



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 485 OF 2011

MARVIN OPIYO AMBALA

(suing as one of the administrators of the estate of

AGGREY OTIENO AMBALA, Deceased)PLAINTIFF

VERSUS

1. JOSPHAT MAINA NDERITU

2. JANE WANJIRU NDEGWADEFENDANTS

AND

FAROOQ ASIF BUTT.....INTERESTED PARTY

RULING

1. The Plaintiff has sought by **notice of motion dated 7th November 2011** the following main orders -

“6. That the...Defendants...by themselves their agents, servants, employees or otherwise howsoever be restrained by temporary injunction from moving into the, house situated and/or located on L.R. No. 1160/951 pending the hearing and determination of the suit.

7. That the...Defendants...be restrained from continuing further developments, constructions, painting or dealings with the house and/or building or structure situated and/or located at Karen 1160/951 pending the hearing and determination of the suit.

8. That the...Defendants...be restrained from selling, alienating, transferring, mortgaging, charging, dealing or handling the suit property i.e. Karen 1160/951 pending the hearing and determination of the suit.

9. That this...Court do grant leave to the Plaintiff to forthwith enter upon

and repossess the suit premises, being L.R. No Karen 1160/951 pending the hearing and determination of the suit.”

2. The grounds for the application set out on the face thereof include –

(i) That “the court proceedings in Kisumu P & A Succession Cause No. 658 of 1986 relating to the estate of AGREEY OTIENO AMBALA the proprietor of Karen 1160/957 has invalidated all the sales in the estate property”.

(ii) That the “court in Kisumu P & A Succession Cause No. 68 of 1986 has authorized the court appointed administrators to ratify some sales and for the ones not ratified or confirmed to file suits”.

(iii) That the administrators have not ratified the sale to the Defendants, hence this suit.

(iv) That the Defendants have always been aware of the succession proceedings but chose not to participate in them.

(v) That the Defendants commenced construction “well-aware that the....Court at Kisumu had issued an order that *status quo* be maintained”.

(vi) That the seller to the Defendants had no property or title to transfer to them.

(vii) That there has been a competing purchaser’s interest that is subject to litigation in Nairobi HCCC No. 350 of 2005, which suit the Defendants declined to be enjoined in.

(viii) That it is in the interests of justice that the orders sought be granted.

3. There is a supporting affidavit sworn by the Plaintiff. It is argued in it that the Defendants constructed on the suit property after the order issued in the Kisumu Court and after they had been served with the order. Various documents are annexed to the affidavit.

4. There was also an application by chamber summons dated 10th October 2012. It was by one FAROOQ ASIF BUTT. He sought to be joined in this suit as Interested Party. He says he was a *bona fide* purchaser for value of the suit property herein. His application was allowed on 26th October 2012.

5. The Interested Party filed a replying affidavit in response to the application. He does not oppose the application.

6. The Defendants did not file any papers in response to the application. But their learned counsel was permitted at the hearing to address the court on any point of law. The point of law raised was that the judgment in the succession cause at Kisumu upon which the present application is founded was stayed by the **Court of Appeal** in **Kisumu Civil Application No. NAI 238 of 2011** by an order given on 22nd November 2012 pending disposal of an appeal against the judgment which is pending before that court vide **Civil Appeal No. 111 of 2012**. It was the view of the Defendants’ learned counsel that judgment in the said appeal will settle all the issues between the parties, including those raised in the present suit, and that therefore it would not be in the interests of justice to grant the order sought in the present application.

7. The Plaintiff’s learned counsel did not dispute that an appeal against the judgment in the Kisumu Succession Cause is pending, or that the Court of Appeal had stayed that judgment. He however pointed out that the Defendants herein are not parties in the appeal.

8. It appears to me that the Court of Appeal may finally adjudicate upon all the issues between, not only the beneficiaries of the Deceased in the succession cause, but also between the parties in the

present suit because this suit is based principally upon some of the orders made in the judgment appealed against. It would thus only cause more problems if the *status quo* now obtaining were to be disturbed by granting the orders sought.

9. In the circumstances I will refuse the application. It is dismissed with no order as to costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 19TH DAY OF JULY 2013