



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO. 95 OF 2014

HENRY MWANGANGIAPPLICANT/PLAINTIFF

VERSUS

BERNARD KITUKU 1ST DEFENDANT

KALONDU MUNYIVA 2ND DEFENDANT

R U L I N G

1. By a **Plaint dated 25/9/2014** the Plaintiff filed suit herein together with a **Notice of Motion dated 26.9.2014**. The Applicant sought 6 prayers. During the inter parte hearing the Applicant indicated that he was interested in prayer NO.3 pending hearing and determination of the suit.

2. The Application is brought under **Order 40 Rules 3 and 3(a) Civil Procedure Rules**. The same is based on the grounds on the face of

the Notice of Motion and it is supported by the Affidavit of Henry Mwangangi Mbithi sworn on the 25.9.2014 and a further affidavit he swore on 14.11.2014. The application is opposed by the Respondents vide their replying affidavits sworn on the 31.10.2014.

APPLICANT'S CASE

3. The Applicant depones that he is the registered owner of the subject herein which he bought from Joel Muthama Makau and has never been his father (deceased) property. He depones that his father's land is Muthetheni/Kalamba/51 where the 2nd Respondent resides being a beneficiary of their father's estate. He avers that he has subdivided the land to his 5 sons and it is them who are using the subject herein but not the 2nd Defendant who resides and uses Muthetheni/Kalamba/51. The 1st Respondent is a clan chairman and he is sued because of his role of attempting to resolve the dispute and for his letter dated 21.9.2014 which suggested the suit property be sub-divided between Plaintiff and the 2nd Defendant.

RESPONDENTS' CASE

4. The 1st Respondent is the chairman of Mulela clan. The 2nd Respondent reported dispute to him

over the subject matter where she alleged the same is family land. He (1st Defendant) summoned the Plaintiff but in vain. He stated that both Plaintiff and 2nd Defendant are beneficiary of their deceased father's estate. He pleads ignorance as to how subject land was acquired by the Plaintiff.

5. On 2nd Respondent's part, she avers that she was married by the wife of the deceased father of the Plaintiff and thus became part of Mbithi Mbithuka (deceased) family. She claims the subject matter was acquired by her deceased father (Mbithi Mbithuka) from one Makau and the Applicant has fraudulently transferred same to himself. She claims to have been using the land until August, 2014 when she reluctantly stopped using it after being served with summons to await the case. She avers that she has nothing on the land as she just used to cultivate and graze therein.

6. After going through the Affidavits, pleadings and submissions by the party, I find the following issues emerge:

- (a) **Whether the Applicant has established a prima facie case?**
- (b) **What is the situation on the ground?**
- (c) **What are the appropriate orders?**
- (d) **What is the order as to costs?**

7. It is not in dispute that the Plaintiff and the 2nd Defendants are beneficiaries of Mbithi Mbithuka (deceased) estate. It is also not in dispute that the 1st Respondent is not interested in the subject matter. The dispute herein is on whether the subject matter was owned by the Mbithi Mbithuka deceased. If it was his property, then the 2nd Defendant claim will be proved to the effect that the Applicant cannot injunct her from use of the subject herein.

8. The Plaintiff proved that the land was originally owned by Joel Muthama Makau. He claims to have bought and he holds a title issued to him on 30.6.2011 – it is MM1. The land was prior to the above registered in the names of Joel Muthama Makau. This was demonstrated in court by search certificates shown to court by the Applicant's advocates.

9. The Respondent No.2 avers that the deceased Mbithi Mbithuka bought the land from Mr. Makau but the Applicant fraudulently transferred same to himself. She has no documents to prove her allegations, but states that she will call witnesses to the same effect.

10. The Plaintiff has not shown prove of purchase other than the title deed in his name. The court is yet to hear the case. It is conceded that the Plaintiff is in possession. The conditions of grant of interlocutory injunction are set out in the case of **GIELLA VS. CASSMAN BROWN CO. LTD.** Which are to the effect that:-

“The Plaintiff has to establish a prima facie case with probabilities of success.

That if orders are not granted, the Applicant will suffer irreparable damages which cannot be compensated by award of damages. AND

If court is in doubt, the balance of convenience has to be considered in whose favour it tilts.”

11. Whereas the Plaintiff shows the title ownership of the property subject herein, the Respondent No.2 is very passionate that the same is family land which the Respondent is defrauding the family. She states that she will bring witnesses to support her story. The undisputed point herein is that the Plaintiff is in possession of the documents in court namely title in Plaintiff's names, and in absence of any other contrary evidence, prima facie case is established.

12. On damages to be suffered, the Applicant is in occupation with his sons. There is no damage which is imminent on his occupation but the 2nd Respondent seeks the same property not to be used by any party. On balance of convenience, the occupier will be inconvenienced most, if he is ousted. The circumstances of the case herein demands that the court do order status quo in view of the fact that the situation on the ground is clear and parties are relatives. On the Issue as against the 1st Defendant I find that he is wrongly enjoined as party.

13. The court makes the following orders:

- (a) **Status quo be maintained until suit is heard and determined.**
- (b) **The 1st Defendant is struck out of the case as a 1st Defendant.**
- (c) **Costs in the cause.**

Signed and Delivered at Machakos this 28th day of November, 2014.

CHARLES KARIUKI

JUDGE