



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Suit 152 of 2013**

**HELLEN WANJIRU KIRAGU and**

**MARY NJERI KIRAGU (Suing as legal representatives of the estate  
of the late**

**JAMES KIRAGU KIGOTHO  
(DECEASED).....PLAINTIFF**

**VERSUS**

**JAMES NDUNG'U  
MIRING'U.....DEFENDANT**

**RULING**

By a plaint dated 5th February, 2013, the applicants, Hellen Wanjiru Kiragu and Mary Njeri Kiragu, instituted this suit against the respondent, James Ndung'u Miring'u seeking, among other orders, a permanent injunction to restrain the respondent either acting by himself, his agents, servants or any other manner howsoever from trespassing,interferring, alienating, disposing, occupying, constructing or dealing in any other way whatsoever with all that parcel of land known as **MITI MINGI/MBARUK BLOCK 5/36** - “the suit property.”

Simutaneneously with the plaint, the applicants filed the notice of motion dated 5th February, 2013 seeking a temporary injunction to restrain the respondent by himself,servants or agents from trespassing,interferring, alienating, disposing, occupying, constructing or dealing in any other way whatsoever with the suit property.

The application is supported by the affidavit of the 1st applicant and is premised on the grounds that the applicants are the rightful/beneficial owners of the suit property, that the respondent has fradulently obtained title documents to the suit property; that unless restrained by way of an injunction, the respondent intends to unlawfully evict them from the suit property and/or dispose of the suit property. They have also deposed that they have been in occupation of the suit property since 1990s, that the suit property is their matrimonial home and that they stand to suffer irreparable loss unless the orders sought are granted.

In his replying affidavit sworn on 14th February,2013 the respondent has deposed that the application is bad in law,unfounded and that the prayers sought are incapable of issuing; that the application is based on misrepresentation of facts and none disclosure of material facts; that he purchased the suit property on 7th December, 2007 through public auction; that thereafter he took possession of the suit property save for about 0.5 acres thereof which was occupied by the applicants.

The respondent has also deposed that the suit property is not and did form part of the free estate of the deceased at the time of his death because the deceased had charged it to secure some loan advanced to him (Kshs.200,000/=) by Kenya Finance Corporation Limited; that the terms of the charge executed by the deceased bound the deceased and his personal representatives, agents and assigns and that the applicants who failed to service the loan, which they knew of, cannot escape the rights and liabilities that accrued therefrom.

It is also contended, on behalf of the respondent, that the applicants deliberately failed to enjoin proper and necessary parties to the suit, namely the auctioneer and the chargee and that without these parties the orders sought cannot be granted.

I have read and considered the pleadings filed by the respective parties, the affidavit evidence adduced in support thereof and the submissions filed by counsels for the respective parties.

The application herein being for a temporary injunction, the burden is on the applicants to satisfy the conditions set down in ***Giella v Cassman Brown & Co. Ltd. (1973) EA 358***, namely that they have a *prima facie* case with a probability of success, that unless an injunction is granted, they might otherwise suffer injury which cannot adequately be compensated by an award of damages; and should the court be in doubt, it will determine the matter on a balance of convenience.

As pointed out earlier, the applicants contend that the suit property belongs to James Kiragu Kigotho (their husband who died on 13th October, 2006); that being the rightful/beneficial owners of the suit property they have been in possession and occupation of the suit property since 1990s (to be precise for the last 20 years); that the deceased had charged the property with Kenya Finance Corporation Limited to secure a loan; that the deceased serviced the loan until the bank was wound up in 1995 and later on till his death; that after the respondent started laying claim on the suit property in 2011, they decided to conduct a search at the Naivasha Lands registry to confirm the status of the property and that they were shocked to find that it was registered in the name of the respondent. They further contend that the respondent, in disregard of the fact that they are in occupation, has brought construction materials ready to fence off and develop the suit property. An action which, to them, amounts to intermeddling with the estate of the deceased. They are apprehensive that unless the respondent is restrained by the orders herein sought he may hastily dispose off the property to third parties or unlawfully evict them from the suit property. They, therefore, pray for a temporary injunction to restrain the respondent either acting by himself, his servants or agents from trespassing, interferring, alienating, disposing, occupying, constructing or dealing in any other way whatsoever with the suit property.

The foregoing allegations and contentions have vehemently being denied by the respondent in his replying affidavit sworn on 14th February, 2013. In that affidavit, contrary to the allegation that the suit property formed part of the free estate of the deceased, the respondent to the effect that the suit property did not form part of the free estate of the deceased at the time of his death and that he lawfully obtained title to the suit property.

Under Section 2 of the Law of Succession free property in relation to a deceased person means-

**“property of which that person was legally competent freely to dispose during his time, and in respect of which his interest has not been terminated by death”**

Even though the death of the deceased did not terminate his interest in the suit property, as the property was encumbered by the charge he had executed in favour of Kenya Finance Corporation Limited, it is clear that at the time of his death such property did not form part of his free property.

As to whether the deceased's interest therein was properly terminated and/or the respondent got a good title from the subsequent sale of the deceased property by public auction that cannot be determined in these proceedings as the court in an interlocutory application is not supposed to make definitive finding on issues of law and fact, which are the preserve of the trial court.

From the foregoing and given the fact that the allegation by the respondent to the effect that he has not threatened the applicants with eviction from the small portion of the suit property they occupy, has not been controverted, I find and hold that the applicants have not established a *prima facie* case with a probability of success to warrant the granting of the orders sought. Moreover, I find and hold that for just determination of the issues herein the Land Registrar, the Auctioneer and the Receiver Manager, on whose instructions the suit property was sold are proper and necessary parties, without whom the orders sought against the respondent are incapable of issuing. See **Pashito Holdings & another v Ndugu & 2 others** KLR (E & L) 1 where the Court of Appeal held:-

**“The gravamen of the respondent's suit was that the Commissioner had no right to alienate public land to any person for any user other than that for which it had been reserved. The respondents could not have established a *prima facie* case with probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings.”**

The gravamen of the applicants in this application is that the respondent's title to the suit property was obtained fraudulently. Although the applicants have not enumerated the particulars of fraud, from the affidavit evidence it is safe to assume that the alleged fraud was perpetuated by the Receiver manager of the wound up company, the Auctioner and the Land Registrar. To establish any claim, against all these persons, it is imperative to make them parties to the suit as the court cannot lawfully make any adverse findings against them unless they are parties to the suit. See **Pashito Holdings & another v Ndugu** (*supra*).

The upshot of the foregoing is that the application has no merit and is dismissed with costs.

**Dated and Signed this 10th day of May 2013.**

**L N WAITHAKA  
JUDGE**

**Present**

Mr Njuguna for Respondents

N/A for Applicants

Stephen Mwangi : Court Clerk

**L N WAITHAKA  
JUDGE**