



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Case 715 of 2011

LYDIA MWIKALI SHEDRACK PLAINTIFF

VERSUS

DENCY WANJA KAKUI1ST DEFENDANT

MBILI NGUNU MAITHYA2ND DEFENDANT

CHRISTOPHER MUTHINI MBATHA3RD DEFENDANT

RULING

1. I have before me the plaintiff's notice of motion dated 15th February 2012. The plaintiff prays for injunction to restrain the defendants from interfering, disposing or dealing in any manner with land known as Donyo Sabuk/Komarock Block 1/12375 pending the hearing and determination of the suit. The application is expressed to be brought under order 40 of the Civil Procedure Rules 2010 and sections 1A, 1B and 3A of the Civil Procedure Act. It is supported by an affidavit of the plaintiff sworn on 15th February 2012.

2. The gist of the application is that the suit land belonged to Shadrack Wambua Kivai, now deceased. The plaintiff is the administratrix of the deceased's estate. She avers that the defendants have fraudulently intermeddled with the property of the estate thereby disinheriting its beneficiaries. It is contended that the transfer of the suit land after the death of the deceased to the third defendant is fraudulent and patently illegal. The plaintiff says the transfer was also irregular because she did not provide a consent to transfer or execute any instrument of transfer to any of the defendants. She is now apprehensive that the 3rd defendant will subdivide or sell the suit land and hence the prayer for interlocutory prohibitive injunction.

3. The 1st defendant does not contest the motion save for costs. The 2nd defendant contests the motion. She has filed a replying affidavit sworn on 13th April 2011. In it, the 2nd defendant alleges a conspiracy between the plaintiff and the 1st defendant against the 3rd defendant. She alleges that the 1st defendant had brought the plaintiff's process server to her house to serve her with court summons in this suit. The 1st defendant had brought gifts to the 2nd defendant and asked the 2nd defendant to deny ever

selling the suit land to the 3rd defendant. As the 2nd defendant “feared the Kamba *Kithitu* punishment” she declined.

4. The 2nd defendant’s case is that her late son James Kakui Ngunu died in 2003 and left some assets. The 1st defendant is the widow of the son. The 1st defendant, it is alleged, convened a family meeting in 2007 where she requested elders to “free” her from the earlier marriage and to be at liberty to remarry. She allegedly gave the suit property to the 2nd defendant as she wanted to redistribute all the deceased’s properties before remarrying. She was in possession of executed blank transfer forms for the suit land. The 2nd defendant subsequently sold the suit land to the 3rd defendant to raise monies for school fees for her grandchildren and other needs.

5. The 3rd defendant also opposes the motion. He has filed two affidavits in reply sworn on 5th March 2012 and 13th April 2012 respectively. In a synopsis, the 3rd defendant avers that he is the registered proprietor of the suit land Donyo Sabuk/Komorock Block 1/12375 as per the copy of title marked “CMM 1”. He says he bought the land belonging to James Kakui Ngunu from the 2nd defendant who also gave him blank transfer forms executed by the deceased. As he is the first registered owner, it is contended that the title is indefeasible and that accordingly, an injunction cannot issue. The 3rd defendant submitted that the property was not part of the estate of the deceased Shadrack Kivai. Lastly, the 3rd defendant submitted that the amended plaint is defective having been filed without leave and having impleaded two new defendants. To this last ground, the plaintiff replied that the amendment was made under the provisions of order 8 rule 1 of the Civil Procedure Rules 2010. The plaintiff reiterated that the green card for the suit land shows it was registered in the name of Shadrack Kivai, deceased, and that no valid transfer could proceed without execution by the administratrix of the estate.

6. I have heard the rival arguments. I am of the following view. The original plaint was filed on 15th December 2011. It named only one defendant, Christopher Muthini Mbatha. Contemporaneously with the suit, the plaintiff filed a chamber summons dated 14th December 2011 seeking an injunction in near similar terms to the present motion. The plaintiff withdrew that chamber summons. The plaintiff proceeded to amend the plaint and to enjoin new parties, the 2nd and 3rd defendants. I have no doubt that the plaintiff was entitled to withdraw the earlier chamber summons. Under order 23 of the Civil Procedure Rules 2010, the remedy for the defendants is in an application for costs. Amendments to a pleading may be effected once by a party without leave before close of pleadings. That is the tenor and spirit of order 8 rule 1 of the Civil Procedure Rules 2010. That is the provision the plaintiff states she relied on to amend the plaint. I am also satisfied that the amendment was made before the close of pleadings.

7. But the amendments that have been done by the plaintiff in this case have primarily brought in a new party to the suit. I hold the view that that is not the nature of amendment contemplated by order 8 rule 1(1). Where a party desires to bring in a new plaintiff or defendant to the suit, the proper procedure is to be found at order 1 rule 10 (1) and (2) which provide;

“10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

See also John Maina Iyadi Vs Omurebe Iyadi and another HCC No 27 of 2011, Nairobi, High Court, (unreported).

8. When the plaintiff approaches the court for injunction, she must rise to the threshold for grant of interlocutory relief set clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that she stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party who has misconducted herself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR.

9. Applying the law to the present facts, I find as follows. At paragraph 12 of the supporting affidavit of the plaintiff, she depones as follows;

“That during my husband’s lifetime, I was aware that he had agreed to sell a parcel of land to one James Kakui Ngunu at Kshs.260,000 but the process had not been completed since the full purchase price had not been paid. I am not aware of the parcel of land having been sold to the 3rd Defendant/Respondent and it could not be possible to sell the said parcel of land measuring about ten (10) acres at Kshs 30,000 as purported to be the case on the record yet my husband had agreed to sell the parcel of ten (10) acres to James Kakui Ngunu at Kshs 260,000”.

10. If the administratrix has admitted the suit property was sold but that the process of transfer was incomplete, it is a tacit admission that the suit land was not available to the beneficiaries of the estate. I would venture to add that the remedy is for the administratrix to collect and call in the debt being the balance of the purchase price owed to the estate. The suit property does not appear as the deceased’s property in the certificate of confirmation of grant rectified on 27th July 2011. That grant is annexed to the further affidavit of Dr. Christopher Muthini Mbatha sworn on 13th April 2012. I agree with the plaintiff about the discrepancies in the green card showing consideration of Kshs 30,000. But I also note that the property was in fact given a value of Kshs 590,000 as consideration and for stamp duty purposes. The plaintiff concedes that there was an *inter vivos* sale by the deceased to James Kakui Ngunu for Kshs 260,000. If there is an unpaid balance, it is a debt due to the estate but the land was removed from the remainder of the deceased’s estate. Those however are matters of evidence to be fully determined by the trial court. I am of the view that on that score, the plaintiff has not at the present stage established a strong *prima facie* case.

11. But I agree with the plaintiff that the process of the subsequent transfer of the suit land to the 3rd defendant, on the face of it is irregular. I say so because the green card reflected the proprietor as at 10th December 2002 to be the deceased. The deceased died on 5th June 2007. The transfer to the 3rd defendant was registered only on 27th July 2009. The 3rd defendant says he received blank transfer forms executed by the deceased. If the evidence of the 2nd defendant is to be believed, she sold the property belonging to James Kakui Ngunu, her deceased son, to the 3rd defendant using the blank transfer forms given to her by the 1st defendant. The 2nd defendant has deponed that James Kakui, her son, died in 2003. The 1st defendant did not oppose the application for injunction. But she is accused of conspiring with the plaintiff as earlier detailed. The 1st defendant’s witness statement filed on 2nd March 2012 with the defence denies giving the blank transfer forms to her mother-in-law, the 2nd defendant. The 3rd defendant says he bought the land from the 2nd defendant. Who then executed the transfer? If the registration was proceeding on the basis of the blank transfer forms, there then remains an important question whether the deceased could transmit property in that manner. I think all those matters and whether there was fraud will be best determined by the trial court. This includes the question whether the title to the 3rd defendant, despite the alleged irregularities in transfer is indefeasible under section 143 of the Registered Land Act. What I find strange is that the 1st defendant’s replying affidavit sworn on 1st March 2012 depones as follows at paragraph 4;

“That in response to paragraph 12 of the said Supporting Affidavit, I wish to confirm that my late

husband had informed me that he was in the process of purchasing a property in the Donyo Sabuk area from one Shadrack Wambua Kivai for Kshs 260,000 but when he passed (sic) under mysterious circumstances, I and my immediate family members were unable to trace any documents in his possession and since I did not know the actual parcel of land and the particulars of its location, I never bothered to include the aforesaid property amongst the assets of my late husband and to investigate the issue with family of Shadrack Kivai but he also died shortly thereafter”.

That seems to agree with the deposition I referred to earlier by the plaintiff at paragraph 12 of the affidavit sworn on 15th February 2012. They both confirm an *inter vivos* sale by Shadrack Kivai to James Kakui both deceased. It contradicts her, 1st defendant’s, witness statement dated 1st March 2012 and filed in court on 2nd March 2012. If the property was sold before the deceased died, it was removed from the estate irrespective of the fact that the transfer was incomplete. The remedy, like I said, lies in the estate collecting the debt for any balance of the purchase price. The less I say, the better to avoid embarrassing or prejudicing the trial court.

12. I am now faced with a title registered in the name of the 3rd defendant. The process of transfer may be tainted with irregularity. But I am unable to hold at this stage that the late Shadrack Wambua Kivai had not sold the land to the late James Kakui Ngunu. On the contrary, both the plaintiff and 1st defendant depone to the fact that the first deceased had sold the suit land for Kshs 260,000 to the second deceased. There may be a balance due on the purchase price. Sadly, those two cannot speak for themselves. I would thus be hesitant to injunct the 3rd defendant, as the registered proprietor, from dealing with his land. In short, the plaintiff has not established a strong *prima facie* case with a probability of success. As stated earlier, the suit, as amended, is also fraught with serious procedural difficulties. I am also of the view the plaintiff can be compensated in damages.

13. For all of the above reasons I find that the plaintiff’s notice of motion dated 15th February 2012 lacks merit. I order that it be dismissed. The plaintiff is the administratrix of the deceased’s estate. I will thus make no orders as to costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 15th day of May 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Chacha for the Plaintiff.

Mr. Mogire for the 1st Defendant.

No appearance for the 2nd Defendant.

Mr. Kuria for Mr. Kalove for the 3rd Defendant.