



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA E078 OF 2021

GRACE KINORU MARKAPPELLANT

VERSUS

MARK MURIUNGI MARK1ST RESPONDENT

FLORA KENDI2ND RESPONDENT

ISABELLA KAGENDO3RD RESPONDENT

RULING

1. Before the court is the notice of motion dated 28.6.2021 seeking for an order of inhibition to be registered against Land Registration No. Nkuene/Nkumari/3730 pending the hearing and determination of this appeal. The application is supported by an affidavit sworn by Grace Kinanu Mark which is not dated.
2. The grounds are that; there is imminent danger of the property being alienated following the dismissal by the lower court of the application dated 8.3.2021; the land is family trust land inherited by the respondent from a succession cause; the applicant has a right of appeal and should the 3rd respondent alienate the land the appeal shall be rendered nugatory, there has been no inordinate delay in filing the application; no prejudice will be occasioned to the respondent and that there would be substantial loss and damage if the respondents were to merge or transfer the suitland to third parties.
3. The application is opposed through a joint replying affidavit sworn by Mark Muriungi Muchai and Flora Kendi who have admitted the suit land arose out of a succession cause save that the 1st respondent had another wife called Flora Kendi, the 2nd respondent who had a child known as Princess Ntinyari.
4. The respondents averred after the subdivision of the estate, the 1st respondent benefited with two parcels namely L.R No. Nkuene/Nkumari/3730 and Nkuene Ngonyi/1248.
5. That at a chiefs meeting on 15.4.2015 it was agreed L.R No. Nkuene/Nkumari/3730 was to be transferred to the 2nd respondent due to the fact that he had a child with the 1st respondent while L.R No. Nkuene/Ngonyi/1248 was to be transferred to the applicant herein but has been uncooperative. That as agreed the land was transferred to the 2nd respondent who sold it to the 3rd respondent. Eventually the 3rd respondent took vacant possession with effect from 2019 with no opposition from the applicant, and has developed the same.
6. Lastly it was averred the applicant had not tendered any evidence that the subject matter had been disposed of or any third party intended to acquire it otherwise the court should not act on hearsay.
7. Parties agreed to canvass the application through written submissions dated 2.2.2022 and filed on 1.3.2022 respectively.
8. The appellants submitted the court under Section 68 of the Land Registration Act 2012 had powers to issue inhibition orders so as to preserve the suit and during the subsistence of the appeal so as to avoid the further convolution of the dispute. Reliance was placed on ***Millicent Wairimu Kathigi vs Peter Kimani Meru ELC No. 21 of 2020.***
9. On the other hand the respondent submitted the issues for determination were whether the application had established a prima facie case, irreparable loss that cannot be compensated and that the balance of convenience tilts in favour of him. Guided by ***Giella vs Cassman Brown (1933) E.A.*** it was submitted the application had failed to meet the test and the principles above since the applicant was gambling with the law by changing facts on appeal in alleging trust whereas in the lower court his claim was that he had been gifted the land together with the

1st respondent and jointly registered which the trial court found untrue. Further the respondents submitted the application was in total departure from the one filed in the lower court a clear portrayal of the applicant as dishonest character who could not be trusted and that she should not be allowed to introduce new issues on appeal.

10. As regards irreparable loss and damage it was submitted the applicant was in occupation of Parcel No. Nkuene/Ngonyi/1248 which the 1st respondent has intended to transfer to her since 2019 and that the applicant had produced no material to show the 3rd respondent was intending to dispose off the suit land.

11. It is not in dispute the court has powers to issue inhibition orders against a registered owner of the land pending the occurrence of a certain event and for a given period of time.

12. An inhibition is in the nature of a prohibitory injunction. In *Charter House Bank Ltd vs Central Bank of Kenya & others (2007) eKLR*, the Court of Appeal held the purpose of granting an injunction pending appeal was to preserve the status quo and to prevent the appeal if successful from being rendered nugatory.

13. In *Bilha Mideva Buluku vs Everlyne Kanyere (2016) eKLR* the court held in considering whether or not to grant an injunction pending appeal, the court would be trying to ascertain if the appeal was arguable or raised serious questions for the courts determination vis a vis the impugned decision without delving into the merits of the appeal.

14. In this application the orders of inhibition are sought against LR No. Nkuene/Nkumari/3730 alleged to be family trust land inherited by the 1st respondent from a succession cause. It is alleged the subdivision no. L.R Nkuene/Nkumari/1359 land is registered in the name of the 1st respondent who is likely to sell, merge or transfer the land to the 3rd respondent before the appeal is heard and determined.

15. From the attached documents to the application there is a copy of title for L.R No. Nkuene/Nkumari/3730 which is in favour of the 3rd respondent. The title deed was issued on 19.9.2019.

16. The copy of records attached indicates the register for Parcel No. 3730 was opened on 20.4.2017 as a subdivision from L.R 1359 and title deeds were issued to Jane Gacheri Michael on 16.5.2017, Flora Kendi on 25.4.2019, Sabella Kagendo Thurania 19.9.2019.

17. The appeal herein is in respect to a ruling delivered on 10.6.2021 where the applicant was seeking temporary orders of injunction and inhibition against the respondents from interfering with her enjoyment and occupation of Land registration no. 3730.

18. The court declined to grant the orders sought for reasons that the 3rd respondent had been validly transferred the and through sale by the 2nd respondent since 2019 and had lawfully developed and occupied the land.

19. The appeal herein seeks a principal prayer for the appeal be allowed in terms of allowing the application dated 8.3.2021 and for an inhibition to be issued pending the hearing of the lower court suit.

20. In other words if the court was to allow this application it would effectively have determined the entire appeal.

21. The respondents have averred that at a chiefs office meeting it was agreed LR. Nkuene/Ngonyi was to be transferred to the applicant since L.R No. Nkuene/Nkumari/3730 had been transferred to the 2nd respondent who sold the same to the 3rd respondent.

22. The applicant has not denied those facts. Similarly she has not laid any material before the court why the court should inhibit and or issue an order against an absolute owner of the land who has rights to use and occupy her land to the exclusion of the rest.

23. In *Mrao Ltd vs First American Bank Ltd & 2 others (2003) eKLR*, the court held a prima facie case is established where on the material placed before the court there is evidence of a right which has been infringed to call the opposite party to give an explanation.

24. There is nothing to show the rights of the appellant have been infringed by the 3rd respondent for this court to issue such drastic orders pending the appeal by way of inhibition and injunction.

25. Whatever land title entries likely to be made, the same are reversible once the applicant establishes her claim to the satisfaction of the appellate court. The appellant has not exhibited the plaint in the trial court to establish if the grounds of appeal are arguable vis a vis the respondents defence in the lower court.

26. In the premises I find the application lacking merits. The same is dismissed with costs.

Order accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS

THIS 27TH DAY OF APRIL, 2022

In presence of:

Muthomi for applicant

Respondent in person

HON. C.K. NZILI

ELC JUDGE