



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 1165 OF 2013

**PENINAH MILANOI MACHARIA (suing as a personal representative
of IBRAHIM KAMAU WAKABA(DECEASED)PLAINTIFF**

VERSUS

CHRISTINE MUTUADEFENDANT

RULING

The Plaintiff has moved the court by way of a Notice of Motion application dated 27th September 2013 brought under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules as well as section 3 and 3A of the Civil Procedure Act. The Plaintiff seeks an order for temporary injunction directed at the Defendant, her servants, agents of employees restraining them from alienating, selling, charging, taking possession, constructing or in any other manner whatsoever from interfering with the property known as LR No. Ngong/Ngong/44471 (herein after referred to as the suit property) belonging to and forming part of the estate of Ibrahim Kamau Wakaba (deceased).

The motion is premised on grounds listed on the face of the application and is supported by the Plaintiff's affidavit sworn on 27th September 2013. The Plaintiff's case is that she is the daughter of Victoria Kamakei Wakaba (deceased) and Ibrahim Kamau Wakaba (deceased). The Plaintiff has annexed as evidence a copy of a Limited Grant Ad litem issued in HC Succ. Cause **No. 1830 of 2013** appointing her as administrator of her late father's estate.

The Plaintiff has averred that the suit property belongs to her late father and has contended that the Defendant was not a wife of her late father but was a house help who was employed by the family to take care of her late father. That Plaintiff states that her father died on 6th December 2012 and has exhibited a certificate of death dated 6th March 2013 as well as a permit for burial dated 13th December 2012.

The Plaintiff avers that unknown to the family, the Defendant obtained a title deed to the suit property after the demise of the Plaintiff's father. A copy of the green card to the suit property indicating that the Defendant was issued with a title deed on 10th December 2012 is annexed and marked "**PMMA**". The Plaintiff alleges that the Defendant has approached financial institutions seeking to borrow monies to be secured by the title to the suit property and has exhibited a letter dated 28th August 2012 where it was alleged that the Defendant was a wife of her late father.

Through a supplementary affidavit sworn by the Plaintiff on 17th February 2014, the plaintiff contends that the Defendant was never gifted the suit property but that she acquired the same fraudulently by forging documents and hurriedly conducting transfer when the Plaintiff's father died. The Plaintiff states that whereas her father died on 6th December 2012, the Defendant effected transfer on 14th December 2012. It is the Plaintiff's case that the Defendant took advantage of her late father's health condition to obtain documents which were later forged to fraudulently transfer the property to herself.

According to the Plaintiff, her late father could not have given the suit property to a person who was not a family member since the property was a family grave yard with five existing graves including her late father's. It is the Plaintiff's contention that even if any document was signed by her late father during the period he was sick, the same was done without her late father's knowledge of what he was signing since he had a mental problem.

While denying that the Defendant was married to her late father, the Plaintiff contended that the alleged marriage was not proved through a marriage certificate or evidence showing that the Defendant got married through customs. It was also averred that although the title deed was dated 10th December 2012, no dates had been indicated on the transfer forms. Lastly, the Plaintiff denied having threatened the Defendant and contended that the Defendant's letter dated 6th September 2012 was authored before the demise of her late father.

In a further supplementary affidavit sworn on 28th February 2014, the Plaintiff reiterated that her late father had a serious mental condition which could have affected his decision making process. It is the Plaintiff's averment that the deceased could have executed several instruments without knowing their legal consequences. A copy of a medical report from P.C.E.A Kikuyu Hospital dated 25th February 2014 annexed and marked “**PMMA**” shows that the deceased was in poor health prior to his death. The Plaintiff maintained that the Defendant was not a wife of her late father and averred that the transfer and any other action preceding the death of her father was questionable and bordered criminality.

The Defendant opposed the application through her replying affidavit sworn on 20th December 2013 where she stated that she was the registered absolute proprietor of the suit property pursuant to a title deed issued to her on 10th December 2012. While contending that she was known to the deceased initially as his house help, the Defendant has averred she became the deceased wife following their prolonged cohabitation after the demise of his wife Victoria Kamakei Wakaba. It is the Defendant's case that prior to the deceased's death on 6th December 2013, the deceased gave her the suit property as a gift and that title in her name was being processed at the time of his death.

According to the Defendant, the suit property was voluntarily gifted to her and conscientiously transferred to her without the deceased being under any disease that affected his decision making whatsoever. Further, the Defendant has contended that the process used to transfer the land as a gift to her was procedural and lawful and that her registration as a proprietor was acknowledged by the Plaintiff's family. The Defendant has annexed as evidence of the acknowledgement a statutory declaration by **Kennedy Muthongo Wakaba** dated 4th February 2013 and his letter to the registrar of the same date.

Lastly, the Defendant has averred that the application is brought in bad faith since her relationship with the Plaintiff has been sour since the demise of Ibrahim Kamau Wakaba and she exhibited a letter dated 6th September 2012 from the Chief Tungutu location requesting the O.C.S Ngong' Police Station to investigate the Defendant's apprehension about her security.

The application was canvassed by way of written submissions and the Plaintiff in submissions dated 13th June 2014 argued that before the Defendant got registered as the proprietor of the suit property, the property belonged to her late father and was transferred to the Defendant in unclear circumstances. It was submitted that whereas Ibrahim Kamau Wakaba died on 6th December 2012, the suit property was transferred to the Defendant on 10th December 2012, 4 days after his demise.

Counsel for the Plaintiff averred that there was no evidence that the Defendant was a wife to the deceased having admitted that she was a house help. It was argued that the Defendant failed to demonstrate in her pleadings or averments when she was employed and when she ceased being an employee and assumed the status of a wife. It was submitted that the Defendant was not a widow of Ibrahim Wakaba (deceased), and that she remained a former employee of the Deceased.

In further submission, the Plaintiff argued that since the Defendant had title to the suit property issued in her name, she was at liberty to deal with the suit property as she wished and could transfer the same to another party. The Plaintiff urged that the Defendant be allowed to keep the title to the suit property but be restrained from dealing with the property until final orders are issued by the court. Counsel submitted that Defendant would not suffer any prejudice by grant of the proposed order of injunction.

The Defendant filed submissions dated 10th July 2014 where she contended she was the holder of title to the suit property and that Ibrahim Kamau Wakaba(deceased) gave her the suit property as a gift during his lifetime. Counsel for the Defendant submitted that the process of transfer was completed on 10th December 2012.

While placing reliance on section 24 and 26 of the Land Registration Act, the Defendant made reference to the case of **Gaitan Lisutsa Mukofu -vs- Brenda Muhato & 9 others Nairobi ELC No. 549 of 2012** and submitted that her title to the suit property was indefeasible. Counsel referred the court to Article 40 of the Constitution and averred that the deceased had a right to enjoyment of his property and was entitled to deal with the property however he wished including giving the property to the wife he had cohabited with for a while. It is the Defendant's submission that a gift does not form part of the estate of the deceased and reliance was placed on the case of **Re estate of Mbagi Muturi deceased (2008) eKLR**

In further submissions, Counsel for the Defendant argued that the wishes of the deceased should be respected as he bestowed the gift to the Defendant when all his faculties were functioning well. Counsel submitted that the principles of granting temporary injunction were set out in the case of **Giella -vs- Cassman Brown (1973)EA 378** and it was contended that the Plaintiff's case had no merit and had no probability of success. It was further submitted for the Defendant that the Plaintiff had not demonstrated how she was going to suffer loss or damage which cannot be adequately compensated by damages should the injunction be refused.

While arguing that no prima facie case had been demonstrated by the Plaintiff to warrant the grant of the relief sought, Counsel submitted that the suit property belonged to the Defendant and that she cannot be restrained from enjoying her property which was her constitutional right. Lastly, it was submitted that the Defendant stood to lose more if the application for injunction succeeded and that being the registered owner, she should be left to enjoy her proprietorship.

The issue for determination is whether the Plaintiff is entitled to the orders sought. The Plaintiff has submitted that the transfer of the suit property was effected after the demise of her late father who was the registered proprietor of the land. This fact is admitted by the Defendant who has argued that the property was gifted to her by the Plaintiff's late father during his lifetime and that the process of transfer was completed on 10th December 2012, 4 days after the demise of the Plaintiff's father.

No evidence of fraud on the part of the Defendant was produced by the Plaintiff. However, the court cannot ignore the fact that the transfer was effected after the death of Ibrahim Kamau Wakaba (deceased). An explanation needs to be provided by the Defendant which can only be done during hearing of the suit. The circumstances under which the transfer was effected to the Defendant even before the burial of the deceased raises issues that call for explanation by the Defendant. The position of the Defendant as wife to the deceased is contested. Whether or not the Defendant was a wife and not a house-help is a matter of evidence which can only be determined at the trial considering all the material placed before the court I am satisfied the plaintiff has established a prima facie case with a probability of success and there is need to preserve the suit property until the suit is heard and determined on its merits.

In the premises therefore and with a view to preserving the suit I grant an order of injunction against the

Defendant restraining the Defendant from selling, leasing, charging or in any other manner encumbering the property known as **L.R.NO. Ngong/Ngong/44471** until the suit is heard and determined.

I order that each party shall bear their own costs of the application.

Ruling dated, signed and delivered this...**24th** ...day of...**October**.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant