



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT & LAND DIVISION
ELC NO. 470 OF 2013

BERNARD CHEGE RWENJI.....1ST PLAINTIFF/APPLICANT

ESTHER WANJIKU GACHAMBI....2ND PLAINTIFF/APPLICANT

VERSUS

KOINA WABMUKUDEFENDANT/RESPONDENT

RULING

The Notice of Motion by the plaintiff/applicant dated 19th April, 2013 seeks an order for a temporary injunction against the Defendant restraining the defendant, his servants or agents from entering, trespassing, constructing, or in any manner interfering with the title or the property known as LIMURU/BIBIRIONI/T.8 pending the hearing and determination of this application and the suit.

The plaintiffs base the application on the grounds that they have a prima facie case and on the ground that the defendant fraudulently bought and became joint owners of the suit property by way a of fraudulent transfer and fraudulently obtained court orders in Kiambu Succession cause No. 45 of 2006 with the plaintiffs late brother one Peter Njoroge. The plaintiffs contend that they stand to suffer irreparable loss as the defendant is in the process of subdividing and constructing in the middle of the suit property which is family property and is thus exposing the plaintiffs to emotional, physical and financial loss.

The plaintiffs have further sworn a joint affidavit in support of the application dated 17th April, 2013.

The defendant for his part has sown a replying affidavit dated 30th April, 2013 in opposition to the plaintiffs application and denies all the allegations of fraud labelled against him by the plaintiffs contending that he lawfully purchased the portion of a third of the suit property that Peter Njoroge Rwenji, the deceased brother of the plaintiffs was entitled to pursuant to Kiambu SRM's Succession Cause No. 45 of 2006 as a son to Rakezi Gachambi Rwenji (deceased).

The undisputed facts in the matter are that the plaintiffs and one Peter Njoroge Rwenji are children of the late Rakezi Gachambi Rwenji (deceased) who was the registered owner of the suit proprietor before her death. The suit property was as per the certificate of confirmation of grant to be shared equally as between the plaintiffs and the said Peter Njoroge Rwenji (deceased). The plaintiffs admit their deceased brother during his lifetime attempted to dispose off his (1/3) third entitlement to various persons.

It does appear that in the Succession matter before the Kiambu Court as per the certificate of confirmation the suit property Title No. Limiuru/Birbirioni/T.8 was distributed to the plaintiffs and the defendant herein in equal shares apparently because the said Peter Njoroge Rwenji (deceased) had sold his share to the defendant. The plaintiffs however contend the transfer of their bought a third portion to the defendant was fraudulent. The contention falls flat on the face since the plaintiffs did not challenge the certificate of confirmation of grant in the succession cause. This court cannot in these proceedings question the proceedings that took place in the Succession Cause before the Kiambu Court.

The Kiambu court had jurisdiction to deal with the Succession matter and there is no evidence that the decisions it reached were reviewed either by itself and/or set aside by an appellate court.

It is the Defendant's contention that he purchased the interest of the plaintiffs' brother in the suit property in terms of the agreement for sale dated 25th July, 2011 annexed to the plaintiffs supporting affidavit and marked 'BER2'. Both the plaintiffs and the defendant have in their affidavits annexed documents that show that Peter Njoroge Rwenji (deceased) was appointed administrator of the estate of Rakezi Gachambi Rwenji who was the plaintiffs mother. The documents further show there was an amendment to the original certificate of confirmation that effected the change of the beneficiaries to the suit property by substituting the name of the defendant for that of the said Peter Njoroge Rwenji (deceased) as the latter had sold and relinquished his interest in the suit property in favour of the defendant.

From the material presented it is clear that the plaintiffs' deceased brother was entitled to occupy and possess the middle third of the suit property and this is the portion that the defendant claims to be entitled to. The plaintiffs and the defendant are now jointly registered owners of the suit property in equal shares meaning each of them is the owner of one third (1/3) undivided share of the suit property and that in law none of them can exclude the other from access and use of the suit property. The plaintiffs have alleged fraud on the part of the defendant but this allegation has not been demonstrated and/or substantiated. As I have observed elsewhere the orders of the Kiambu Succession court remain lawful and valid for as long as they have not been varied or set aside by a court of competent jurisdiction.

The plaintiffs do not deny that their deceased brother was entitled to a third share of the suit property. As such beneficiary he was perfectly entitled to dispose of his share as he pleased. The plaintiffs may have been opposed to their brother selling his share to a third party but to the extent that they did not persuade him not to do so it is too late in the day for them to object as the defendant now has the same right as themselves in the suit property being registered as he is as a co-owner.

It is further unclear in what capacity the plaintiffs have brought this action as the interest they claim relates to the interest that their late brother held and they are not claiming as the administrators of their late brother's estate. Hence there is an issue whether or not the plaintiffs have a locus standi to institute this suit against the defendant. The plaintiffs have no capacity to challenge the agreement between their late brother and the defendant as they were never parties to that agreement and as they stand now they have not been appointed as the personal legal representatives of their deceased brother.

Having regard to all the facts and material placed before the court I am unable to find that the plaintiffs have demonstrated that they have a prima facie case with a probability of success. The defendant is a co-owner of the suit property as per the title deed in respect of Title Number LIMURU/BIBIRIONI/T.8 dated 23rd February, 2012 which is in the name of Koina Wambuku, Bernard Chege Rwenji and Esther Wanjiku Gachambi.

The defendant through her advocates on 6th May, 2013 gave a notice of preliminary objection on the following points:-

1. That this court lacks jurisdiction to entertain this suit which emanates from an award of principal magistrate court Kiambu in Succession Cause No. 45 of 2006.
2. That the applicants/plaintiffs herein have no locus standi to bring this suit claiming interest on behalf of the late Peter Njoroge Rwenji.
3. That the application and the entire suit is fatally defective lacks any legal basis and is in violation

of the law.

I have stated elsewhere that the orders issued by Kiambu court in the succession cause remains valid and cannot be challenged in this court except by way of an appeal. This is not the case and my view is that it is the orders from that court that effectuated the transmission of the suit property to the plaintiffs and the Defendant. Equally the plaintiffs cannot purport to bring this suit on behalf of their deceased brother as they lack the locus to do so.

In the premises it is my holding that this suit as brought is incurably defective and incompetent and I do not consider that it is capable of being cured even by any amendment and there would be no basis to allow the same to remain on record as at any rate it would be doomed to fail. In the circumstances I would uphold the preliminary objection and order that the plaintiffs' suit be struck out with costs to the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiffs/Applicants

..... for the Defendant/Respondent