REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

Civil Case 362 of 2011

1. RODAH MUGIKUYU MUTUNGA.....APPLICANTS

2. LUKA MUINDE.....APPLICANTS

3. JUDITH K. MBOKA.....APPLICANTS

4. JUSTUS MUNYOKI.....APPLICANTS

5. MUSILI MAKAU.....APPLICANTS

VERSUS

KITOLE MUTINDA & ANNA MUTINDA

(SUED AS THE WIDOWS&PERSONAL REPRESENTATIVE OF WILLIAM MUTINDA KALIALI, (deceased).....RESPONDENT

AND

COUNTY COUNCIL OF KITUI.....INTERESRED PARTY

RULING

On 5th December, 2011, the applicants took out a Notice of Motion under a certificate of urgency seeking in the main to unjunct the respondent and interested party from dispossessing, evicting and or in any way interfering with their possession and occupation of land parcel Yatta B2/Kwavonza/1(*now subdivided in parcel Nos. 789 – 806 inclusive*) whatsoever pending hearing and determination of the application interpartes and thereafter the main suit. They also prayed that the costs of the application be borne by the respondent and interested party.

Two grounds were put forth in support of the application. One, that the applicants had been in open and continues occupation and possession of the land parcel Yatta B2/Kwavonza/1(*now subdivided into parcels Nos. 789-806 inclusive*) hereinafter *"the suit premises"* since 1996, and do not own any other land. Secondly, the applicants would be rendered landless and destitute if the orders sought were not granted.

In support of the application, the 1st applicant swore that they had been living on the suit premises since 1996 and had buried their dead thereon. The suit premises were still registered in the name of **William Mutinda Kaliali** though the interested party had commenced subdividing the same with the intent of disposing it of. Accordingly, unless restrained, the interested party and or the respondent would evict

them therefrom.

The application was expressed to be brought under Order 40 rule 1 of the Civil Procedure rules and section 3A of the Civil Procedure Act. The application too was premised on the originating summons, hereinafter "*the O.S"* also taken out by the applicants against the respondent and the interested party. In the O.S, the applicants claim ownership of the suit premises jointly and severally on account of adverse possession.

The suit premises measures approximately 17.1 acres. Apparently, the applicants were settled on the suit premises by the Provincial Administration and the interested party in 1996. Each of the applicants occupied about 3 acres and had since built their homes, cultivated the land and buried their dead thereon. The suit premises initially belonged to **William Matinda Kaliali,** deceased. In or about March, 1989 the interested party had requested him to surrender it for purposes of building Divisional Headquarters. In exchange the deceased was to get another parcel of land that he offered him. However, the divisional headquarters were built elsewhere and the applicants were then settled on the suit premises instead, with a promise to prepare and issue to them allotment letters. They had continued to occupy the suit premises openly and with the knowledge of the deceased, who was also living in the same area, who never raised any objections until his death. Recently, they learnt that the intended surrender of the suit premises never materialized and the suit premises remained in the name of the deceased, which had now been subdivided into several parcels and given numbers 789 to 806 all inclusive. Because of their long occupation of the suit premises spanning over 12 years, they had right to ownership by reasons of adverse possession.

Served with the application, the respondent immediately filed grounds of opposition alleging that the suit was bad in law as Order 40 rule 1 of the Civil Procedure rules did not apply, the application was bad in law again as it was based on an incompetent suit, the applicant did not have any recognized and or legitimate claim against the respondent, the respondent has no *locus standi* to be sued, the application in its entirety was frivolous, vexatious and an abuse of the court's process and lastly, it accused the applicants of duplicity since there was a pending case by the applicants over the same subject matter being High Court Constitutional Application Number 76B of 2011.

In a supplementary affidavit filed by the applicants, they acknowledge having filed the said Constitutional application. However, they had since withdrawn the same vide Notice of withdrawal of suit dated 2nd December, 2011. This was before they filed the instant O.S.

Annah Mutinda swore a replying affidavit on behalf of the respondents and interested party. Basically, she deponed that she could not understand why her co-wife and herself had been sued when the suit premises were registered in their late husband's name and yet they had not been appointed as personal representatives of the estate of the deceased. The applicants did not have any recognized rights and or interest in the intestate estate of their deceased husband. Otherwise the applicants had filed a constitutional application on the same issue being 76B of 2011 that was still pending in court. In any event the suit premises do not exist; the title having been closed on 16th February, 1992 upon subdivision. The new titles created after subdivision being; Yatta B2/Kwavonza/786-806 were registered on 16th December, 1992. From the foregoing, it was apparent that by the time the applicants allege to have entered the suit premises, it had ceased to exist 4 years earlier, and that from the date the applicants allege to have entered the suit premises to the death of the registered owner on 16th February, 2003, was only a period of 6 years. In the premises and as far as the respondent were concerned the applicants and interested party were intermeddling with the estate of the deceased.

Subsequent thereto, the applicants filed a Notice of Preliminary Objection to the entire O.S. The grounds in the Notice are similar if not, the same as those raised in the grounds of opposition to the application. The interested party however, did not file any papers in opposition to the application.

When the application came before me on 29th February, 2012 for *interpartes* hearing, **Mr. Ogutu** and **Mr. Musyoki,** learned counsel for the applicants and respondents respectively agreed to canvass the same

by way written submissions. However, it was not until 8th June, 2012 that those submissions were on board. I have carefully read and considered them alongside cited authorities.

Does the application satisfy the principles set out in the off-quoted case of **Giella vs Cassman Brown & Co. Ltd [1973] E.A. 358** at **page 360** for the grant of an interlocutory injunction to wit;-

§ An applicant must show a *prima facie* case with a probability of success.

§ An applicant shall suffer irreparable injury if the injunction is not granted, and

§ If the court is in doubt, it should decide the application on the balance of convenience

These principles have been affirmed by the Court of Appeal in several latter decisions for instance in the case of **Shitakha vs Mwamodo & 4 Others [1986] KLR 445** the Court held thus-

"Counsel has tended to lose sight of the principles by which this Court and the High Court have for years been guided in deciding whether or not to grant a temporary injunction. These principles were firmly stated by Spry VP in Giella vs Cassman Brown & Co. Ltd [1973] E.A. 358 at 360. They are, first, an Applicant must show a prima facie case with a probability of success. Secondly an interlocutory application 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."

It should also not be forgotten though that first and foremost, an injunction is a discretionary as well as an equitable remedy so that the conduct of the parties prior and subsequent to the mounting of the application may come in focus.

I doubt whether on the material placed before me, the applicants can claim to have made out a *prima facie* case with a probability of success at the trial. It is common ground and indeed the applicants admit that much, that the suit premises are registered in the name of **William Mutinda Kaliali**. Ofcourse the respondent hold a different view that the suit premises no longer exist. However, I choose to go by the contention of the applicants. It is also common ground that, the registered proprietor of the suit premises aforesaid is dead. Indeed he died on 16th February, 2003. It is also common ground that a grant of letters of administration intestate have yet to be taken out by the would be beneficiaries or administrators of the said estate. The suit premises being registered in the name of the deceased, remains the property of the deceased and therefore his estate. It can only be dealt with in accordance with the Law of Succession Act. Neither the applicant nor the interested party can do anything with it. If they were to do so, they will be intermeddling with the estate of the deceased. The respondents are mere widows of the deceased but are not yet his legal representatives. They cannot be sued or sue in respect of the estate of the deceased. I note from the intitulement that the respondents have been sued as widows and personal representatives of **William Mutinda Kaliali** – deceased. Widows they are. However, that fact alone does not turn them into personal representatives of the estate of the deceased. They must have a grant. Under section 2 of the Law of Succession Ac, a personal representative is defined as "*the executor or administrator of a deceased person*". And administrator is in turn defined to mean a person to whom a grant of letters of administration has been made under the Act. In law a suit cannot be maintained against a dead person and his estate unless a personal representative or executor has been appointed. These are the people that whoever, cares to mount the suit against the dead must sue. In the circumstances of this case, much as the suit premises are registered in the name of the deceased, the applicants should not have sued the respondents, since they are mere widows of the deceased. Again by virtue of the suit premises being in the name of the deceased, I do not see how the interested party could be sued on that account.

Of course the applicants have argued in response that according to sections 35, 36 & 40 of the Law of Succession Act, a spouse of a person who had died intestate has a life interest in the property left behind by the spouse. They are the ones who can deal with the property on behalf of the deceased before an administrator is appointed, and are the ones who can be sued in respect thereof. In this case therefore the right people to sue were the respondents.

This submission has no legal basis at all. The sections alluded above by the applicants deal with the distribution of the estate of the deceased where for instance the deceased has left one surviving spouse and child or children, where intestate has left one surviving spouse but no child or children or where the intestate was polygamous. They have nothing to do with conferring on the widows, the capacity of a legal representative. The fact that the widows have a life interest in the property of the deceased does not confer on them *Ipso facto* the title of legal representative. That title is conferred upon a petition being filed by whoever wishes to be appointed as such.

I do not buy the applicants' further argument that this is a mere technicality which can be resolved by reference to Article 159(2) (d) of the Constitution which is to the effect that *"justice shall be administered without undue regard to technicalities"* This is not a mere technicality. It goes to the root of the suit and indeed the jurisdiction. I do not believe that the said article was meant to shun away all the known rules of engagement in judicial proceedings. It was never meant to protect suits filed in courts without jurisdiction or such like things. The intent was to deal with minor technicalities that do not go to the root of a case. Filing suit that involves land of the deceased and bringing in his widows who are not legal representatives of the deceased cannot be termed a minor technicality. It's a major technicality as the issue at hand is the competence or otherwise of the suit.

Coming to the suit itself, it is anchored of adverse possession. It is trite law that a person relying on adverse possession must show that he has been in hostile occupation of the suit premises. Clear possession, lack of consent of the owner, and the occupation being for more than 12 years are the prerequisites for a successful suit founded on adverse possession. From their own pleadings, they were settled on the suit premises by the interested party after it had persuaded the deceased to surrender the suit premises to it for purposes of building Divisional Headquarters in exchange with another parcel of land that it had offered him. However, the divisional headquarters were built elsewhere and the applicants were instead settled on the land. If these were circumstances under which the applicants entered the suit premises, it is doubtful whether it was hostile. I will leave the matter at that lest I be accused of making final conclusions on the O.S at an interlocutory stage.

Everything considered, I am satisfied that the applicants have not at this interlocutory stage made out a *prima facie* case with a probability of success at the trial. That being my view of the application, I do not think that it serves any useful purpose to consider the other criterion for granting an interlocutory injunction.

The application is dismissed with costs to the respondents.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH JULY 2012.**

ASIKE-MAKHANDIA
JUDGE