



No. 314

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 463 OF 2013

VINCENT OKUMU (Suing as the personal and

legal representative of the estate of Chrisantus Ongeru (deceased) PLAINTIFF

VERSUS

CALEB EDWIN MAKORI1ST DEFENDANT

BERNARD A. MAKORI2ND DEFENDANT

RONALD N. MAKORI3RD DEFENDANT

INNOCENT G. MAKORI 4TH DEFENDANT

DOMINIC M. MAKORI5TH DEFENDANT

THE LAND REGISTRAR – KISII 6TH DEFENDANT

ERIC O. MAKORI7TH DEFENDANT

RULING

1. What is before me is the plaintiff's application dated 18th November 2013 seeking a temporary injunction to restrain the 1st to 5th defendants (hereinafter referred to only as "**defendants**") from further trespassing into, heaping or depositing building materials or constructing any structures on or intermeddling in the hitherto vacant one half of all that parcel of land known as **LR No. Central Kitutu/Daraja Mbili/135**(hereinafter known as "**the suit property**") pending the hearing and determination of this suit. The plaintiff is the legal representative of the estate of one, **Chrisantus Ongeru** (deceased) (hereinafter referred to only as "**Ongeru**"). Ongeru and one, **Joseph Makori**(deceased (hereinafter referred to as "**Makori**") were at all material times registered as joint proprietors of the suit property. Makori died on 25th November 2001 while Ongeru died on 24th August 2008. The plaintiff has brought this suit against the defendants who are the children of Makori claiming that they caused the entire parcel of land comprised in the suit property to be transferred to their names without regard to the interest of Ongeru therein. The plaintiff has claimed that the said transfer was effected fraudulently the same having been carried

- out purportedly pursuant to a grant of letters of administration issued in Kisii High Court Succession Cause No. 273 of 2008.
2. The plaintiff has contended that the grant of letters of administration in respect of the estate of Makori was issued in Kisii High Court Succession Cause No. 53 of 2011 in which the suit property never featured and not in Kisii High Court Succession Cause No. 273 of 2008 which concerned a different estate altogether. The plaintiff has contended that following the said fraudulent transfer of the suit property into the name of the defendants, the defendants have now commenced development on the portion of the suit property which belongs to Ongeri and which had all along remained undeveloped. The plaintiff has contended that the defendants activities aforesaid amount to intermeddling and wasting of the estate of Ongeri and should be restrained by the court. It is on account of the foregoing that the plaintiff has sought an injunction against the defendants on terms set out above.
 3. The defendants did not file a replying affidavit in response to the plaintiff's application. Instead, the defendants chose to oppose the application by way of grounds of opposition dated 8th January 2014. In the said grounds of opposition the defendants have attacked the plaintiff's application on various grounds. The defendants have contended that the plaintiff's application lacks merit, is brought in bad faith, is misconceived and amounts to an abuse of the process of the court. The defendants have contended that the plaintiff's application is fraught with falsehood, inconsistencies and misrepresentation. The defendants have accused the plaintiff of lack of candor and concealment of material facts. The defendants have contended that the plaintiff has failed to establish a prima facie case with a probability of success against the defendants to warrant the grant of the orders sought.
 4. On 27th January 2014 the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. The parties filed their respective submissions on 7th April 2014. I have considered the plaintiff's application and the defendants' grounds of opposition filed in opposition thereto. I have also considered the written submissions filed by the respective advocates for the parties. The law on temporary injunction is now well settled. As was held in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358** an applicant for a temporary injunction must demonstrate a prima facie case with a probability of success and that he will otherwise suffer irreparable injury unless the injunction is granted. If the court is in doubt on the above, the application would be determined on a balance of convenience.
 5. The plaintiff has proved and it is not denied by the defendants that Ongeri was a co-proprietor of the suit property and as such his estate has an interest in the property. The plaintiff has also placed evidence before the court which points to the fact that the defendants caused the suit property to be transferred to their names irregularly in a manner bordering on fraud and without taking into account the interest of the estate of Ongeri in the property. The defendants who did not swear any affidavit to controvert the factual averments contained in the plaintiff's affidavit in support of the application herein. The fact that the suit property was transferred to the names of the defendants without following the due process is not denied. The fact that the interest of the estate of Ongeri was not taken into account in the said transfer is also not denied. For the foregoing reasons, I am satisfied that the plaintiff has established a prima facie case against the defendants with a probability of success. On the issue as to whether the plaintiff would suffer irreparable injury unless the orders sought are granted, I am equally satisfied that that would be the case. The suit property is now wholly registered in the names of the defendants. If the defendants dispose of the suit property, the same would be beyond the reach of the estate of Ongeri that would no doubt suffer irreparable injury.
 6. I am persuaded that the plaintiff has satisfied the conditions for granting a temporary injunction. The problem that I now have is with regard to the identification of the portion of the suit property against which the injunction sought is directed. Ongeri and Makori owned the suit property jointly. It is not clear on the material before me whether they held the suit property as joint tenants or as tenants in common. In the absence of such indication, it must be implied that Ongeri and Makori held the suit property as tenants in common in equal undivided shares. The plaintiff has stated in his affidavit that half of the suit property is developed with residential buildings while the other half is undeveloped. The plaintiff wants the court to stop the defendants from developing the undeveloped portion of the suit property which the plaintiff claims to belong to Ongeri. As I have stated above, Ongeri and Makori had equal but undivided shares in the suit property. The suit

property had not been partitioned. Until land which is held or owned in common is partitioned, the shares of the owners are unidentifiable. The plaintiff has not given to the court a clear picture of how the so called undeveloped portion of the suit property stands in relation to the rest of the suit property more particularly whether it can be isolated from the rest of the suit property for the purposes of the injunction sought without interfering with the other portion of the suit property occupied by the defendants.

7. Doing the best I can for the plaintiff in the circumstances, I hereby order that pending the hearing and determination of this suit, the defendants are restrained from selling, transferring or charging the suit property and from carrying out any other or further construction of structures of any nature on the hitherto undeveloped portion of the suit property. The plaintiff shall have the cost of the application dated 18th November 2013.

Delivered, signed and dated at KISII this 15th day of August, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Minda for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE