



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

E.L.C. NO 1 OF 2014

FORMERLY E.L.C.A 76 OF 2014 (KERUGOYA)

STELLA MURINGO MWITI (*Suing as the administratrix of the estate of*

Alfred Nyamu Ndiga alias Alfred Nyamau Ndiga - Deceased).....PLAINTIFF

VERSUS

BENJAMIN NJUE KIROTO.....1ST DEFENDANT

GACHARAGE TEA FACTORY COMPANY LTD.....2ND DEFENDANT

RULING

INTRODUCTION

Mrs Stella Muringo Mwiti, the plaintiff/applicant seeks an order of inhibition in respect of land parcel number L.R Embu/Kithunthiri/1337 together with an order of costs of this application dated 12th March, 2014, which parcel of land is currently registered in the name of Gacharage Tea Factory Co. Ltd, the second defendant/respondent.

Second defendant/respondent has opposed the application. The 1st defendant is not party to this application. The case of each of the parties to this application is set out below.

The Case for the Plaintiff/Applicant:

According to the plaintiff, the suit land belonged to her father. The first defendant fraudulently and without the knowledge of the plaintiff and members of her family, forged documents and had himself registered as the owner of the suit land. Furthermore, the plaintiff alleges that the fraudulent transaction was reported to the police both in Nairobi and Embu for investigations. She also alleges that thereafter, the 1st defendant sold the suit land to the 2nd defendant/respondent.

The plaintiff's application is supported by her affidavit dated 12th March, 2014 and on the grounds that are set out in the notice of motion of the same date.

The Case for the 1st Defendant/respondent:

The 1st defendant does not appear to have filed any documents in opposition to the plaintiff's application.

It appears that the plaintiff is not seeking any interim relief or prayer against the 1st defendant.

The case for the 2nd Defendant/respondent:

The 2nd defendant has opposed the application through its replying affidavit dated 13th June, 2014. It has urged the court to dismiss the application with costs.

According to the 2nd defendant, it followed the law in its acquisition of the suit land. It carried out an official search in the lands registry, which showed that the suit land was not encumbered. A sale agreement was entered into and executed between itself and the 1st defendant.

Furthermore, the second defendant was duly registered as the owner of the 182.85 acres of the suit land, after paying to the 1st defendant the purchase price in sum of Kshs 41,141,250/=.

The Applicable Law:

The law governing the grant of an inhibition order is set in the ***Land Registration Act of 2012 in Section 68*** thereof. The provisions of that section state as follows:

1. The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.
2. A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.
3. An inhibition shall not bind or affect the land, lease or charge until it has been registered.

The provisions of the above section have been interpreted judicially by the superior courts. References to those judgements is instructive.

In ***Mary Kaburo M'njuki V. M'Chabari Mitaru, Civil Case No. 62 of 2010***, the ***High Court (Kasango, J)*** at Meru cited with approval the case of ***Hellen Njeri Mureithi V. Angela Nyawira Ndiuini & another, Court of Appeal Civil Application No. NAI 151 of 2008 (EU 96/2008)***, in which that court of appeal granted an injunction to a party that was not the registered owner of the land, but had an interest in the land. The Court of Appeal said that:

“The issue is emotive as there are accusations and counter-accusations as to what each party's intentions regarding the disputed property is. In view of the mutual suspicion, we consider that unless the property is preserved there is the risk of the 1st respondent transferring the property to third parties and thereby cause undue hardship to the applicant. There is a basis for the applicant's apprehension that the property may be taken beyond her reach and thus render her intended appeal nugatory. In the result, in exercise of our original jurisdiction in this matter, we allow the application and grant the order of injunction as prayed in prayer (2) of the motion dated 5th June, 2008. The costs of the motion shall be in the intended appeal.”

And in yet another case of ***Thomas Mungiria & 9 others Vs Joseph Mutuma & 4 others (2012) eKLR***, the High Court (Lesiit, J) cited with approval the case of ***Simiyu V. Housings Finance Co. of Kenya Ltd (2001) & EA 540 at page 546*** in considering the grant of an interlocutory injunction stated that:

“.....the case can also be determined in(sic) a balance of convenience. This being an interlocutory application. I have cautioned myself that I should not make conclusive findings of fact or law. See the case of Simiyu Vs Housing Finance Company of Kenya Ltd (2001) 2 E.A. 540 at page 546.

“In answering that question the court is to remember that it is not required – indeed it is forbidden to make definitive findings of fact or law at the interlocutory stage particularly where the affidavits are contradictory and the legal propositions are hotly contested as is the case here.”

Finally in *Japheth Kaimenyi M'Ndatho V M'Ndatho M'Mbwiria, Civil Suit No 161 of 2011*, the *High Court (Makau,J) at Meru* stated that an applicant for an order of inhibition has to satisfy the following conditions:

- a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued.***
- b. That the refusal to grant orders of inhibition would render the applicant's suit nugatory.***
- c. That the applicant has an arguable case.***

Issues For Determination:

In the light of the submissions of the parties, the affidavit evidence, the statutory law and the judicial decisions referred to above, the following are the issues for determination:

1. Whether or not the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the plaintiff/applicant unless a preservative order of inhibition is issued
2. Whether or not the refusal to grant an order of inhibition would render the plaintiff's suit nugatory
3. Whether or not the plaintiff has an arguable case
4. Who will bear the costs of this application

Evaluation of the affidavit, Evidence, the Law and Submissions:

I have carefully considered the affidavit evidence, the legal issues in the application and the submissions of the parties.

It is clear from the affidavit evidence of the plaintiff that she is the administratrix of the estate of deceased Alfred Nyamu Ndiga, which estate includes the suit land. It is this suit land that the 1st defendant allegedly transferred to himself as the owner through fraudulent means. This alleged fraudulent transaction was reported to the police for investigations.

Furthermore, unless this court issues an inhibition order, the suit land is at risk of being disposed or transferred to third parties to the detriment of the plaintiff. Hence the necessity of a preservative inhibitory order.

Additionally, a refusal to grant an order of inhibition would render the plaintiff's suit nugatory.

Finally, the plaintiff has an arguable case. The answers to the issues for the determination are all in the affirmative.

Verdict and Disposal orders:

In the light of the above reasons, I hereby grant an order of inhibition in respect of land parcel No. L.R. Embu/Kithunthiri/1337 pending the hearing and determination of this suit.

The plaintiff/applicant has succeeded in this application. In terms of ***Section 27, Civil Procedure Act***, a

successful party is entitled to the costs of the application, unless it is shown that there are good reasons to deprive him of such costs. In the circumstances, the costs of this application are awarded to the plaintiff.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this ...**17th** ...day of ...**November, ...2014**

In the presence of Mr Makori holding brief for Mr. Mbaabu and in the absence of counsel for the 1st and 2nd defendants/respondents.

Court clerk Mr Kirong

Right of appeal under Order 43(7) Civil Procedure Rules explained to the parties.

J.M. BWONWONGA – JUDGE

17.11.14