



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC NO. 281 OF 2012

**EDWIN KABUE MUIGAI (Suing as the Legal Representative
of the Estate of the Late Muigai Mburu Mbote).....PLAINTIFF**

-VERSUS-

WILSON KINYANJUI.....1ST DEFENDANT

SAMUEL NGANGA KURIA.....2ND DEFENDANT

RULING

The Plaintiff filed a plaint dated 27th July, 2012 seeking a declaration that; the title to land parcel No. Bahati/ Kabarati Block 1/3553 ("suit land") was acquired illegally and fraudulently, an order of revocation or cancellation of the title to the suit land, that the suit land reverts back to the deceased and a permanent injunction restraining the defendants from selling, leasing, trespassing or otherwise alienating the suit land.

His claim is that Muigai Mburugu Mbote (deceased) was the registered owner of the suit land; That the 1st Defendant herein filed in the Lands Registry a false and fraudulent affidavit which was purportedly sworn by the deceased stating that the original title deed was lost whereas the same had been given to the Plaintiff for safe keeping by the deceased himself. As a result a new title was reissued to the deceased on the basis of the false affidavit and the Defendants subsequently had the land transferred to themselves which land they have now sub divided into 17 plots and are in the process of disposing off to third parties.

Simultaneously with the plaint, the plaintiff/respondent, filed a Notice of Motion of even date wherein he sought for an order of injunction restraining the Defendants from dealing with the suit land pending the hearing and determination of the application.

An order of Status Quo was granted to the respondent Exparte. According to the order there was to be no further transactions such as selling, sub-dividing, leasing or alienation of the suit land pending the inter-parties hearing of the application. These orders were extended on various dates the last being on 17/12/2012. (This application is still pending for Hearing and determination).

On 14th May, 2013 the applicants/ defendants filed a Notice of motion seeking among other orders a temporary injunction to restrain the plaintiff/ respondent either by himself, his servants, agents or persons claiming through him from entering, trespassing, leasing, selling, alienating or otherwise interfering,

wasting, damaging, cultivating or dealing in any other way whatsoever with the suit land or portions thereof.

The Application was canvassed by way of oral submissions. Ms. Chege for the Applicant submitted that the Plaintiff had acted in breach of the orders issued on 14th August, 2012. He had misconstrued the order by alleging that it only prohibited the alienation of the land whereas the same prohibited use of the land. Further the allegation that the plaintiff was currently cultivating the land was false as he had not mentioned this either in the plaint or application dated 27th July 2012, of being in possession and there was no house on the suit land. According to Counsel, the Applicant had established a prima facie case with a probability of success by demonstrating that he was the registered owner of the suit land and that portions of the same had already been sold to 3rd Parties.

Ms. Gatei for the Plaintiff/ Respondent opposed the application on 3 grounds. Firstly, she submitted that the application is defective as there was no counterclaim filed by the Defendants wherein they were seeking an injunction. Therefore it was not open for them to seek the interlocutory prayers whereas the same had not been sought in their pleadings. Secondly, it was alleged that the suit land does not exist as the same had been sold and sub-divided to 3rd parties. It was further contended that the orders directing the parties to maintain status quo of the suit premises had already lapsed. The plaintiff cannot be restrained by what is no longer in existence. In any event the orders restraining alienation did not prohibit the Plaintiff from cultivating the suit premises.

The conditions for granting a temporary injunction are provided for in the landmark case of **Giella vs. Cassman Brown & Co. Ltd [1973] E.A 285-**

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.” also See ***EA Industries v Trufoods [1972] EA 420.***

It is not disputed that the suit land belonged to the late Muigai Mburugu Mbote who was the father to both the plaintiff and the 1st defendant. The plaintiff herein alleges that he is entitled to the suit land being part of the estate of their father alongside other beneficiaries of his late father and that the 1st defendant fraudulently registered the suit land in his name and that of the 2nd defendant to the exclusion of all the other beneficiaries. The 1st defendant on the other hand alleges that the plaintiff, his mother and other siblings had never lived on the suit land having left for Nairobi in 1976; that the suit land did not form part of their father's estate as their late father had disposed off his interest therein before he passed on and the same was not available for distribution to beneficiaries of his estate and neither was it the subject of succession proceedings. His father had transferred the suit land to him as a gift and to the 2nd defendant as a purchaser for consideration honestly and devoid of any fraud or duress.

From the affidavit evidence, I find that the applicants have established a prima facie case with a probability of success. They are the registered owners of the suit land. However, the respondent claims beneficiary interest in the suit land. He has taken out letters of Administration for the estate of the Late Muigai Mbura Mbote and that of other beneficiaries and his claim must be addressed.

In my view the main issue for determination in this matter is whether the suit land forms part of the estate of the late Muigai Mburugu Mbote or not. If the trial judge finds in the affirmative then the suit will be transferred to the family division for distribution of the estate but if not, the trial judge will hear and determine this suit as a land matter. This is a weighty issue that cannot be dealt with at an interlocutory stage but can only be addressed by the trial Judge.

Under the circumstances it is important for the court to preserve the suit land under **order 40 Rule 1** of the Civil procedure rules and prevent the property in dispute from wastage, damage or alienation.

I therefore order as follows:

1. Status quo to be maintained as follows: neither the plaintiff nor the defendant will lease, sell, alienate , waste and/or damage the suit land pending the hearing and determination of the suit.
2. The plaintiff is warned against leasing the suit land to any person including his sister in law. If he disobeys the order again, the defendants to commence contempt proceedings.
3. Although the Application dated 27th July 2012 has not been heard and determined, I find that it raises the same issues as the instant Application and there will be no gains made in pursuing that application.

I direct that parties do move with speed and set down this matter for hearing within 60 days after compliance with order 11.

4. Costs in the cause.

Dated, signed and delivered on this 11th day of October 2013.

L N WAITHAKA

JUDGE.