



No. 229

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E&L COURT CASE NO 153 OF 2013

ERNEST MACHUKA MORIMBOCHO..... PLAINTIFF

VERSUS

JOSEPH MOKONO OMWERI..... 1ST DEFENDANT

STEPHEN NYAKOI MAKORI2nd DEFENDANT

THE REGISTERED TRUSTEES WORLD

WIDE GOSPEL CHURCH OF KENYA.....3RD DEFENDANT

RULING

1. What is before me is the plaintiff's application brought by way of Notice of Motion dated 1st April, 2013 under order 40 rule 1(a) and 2(1) of the Civil Procedure Rules 2010, sections 24(a), 25(1), 68(1) of the Land Registration Act No. 3 of 2012 and Article 40 and 159(2) of the constitution of Kenya, 2010 seeking among others, the following reliefs:-

- a. **That pending the hearing and determination of the substantive suit, an order of inhibition do issue to inhibit the registration of any dealing respecting titles L.R nos. Wanjare/Bomorenda/4067 and Wanjare/Bomorenda/4068 and an order of injunction do issue restraining the defendants/respondents, either by themselves, their agents, assigns, representatives and/or any other person(s) howsoever acting under their directions from evicting or however interfering with the plaintiff/applicant's quiet use, possession and enjoyment of titles L.R Nos. Wanjare/Bomorenda/4067 and Wanjare/ Bomorenda/4068.**
- b. **That parties be at liberty to apply for such further and/or other necessary orders as may be expedient for the due performance of the orders of this honorable court.**
- c. **That the costs of this application be borne by the defendants/respondents in any event.**

2. The plaintiff's application was brought on the grounds that were set out in the body thereof and was supported by the affidavit sworn by the plaintiff on 2nd April, 2013. In the said affidavit, the plaintiff deposed that, at all material times, all that parcel of land known as **LR no. Wanjare/Bomorenda/456** (herein after referred to as "**Plot No. 456**") was an ancestral land registered in the name of one, Morimbocho Machuka, who was the plaintiff's father and the 1st defendant's grandfather who died on 2nd October, 1980. The plaintiff deposed further that the plaintiff and other beneficiaries of the estate of Morimbocho Machuka (hereinafter referred to only as "**the deceased**") have resided on Plot No. 456 and still reside thereon for over 35 years.

3. The plaintiff has deposed that in the month of January 2013 when he sought to establish the status of Plot No. 456, the 2nd respondent claimed that he had acquired lawful title over the same. On making inquiries, the plaintiff discovered that the 1st defendant who is his nephew had purportedly obtained registration as proprietor of Plot No. 456 on 2nd April 2011 and had proceeded subsequently to subdivide the same into two portions, namely, **LR.Nos. Wanjare/Bomorenda/4067 and 4068** (hereinafter referred to together as “**the suit properties**”). If that was not enough, he discovered that the 1st respondent had caused **LR.No. Wanjare/Bomorenda/4067** (“**Plot No. 4067**”) to be registered in his own name and transferred **LR.No. Wanjare/ Bomorenda/4068** (“**Plot No. 4068**”) into the name of the 3rd defendant.

4. The plaintiff annexed to his affidavit as an exhibit a copy of the register for Plot No. 456 which showed that the 1st defendant acquired title to Plot No. 456 by way of a transfer that was registered on 2nd April 2011. The plaintiff has contended that the 1st defendant could not have had Plot No. 456 transferred to his name by the deceased on 2nd April, 2011 because the deceased died on 12th October, 1980 before the 1st defendant was born on 18th January, 1981. The plaintiff has contended that the transfer of Plot No. 456 to the 1st defendant, the subdivision of the same into **LR. Nos. Wanjare/Bomorenda/4067 and Wanjare/Bomorenda/4068** and the subsequent registration of the 1st defendant and the 3rd defendant as the proprietors thereof are illegal, null and void. The plaintiff has contended that Plot No. 456 that was owned by the deceased was upon his death vested in his estate and the same could not be dealt with except through Probate and Administration proceedings under the Law of Succession Act Cap. 160 Laws of Kenya which has never been instituted. The plaintiff has contended that the transfer of Plot No. 456 to the 1st defendant and the subdivision thereof and creation of **LR Nos. Wanjare/Bomorenda/4067 and 4068** has illegally deprived the plaintiff and other beneficiaries of the deceased of their lawful inheritance and in the event that the instant application is not allowed, the plaintiff stands to suffer irreparable loss and damage taking into account the fact that the subject matter is a parcel of land subject to waste and disposal and not capable of restoration and/or restitution.

5. On the 5th April 2013, I certified the plaintiff’s application as urgent and granted an interim order of inhibition to inhibit any dealings with titles to **LR. Nos. Wanjare/ Bomorenda/4067 and Wanjare/Bomorenda/4068** pending the hearing and determination of this application inter partes. The defendants were served and they entered appearance on 10th April 2013 through the firm of Bw’ondika and Co. advocates. The 1st defendant swore a replying affidavit on 19th April 2013 in opposition to the plaintiff’s application herein while the 2nd defendant swore a similar affidavit on 24th April, 2013. In his affidavit the 1st defendant denied all the allegations in the plaintiff’s affidavit in support of the application herein. The 1st defendant contended that the plaintiff has failed to disclose to the court the fact that there are other heirs of the deceased who are dead and the fact that their family members have the right to benefit from the suit properties. The 1st defendant contended further that the plaintiff has not met the conditions for granting a temporary injunction. In his affidavit, the 2nd defendant went to great length to explain the interest of the 3rd defendant and an entity known as Full Gospel Churches of Kenya in the suit property. He stated that the 3rd defendant purchased a portion of Plot No. 456 measuring 50 feet by 100 feet in the year 2006. The 2nd defendant denied that Full Gospel Churches of Kenya had purchased any portion of Plot No. 456 in 1998 as claimed by the plaintiff. He contended that this suit has been brought in bad faith and that the defendants would suffer irreparable harm if the orders sought are granted.

6. When the application came before me for hearing on 23rd July 2013, the advocates for the parties agreed to argue the same by way of written submissions. The plaintiff filed his submissions on 17th May, 2013 while the defendant’s submissions were filed on 20th November, 2013. I have considered the plaintiff’s application together with the affidavit filed in support thereof. I have also considered the defendants affidavits sworn in opposition to the application and the written submissions filed by the advocates for both parties. The principles to be applied when considering an application for interlocutory injunction are well settled. As was stated in the case of, **Giella vs. Cassman Brown & Co. Ltd. (1973) E.A 358**, an applicant for interlocutory injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that unless the injunction is granted he will suffer

irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience. In the case of, **Mrao Ltd. vs. First American Bank of Kenya Ltd. & 2 Others [2003] KLR 125**, it was held that a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It was said to be a case which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. The question that I need to answer in the present application is whether the Plaintiff has demonstrated on the material placed before me that the defendants or any of them have infringed on any of his rights. From my analysis of the contents of the parties' respective affidavits and submissions of counsel, there is no dispute that at all material times, the deceased was the registered proprietor of Plot No. 456. It is also not in dispute that the plaintiff is a son of the deceased and as such one of the beneficiaries of his estate. The Plaintiff's contention that no application has been made for grant of letters of administration of the estate of the deceased has not been controverted by the defendants. The 1st defendant is therefore not a duly appointed administrator of the estate of the deceased. It is not in dispute that the 1st defendant caused Plot No. 456 to be transferred to his name after the death of the deceased. It is not in dispute that such transfer could only be effected by the administrator of the estate of the deceased. The 1st defendant thereafter proceeded to sub-divide Plot No. 456 into Plot No. 4067 which he registered into his name and Plot No. 4068 which he transferred to the 3rd defendant. Again these transactions could only be carried out by an administrator of the estate of the deceased.

7. Section 45 (1) of the Law Succession Act, Cap.160 Laws of Kenya provides as follows:

“ Except so far as expressly authorized by this Act, or by any other written law or by a grant of representation under this Act no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

In the case of, **Gitau and 2 Others –vs- Wandari and Five Others (1989)KLR 231** Tanui J.(as he then was) held that:-

“Any act done concerning the estate of the deceased by a person who has not obtained representation amounts to intermeddling with the estate”.

8. It follows from the foregoing that the 1st defendant who has not obtained letters of administration in respect of the estate of the deceased has intermeddled with the property of the deceased. Intermeddling with the property of a deceased person is a criminal offence and the intermeddler is answerable to the administrator of the estate of the deceased with respect to the property the subject of his intermeddling. Due to the foregoing, I am satisfied that the plaintiff has demonstrated that he has a prima facie case against the defendants with a probability of success. It has been demonstrated that the transfer of Plot No. 456 from the name of the deceased to the name of the 1st defendant was carried out illegally as no letters of administration had been obtained in respect of the estate of the deceased. The 1st defendant who had acquired title to Plot No. 456 illegally had no better title to the property which he could confer upon the 3rd defendant. The subdivision of Plot No. 456 and the transfer of portions thereof to the 1st defendant and the 3rd defendant were equally illegal. As I have stated above, the plaintiff is a beneficiary of the estate of the deceased. Plot No. 4067 and Plot No. 4068 which are sub-divisions of Plot No. 456 are now registered in the names of the 1st defendant and the 3rd defendants respectively. If the orders sought are not granted, the 1st and 3rd defendants would be at liberty to deal with the properties in whatever manner deemed fit by them which includes alienating the same to third parties. If this happens, there is no doubt that the plaintiff would suffer irreparable harm.

9. I have said enough to show that the plaintiff has met the conditions for granting a temporary injunction. The plaintiff's application dated 1st April, 2013 is allowed in terms of prayer (c) thereof. In view of the fact that the plaintiff is not the only beneficiary of the estate of the deceased, the order issued herein shall not give the plaintiff exclusive right over **LR. Nos. Wanjare/Bomerenda/ 4067 and LR. No.**

Wanjare/Bomerenda/ 4068. The other beneficiaries of the estate of the deceased shall be at liberty to continue occupying and using whatever portion of the suit property which was in their occupation and use prior to this order if any. The costs of the application shall be in the cause.

Delivered, dated and signed at Kisii this 4th day of April 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

Mr Ochwangi holding brief for Nyamurongi for the 1st – 3rd Defendants

Mobisa Court Clerk

S. OKONG'O

JUDGE