



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 475 of 2012

SHIPHRAH W. KABIAPLAINTIFF/APPLICANT

=VERSUS=

MWIKI CO. LTD & 3 OTHERS.....DEFENDANT/RESPONDENTS

RULING:

The Applicant herein **Shiphrah W Kabia** has brought this **Notice of Motion** dated 3rd August 2012 seeking for various orders. The application is brought under **Section 3A of the Civil Procedure Act, Order 40 Rule 2, 2A, 5 & 9 of the Civil Procedure Rules** and all other enabling provisions of Law. The applicant seeks for these orders:-

- a) Spent,
- b) Spent,
- c) Spent,
- d) Spent,
- e) Pending the hearing and determination of this suit, the Defendants , their agents, servants , employees and or any persons whomsoever acting under their instructions , be and are hereby restrained by an order of Temporary Injunction from cancelling **Plot Certificate No. 2296** issued to **Shiphrah Wairimu Kabia** on 17th April, 2012 in respect of **Plot No. 228 Kasarani – Mwiki**.
- f) Pending the hearing and determination of this suit, the Defendants, their agents, employees and or any persons whomsoever acting under the instructions be and are hereby restrained by an order of Temporary Injunction from selling , disposing , interfering , trespassing and / or tampering or in **any way** whatsoever dealing with the plaintiffs' property known as **Plot No. 228 Kasarani- Mwiki** .
- g) That the Defendants be condemned to pay costs of this application.

The application was supported by the grounds on the face of the application and on the supporting affidavit of **Shiphrah Wairimu Kabia**. The applicant averred that she is the owner of Plot Certificate **No. 2296** issued on 17th April 2012 in respect of **Plot No. 228 Kasarani- Mwiki** . That further, the plot is developed and currently has 20 double roomed houses and the tenants. She further stated that the plot was initially owned by **Louis Gachimbi Nderitu** who is now deceased and who was married to the applicant under Kikuyu customary marriage on 14/12/1996 in Tetu. She alleged that she provided finance from time to time to develop the plot and it was agreed that the plot be registered and owned jointly between the plaintiff and the deceased to secure and protect the financial interest.

As a result, the 1st Defendant then issued on the 12th March 1987, Plot Certificate No. 342 for the plot in

joint names of the plaintiff and the deceased. She further stated that though she separated from the deceased in December, 2002. She continued to derive financial benefits from the plot. Consequently, upon the demise of the deceased on 19th January 2012, the plaintiff notified the 1st Defendant and was advised by officials of 1st Defendant to apply for the amendment of the land records which she did and 1st Defendant issued her with Certificate No. 2296 on 17th April, 2012 in her name.

However, on 27th July, 2012 she received a letter dated 10th July, 2012 written by 1st Defendant on instigations of 2nd, 3rd, and 4th Defendants threatening to cancel her plot certificate No. 2296 that was issued on 17/4/2012 in respect of **Plot No. 228 Kasarani -Mwiki**. The applicant therefore sought for courts protection to prevent the Defendants from disposing off the plot in question. Applicant attached various documents to support her claim.

The application was opposed by all the Defendants / Respondents herein. The 1st Defendant, Mwiki Company Ltd through its Managing Director, **Robert Waweru**, vehemently opposed the Notice of Motion. The 1st Deponent averred that their shareholder **Louis Gachimbi Nderitu** was allocated **Plot No. 228** and issued with Certificate **No. 342 12/5/198**. He however stated that though he can identify his signature on **SWK 1**, the same appears to be forged because the name **Shiphrah Wairimu Kabia** is typed using a different typewriter (electric).

He further contended that certificate No. 2296 marked **SWK1** is a forged one because there was no Transfer of Certificate Number 228 from deceased into the joint names of the deceased and applicant. If that was the case, the company would have cancelled Certificate No. 228 dated 12/3/1987 in the names of **Louis Gichambi Nderitu** and issued another one in the joint names. He further stated that the police department is investigating offences of fraud, forgery and conspiracy to defraud. The 1st deponent urged the court to dismiss the case as the applicant has not come to Court with clean hands.

The 2nd and 3rd Defendants also opposed the application. **Susan Gechieri Murugu** the 3rd Defendant filed a Replying Affidavit and averred that the applicant has never been a wife of **Louis Gachimbi Nderitu**. She contended that she was the wife of the deceased as and at the time of his death having gotten married to him in the year 2009. She further denied that the applicant contributed to the purchase of the suit plot. She alleged that the deceased and herself used to collect rent from the 20 rented houses as evidenced by bundle of receipts, **SGM I**.

3rd Defendant further contended that at no time during the lifetime of her husband did the applicant lay any claim to the suit property and that she only began deriving financial benefits upon the death of **Louis Gachimbi Nderitu** as she issued tenants with notices directing that rent be paid to her. She further stated that the utility bills were in the names of the deceased and applicant relied on questionable Death Certificate in applying for replacement and subsequent transfer of the suit property. She therefore reiterated that the suit property belongs to the late **Louis Gachimbi Nderitu** and the records were fraudulently altered and therefore the applicant has not come to court with clean hands.

The 4th Defendant **Purity Wambui Gachimbi** also opposed the Notice of Motion and raised a Preliminary objection. 4th Applicant argued that the entire suit offends Section 45 of the law of Succession and the applicant is an intermeddler. She further contended that she is the 1st born daughter of **Louis Gachimbi Nderitu** and **Cecilia Wangeshi Mwach** both now deceased. She averred that her parents got married under kikuyu customary marriage in 1988. She admitted that prior to the deceased marrying her mother, he was married to the plaintiff and their marriage had broken down. PWG 3 confirmed the existence of such customary marriage. 4th deponent stated that plaintiff fraudulently transferred plot No. 228 Kasarani into her name but the said plot was previously solely owned by her deceased father. That the applicant is therefore intermeddling with the estate of the deceased as the estate has not been distributed. That the police are investigating the issue of forgery and fraud as the plot did not pass over to plaintiff by operation of law as alleged by her. She further contended that she is a stranger to the plaintiff allegations in her affidavit and the applicant's acts are tainted with fraud and she has not come to court with clean hands.

The parties herein opted to dispose off the application by way of written submission. I have considered the rival arguments and I make the following findings:-

The 4th Defendant has raised a Preliminary Objection that by dint of Section 45 of the Succession Act, the plaintiff is an intermeddler in the estate of the deceased. Section 45 of the Succession Act reads as follows:

“ *except so far as expressly authorised by this Act or by any other written law or by Grant of representation under this Act, no person shall for any purpose , take possession or dispose of , or otherwise intermeddle with any free property of a deceased person. Section 45(2) any person who contravenes the provisions of this Section shall be guilty of any offence and liable to a fine....”.*

There is no doubt that the plot in question involved the deceased herein **Louis Gachimbi Nderitu** . He died on 19/1/2012. The applicant caused the suit property to be registered in her name on 17/4/2012 . That was not through a succession cause but through an affidavit **SWK4**. The other beneficiaries of the deceased were not involved. In causing the plot to be changed from the deceased's name to her name, the applicant herein intermeddled with the deceased property without following the provisions of the Succession Act. That was contrary to Section 45 of Cap 160 and applicant is therefore guilty of an offence. I will concur with the 4th Defendant that the entire suit offends the provisions of Section 45 of the Succession Act and Applicant herein is an intermeddler.

Supposing the Applicant was not an intermeddler, has she satisfied the Court to the required standard to warrant the Court to grant her injunction orders?.

Injunction orders are equitable reliefs and whoever comes to court for such relief should practice equity. The threshold principles for grant of injunctions are well laid out in the case of **Giella Vs Cassman Brown Co.Ltd (1973) EA 358** . The applicant should satisfy to the Court that she has a **prima facie case** with probability of success. Secondly, she stands to *suffer irreparable loss or injury* which cannot be compensated by damages and thirdly, if Court in doubt, it should decide on a *balance of convenience*.

It was the plaintiff admission that the suit plot was in the name of the deceased and herself. The deceased died on 19/1/2012 . The plaintiff's changed the suit plot into her name without going through a succession cause. She did not involve the other beneficiaries of the deceased. It was also her contention that she separated with the deceased in the year 2002 but she has been deriving benefits from the said plot. She did not avail evidence of how she used to derive such benefits. There were allegations that the suit plot used to be in the names of the deceased **Louis Gachimbi Nderitu** .

It was also alleged that the applicant fraudulently added her name for the purpose of having the certificate changed into her sole name. That averment was made by **Robert Waweru**, the Managing Director of 1st Defendant. The applicant title to the suit plot is therefore questioned and suspected to be tainted with fraud. The Court cannot hold that with certainty that she has a good title. There are allegations of fraud and forgery made against the applicant. The Court cannot therefore find that the applicant has a **prima facie case** with high probability of success. 3rd Defendant averred that she was the wife to the deceased prior to his death. That they used to collect rent from the rental houses as per attached receipts in her affidavit **SGM I**.

The applicant did not provide any evidence of receipt of any rent from the tenants on the suit plot. No evidence of deposit of any rental income in her account. Applicant started deriving benefits after the demise of **Louis Gachimbi Nderitu** . Applicant also did not provide evidenced of her monetary contributions towards financing of the project on the suit land. The court therefore will find it difficult to hold that applicant will suffer irreparable loss or injury which cannot be compensated by damages.

On the balance of convenience, the same does not tilt in favour of the applicant. The applicant admitted that she separated with the deceased in the year 2002. The applicant was never in possession of the suit

plot. However, 3rd Defendant has demonstrated that the deceased and herself used to collect rent from the tenants who had rented houses on the suit plot. The balance of convenience therefore tilts in favour of the 3rd Defendant. I rely on the case of **James Jamwa Ndeda Vs Dorine Alouch, Kisumu High Court, Civil No. 136 of 2007** to buttress the above point. In the above case, it was held that the balance of convenience would tilt in favour of the Defendant who was in actual occupation of the suit land rather than the plaintiff who may be in occupation by 'remote control'.

As I had stated earlier, there are allegations of fraud against the applicant herein. He who comes to equity must come with clean hands. With those allegations hanging on the shoulders of the applicant and given that she has not disapproved them, i will not hold with certainty that she has come to court with clear hands. Applicant also did not obtain a court order through Succession Cause to have the name of the deceased removed from the original plot Certificate no. 228. The applicant also did not inform the deceased's other beneficiaries of her intention and action.

Having considered the Notice of Motion dated 3/8/2012 and the annexures thereon and the Replying Affidavit by the Defendants / Respondents. I find that the plaintiff/ Applicant has failed to satisfy to the satisfaction of the Court the conditions for the grant of a temporary injunction as set out in the case of **Giella Vs Cassman Brown Ltd.**

For the above reasons, the Court dismisses the applicant's Notice of Motion dated 3/8/2012 with costs to the Defendants.

Dated, signed and delivered this 24th May, 2013

L. N. GACHERU
JUDGE

In the Presence of:-

.....For the Plaintiffs
.....For the Defendants
.....Court Clerk

L. N. GACHERU
JUDGE