Secondly the Respondent claims his interest as a beneficiary in the estate of the late Aggrey Simiyu needs to be protected. The appropriate forum to ensure his rights are secured as a beneficiary is within the succession cause and not by filing this suit.

11. The Respondent's options are still open. Therefore I agree with the Defendants/Applicants that this suit is improperly before this court as this court cannot challenge/vary the orders issued by a court of concurrent jurisdiction i.e High Court in Kitale. In any event, this court is not clothed with jurisdiction to hear and determine matters regarding distribution of assets of deceased person estates.

12. I do find the present application has merit and do hereby strike out this suit with costs with each party to bear their respective costs. The earlier orders of temporary injunction issued be and are hereby discharged.

DATED, SIGNED and DELIVERED this 20th day of March 2014

A. OMOLLO

JUDGE.