



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 622 OF 2013**

CYPRIAN NJAGI NDEGWA (SUING IN HIS CAPACITY AS  
THE ADMINISTRATOR OF THE ESTATE OF  
SEBASTIAN MBUI NDEGWA .....PLAINTIFF/APPLICANT  
  
VERSUS  
  
MICHAEL IRERI NGANGA ..... DEFENDANT/RESPONDENT

**RULING**

The plaintiff/applicant herein, suing as the administrator of the Estate of SEBASTIAN MBUI NDEGWA (deceased) filed this Originating Summons seeking an order that the deceased has become entitled to ownership of land parcel No. EVURORE/EVURORE/2169 measuring 0.046 Ha by virtue of **Section 7 of the Limitation of Action Act** having been in occupation of the same for a period exceeding 12 years preceding the presentation of this summons. In the alternative, he sought a declaration that the defendant is registered as proprietor of the said parcel of land in trust for the deceased. The Originating Summons was supported by the plaintiff/applicant's affidavit in which he deponed, inter alia, that he is the administrator of the deceased's Estate as prior to his death, the deceased had entered into a sale agreement with one TERESIA WAMBUI NGANGA ((also deceased) for a portion measuring 0.05 Ha out of parcel of land No. EVURORE/EVURORE/93 at a consideration of Ksh.20,000/= which was paid and the late SEBASTIAN MBUI NDEGWA put up his home and four rooms for rent as well as a shop on the said portion. However, the parcel of land EVURORE/EVURORE/2169 is registered in the names of the defendant who is a son to TERESIA WAMBUI NGANGA.

Simultaneously with the filing of the Originating Summons, the plaintiff/applicant filed an application seeking an injunction to restrain the defendant/respondent by himself his servants, agents, workmen and/or anyone else claiming under him from offering for sale, transferring, alienating, evicting or interfering with the said parcel of land No. EVURORE/EVURORE/2169 (hereinafter the suit land) pending the hearing of this suit.

In his affidavit in support of the same application, the plaintiff/applicant deponed that he is the administrator of the Estate of the late SEBASTIAN MBUI NDEGWA who had entered into an agreement with TERESIA WAMBUI NGANGA (mother to the defendant) for the purchase of a portion of the suit land on which the late SEBASTIAN MBUI NDEGWA proceeds to put up a home, shop and rental rooms but passed on before the title to that portion could be registered in his name. The defendant has now chased away tenants from the premises and intends to transfer the portion to a third party yet that portion is the sole livelihood of the children of the deceased SEBASTIAN MBUI NDEGWA. Annexed to the said affidavit was the grant of letters of administration in respect of the Estate of the late SEBASTIAN MBUI NDEGWA issued to the plaintiff/applicant, the sale agreement between the late SEBASTIAN

MBUI NDEGWA and the late TERESIA WAMBUI NGANGA in respect of the parcel No. EVURORE/EVURORE/93 and the search certificates in respect of EVURORE/EVURORE/93 and EVURORE/EVURORE/2169 – see annexures **CNN 2(a)** **2(b)** and **CNN 3**.

The application was opposed and in his replying affidavit, the respondent deponed, inter alia, that he is not the administrator of the Estate of the late TERESIA WAMBUI NGANGA who signed the agreement with the late SEBASTIAN MBUI NDEGWA of which he was not a privy to and in any event, the parcel of land EVURORE/EVURORE/93 is registered in the names of one NGANGA MUTEMA while defendant is registered owner of EVURORE/EVURORE/2169 as the deceased SEBASTIAN MBUI NDEGWA and his family have never been in occupation of his land. Further, the defendant/respondent deponed that a claim for adverse possession cannot be filed and sustained on behalf of a deceased person neither can a claim for trust.

I have considered the application the rival affidavits and submissions of counsel with respect to the remedy for injunction.

Although the remedy of injunction is being sought in respect of EVURORE/EVURORE/2169 registered in the defendant's names, the supporting affidavit refers to EVURORE/EVURORE/93 which the late SEBASTIAN MBUI NDEGWA is said to have purchased from the late TERESIA WAMBUI NGANGA. The Originating Summons is also in respect of EVURORE/EVURORE/2169 a portion of which the plaintiff/applicant says the family of the late SEBASTIAN MBUI NDEGWA has been occupying for over 12 years. The defendant is therefore sued as owner of EVURORE/EVURORE/2169 which is not disputed. The certificate of search confirms the same.

For a party to succeed in such an application, he has to meet the test laid down in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

1. ***The applicant must show a prima facie case with a probability of success.***
2. ***Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.***
3. ***Thirdly, if in doubt the Court will decide the application on a balance of convenience.***

Considering the said application in light of the above principles, it is clear that the suit land is registered in the names of the defendant. There is a certificate of search showing that EVURORE/EVURORE/2169 a portion of which the plaintiff/applicant seeks in adverse possession is in the names of the defendant. It would appear from the supporting affidavit (paragraph 6) that the original parcel of land was EVURORE/EVURORE/93 which was subsequently sub-divided into several portions and the portion that the late SEBASTIAN MBUI NDEGWA was purchasing is the parcel No. EVURORE/EVURORE/2169 which is registered in the names of the defendant. Being the registered owner of EVURORE/EVURORE/2169, the defendant is no doubt entitled to the rights and privileges of that registration. It is however the plaintiff/applicant's claim that the said registration is in trust for the family of the late SEBASTIAN MBUI NDEGWA who it is claimed occupies the said portion. That occupation has been denied by the defendant. However, there is an agreement, which is not denied, between the late SEBASTIAN MBUI NDEGWA and the late TERESIA WAMBUI NGANGA for the purchase of the said land. It is un-likely that the late SEBASTIAN MBUI NDEGWA would purchase a portion of the suit land and not occupy it. The registration of the defendant as the owner of the suit land does not relieve him of his obligations as a trustee – see **MUKANGU VS MBUI K.L.R (E & 1) 1** and also **GATHIBA VS GATHIBA 2001 K.L.R 2008**. Considering all the above, I am of the view that the plaintiff (applicant has established a prima facie case as laid down in the **GIELLA** case (supra).

Further, it would appear to me that unless the defendant/respondent is enjoined and proceeds to dispose of the portion of the suit land, that would amount to meddling with the Estate of a deceased which is prohibited by law.

Having purchased the portion of the suit land in 1991 (***annexture CNN 2 (a) and (b)***) on which the family

of the late SEBASTIAN MBUI NDEGWA resides, and bearing in mind that the deceased left behind two children namely DESMON GITONGA born in 1995 and BETH KAWIRA born in 1996 (having been predeceased by his wife MONICA) and also taking into account that the Court should take whatever course appears to carry the lower risk of injustice, if the defendant evicts the children of the late SEBASTIAN MBUI NDEGWA, a grave injustice would ensue. A Court of equity must guard against that eventuality – see FILMS ROVER INTERNATIONAL 1986 3 ALL E.R 772.

Ultimately therefore, upon considering all the relevant evidence before me, I grant an order of injunction in terms of prayer 3 of the plaintiff/applicant's application dated 3<sup>rd</sup> July 2013 pending the hearing of this suit.

Costs to the plaintiff/applicant.

**B.N. OLAO**

**JUDGE**

**18<sup>TH</sup> JULY, 2014**

18/7/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Murage for Mr. Munene for Applicant – present

Mr. Njiru for Respondent – absent

COURT: Ruling delivered in open Court this 18<sup>th</sup> day of July, 2014.

Mr. Murage for Mr. Munene for Applicant – present

Mr. Njiru for Respondent – absent.

**B.N. OLAO**

**JUDGE**

**18<sup>TH</sup> JULY, 2014**