



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL MISC. NO. 1441 OF 2013

JANE MUTHONI NJUGUNA.....PLAINTIFF

VERSUS

JOSEPH NJUGUNA MUREMA.....DEFENDANT

RULING

By an application dated 26th November 2013 the plaintiff applicant seeks the following orders:-

1. That the Respondent be restrained from disposing, alienating or in any way interfering with land comprised in title number **Ruiru/Kiu Block 2 (Githunguri) 2423** until the application for revocation is heard and determined.
2. That the Respondent be restrained from further destruction of the houses on the land and from evicting the applicant from the land where the applicant and her family have lived since 1983.

The grounds upon which the application is premised are set out on the body of the application and include the following:-

- a. That the suit property belonged to the Applicant's mother in law who died on 6th December 1999 and on 5th February 2013 the Honourable court confirmed the grant made to the Respondent on 20th January 2012 vide **High Court Succession cause NO. 1886 of 2011**.
- b. That the Respondent after disappearing for many years, from home applied for the grant without the knowledge of the applicant or that of their children who are all adults.
- c. That before her death the deceased was helping the family, and indeed had given one plot to the Respondent the applicants husband, which he sold even before her death.
- d. The respondent is now in the process of selling the aforesaid land, and has received part of the purchase price.
- e. The Respondent on 15th October 2013 came with people who demolished the applicant's home on the land where she has lived with her children since 1983 and took away the iron sheets and generally destroyed the family home on the land and evicted the family from the land.
- f. The applicant is now homeless, being forced to live with a daughter who is sickly and retarded in mind.

The applicant has further sworn an affidavit dated 26th November 2013 in support of the application where she reiterates the grounds set on the face of the application. The applicant avers that her husband the respondent herein secretly applied for grant of letters of administration to his mother's estate which comprised only of the suit property whereat the applicant avers they had built their matrimonial home. The applicant states she has applied for the revocation of the grant issued in the **succession cause NO. 624 of 2011** vide an application dated 1/11/2013 and that the application is unlikely to be heard this year and thus the filing of the instant application before this court.

The applicant contends that she, as the spouse of the respondent has by virtue of section 28 (a) of the Land Registration Act, 2012 overriding interest over the suit property as that is where their matrimonial home stands and that the respondent cannot deal with the property without the consent of the applicant. The demolition of the matrimonial home on 15/10/2013 was thus in contravention of the applicant's rights and the applicant seeks the intervention of the court to restrain the Respondent from disposing and/or selling the suit property before the summons for revocation have been heard and determined.

The Defendant, **Stephen Njuguna Murema** has sworn a replying affidavit dated 9th December 2013 in opposition to the application by the applicant and depones that the application is frivolous, scandalous, vexations and an abuse of the court's process ostensibly because the Defendant has obtained confirmation of grant to the estate of the late **Diana Wanjiru Njuguna** (deceased) the previously registered owner of the suit property and the respondent is the sole beneficiary of the suit property. The Respondent avers that the applicant has made two applications for summons for revocation of grant dated 27th August 2013 and 1st November 2013 in **HC Succession cause NO.1886 of 2011** at Nairobi as per annexures marked "**JNM3**". The Respondent avers that the applications for revocation of grant came up for hearing on 4th December 2013 before the Family Division Court of the High Court at Nairobi when the applicant sought an order for status quo on the suit property pending the determination of the application for revocation of grant which the Family Court declined to grant and instead called for the succession file **CMCC 624 of 2011 Thika** to enable it issue further directions/order.

The Respondent further avers that the suit property is vacant and that he had only constructed a structure on the suit property for a caretaker for security reasons which he demolished. The Respondent denies having been missing at any time as alleged by the applicant and contends that it is the applicant who had given false information that he was missing. He alleges the applicant is being investigated for giving false information to the police.

The applicant swore further affidavit dated 27th January 2014 in response to the respondent's replying affidavit where she clarifies that she withdrew the application for revocation of grant dated 27th August 2013. The applicant further depones that **Musyoka Judge** of the Family Division court directed the **Thika CMCC NO. 624 of 2011** to be forwarded to Nairobi to enable the court give directions in regard to the application for revocation of grant pending before the court.

The parties at the direction of the court filed written submissions where they each reiterates the facts as set out in their respective affidavit and articulate their respective positions: The applicant principally relies on the provisions of section 28 (a) of the Land Registration Act 2012 and argues that the applicant as the respondent's wife has an overriding interest over the suit property and that the respondent cannot deal with the property to her prejudice. For his part the respondent maintains that the matter before the court purely belongs to the Family Division Court it being a succession matter and the parties having submitted to the jurisdiction of that court. The applicant has not only filed an application to revoke the grant issued to the respondent but sought an order of status quo which the court did not grant. The respondent submits the applicants present application is made in abuse of the court process.

It is not disputed that the applicant in 2011 sought to obtain grant of letters of administration to the estate of **Diana Wanjiru Njuguna** who she describes as her mother in law vide **Thika CMCC 624 of 2011** (succession) and that this matter has been called up by **Musyoka Judge** of the Family Division Court in Nairobi **HC Succession cause NO. 1886 of 2011** where the Respondent has applied and has been granted letters of administration which have been confirmed and which grant the applicant has vide an application

filed on 1st November 2013 has sought to be revoked. Thus the same subject matter involving the suit land was pending before the Family Division Court on 27th November 2013 when the applicant filed the present suit and application before this court. My view is that the applicant decided to file this suit in the ELC court when she failed to obtain conservatory orders in the Family Division Court to try and obtain a conservatory order from this court which apparently she got at the exparte stage.

The Family Division Court has the power and jurisdiction to grant conservatory orders in matters pending before pending it the hearing and determination of the matters. The applicant having submitted herself to the jurisdiction of that court by filing the application for the revocation of the grant issued to the Respondent cannot properly come to this court to seek injunctive and/or conservatory orders which the Family Division Court could consider and grant. The applicant in my view should have applied for the conservatory order before the succession court which was seized of and was handling the matter.

The filing of the instant suit and application before this court amounts to seeking to have the same matter litigated in two different courts with concurrent jurisdiction. The courts will not permit that as to do so could lead to judicial confusion as there is the possibility there could emerge conflicting decisions and/or rulings. The parties in this matter have infact acknowledged that this is a succession matter which entirely belongs to the family Division Court and they ought therefore to ventilate all their concerns before that court.

I am in the premises persuaded that the filing of the suit and the application before this court was in abuse of the court process. I accordingly order that the application and the entire suit be struck out. However this being a matter involving family members I will not make any order as to costs for the application and the suit. Each party shall bear their own costs.

Orders accordingly.

Ruling dated, signed and delivered this...26thday of.....June.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant