



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENTAL & LAND CASE 109 OF 2012**

**MARY NYAWIRA MURIUKI.....PLAINTIFF**

**- VERSUS -**

**STEPHEN KINYANJUI..... 1<sup>ST</sup> DEFENDANT**

**MICHAEL MUNENE MURIUKI .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is the plaintiff's notice of motion dated 29<sup>th</sup> February 2012. It is expressed to be brought under orders 40 and 51 of the Civil Procedure Rules 2010 and sections 1A, 1B and 63 of the Civil Procedure Act. The plaintiff has sworn a deposition on even date. The plaintiff prays for a prohibitive injunction to restrain the defendants from constructing upon, alienating, interfering or selling the property known as Ruiru/East Block 5/67.

2. The gist of the motion is that the plaintiff is the administratrix of the estate of Alexander Muriuki Ndwiga, deceased. She is the widow. The 2<sup>nd</sup> defendant is her son. The pith of the matter is that her son has purported to sell the suit property to the 1<sup>st</sup> defendant. The latter has now entered the land, erected a perimeter wall and permanent structures and persisted in possession. The plaintiff's case is that that occupation is illegal and unlawful and amounts to intermeddling in the estate of the deceased.

3. The motion is contested. The 1<sup>st</sup> defendant has filed a replying affidavit sworn on 8<sup>th</sup> May 2012. He avers that the plaintiff and the 2<sup>nd</sup> defendant, being the administrators of the estate, sold the property to him. A copy of the sale agreement is annexed dated 9<sup>th</sup> September 2009. He paid the purchase price. The vendors undertook to incorporate the terms of the sale in the grant. Upon confirmation of the grant intestate, the vendors executed the necessary transfer instruments in favour of the 1<sup>st</sup> defendant. He avers that he is a *bona fide* purchaser for value. He was thus surprised to see details of another or parallel succession cause over the same estate annexed to the plaintiff's affidavit. He avers that the latter cause is defective for want of jurisdiction of the Senior Resident Magistrate at Gichugu. He placed a caution on the land to protect his interests. He also takes up cudgels on the inordinate delay in bringing these proceedings. His view is that he is being dragged into a dispute between the plaintiff and her son, the 2<sup>nd</sup> defendant. It was thus submitted that the plaintiff has not met the threshold for grant of an interlocutory prohibitive injunction.

4. I have heard the rival arguments. I take the following view of the matter. The parameters for grant of interlocutory prohibitive injunction are now well settled. When a litigant approaches the court for injunction, he 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 he 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 himself 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 80. See also The Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

5. I then juxtapose those principles against the facts. It is common ground that the suit land was owned by the deceased Alexander Muriuki. I have perused the certificate of confirmation of grant issued by the High Court, Nairobi, in succession cause 2407 of 2009 Re estate of Alexander Muriuki Michael Ndwiga. The grant was made to Mary Nyawira Muriuki, the plaintiff, and Michael Munene Muriuki, the 2<sup>nd</sup> defendant. In the schedule and description of property, Stephen Kahugu Kinyanjui, the 1<sup>st</sup> defendant, is named as the beneficiary of the whole of the property known as Ruiru East/Block 5/67. That is the suit property. I have perused the agreement for sale dated 9<sup>th</sup> September 2009. It is for the suit property. It is executed by the plaintiff and 2<sup>nd</sup> defendant, as vendors, and the 1<sup>st</sup> defendant, as the purchaser. It is for consideration of Kshs 2,750,000. An agreed deposit of Kshs 300,000 was acknowledged. The vendors acknowledged that they were the joint administrators of the estate. One of the completion documents required at clause 4.2.5 was a confirmed grant of letters of administration. That grant was confirmed by the High Court on 6<sup>th</sup> July 2010.

6. From that history, I have reached the inescapable conclusion that the plaintiff is less than candid when she depones at paragraph 8 that the 1<sup>st</sup> defendant has no equitable or legal right over the property. The plaintiff makes no reference to the succession cause at the High Court. She does not say her signature was procured by fraud. Fundamentally, she has not replied to the replying affidavit of the 1<sup>st</sup> defendant. The averments by the 1<sup>st</sup> defendant are thus uncontroverted.

7. To be fair to the plaintiff, there is a second set of a certificate of confirmation of a grant to the same estate issued in the Senior Resident Magistrate's Court, Gichugu in cause number 53 of 2009 Re estate of Alexander Muriuki Michael Ndwiga. In it, she is named as the sole administratrix. The suit property was to be transmitted to her. In fact, all the properties of the deceased were to be transmitted to her. I find that strange for two reasons: Her son, the 2<sup>nd</sup> defendant is not named as a beneficiary; and fundamentally, I entertain serious doubts that the court had jurisdiction. I say so in view of the pecuniary jurisdiction bestowed on a Magistrate's court in succession matters under the Law of Succession Act. The sale value of the suit property alone of Kshs 2,750,000 exceeds the pecuniary jurisdiction of that court sitting as a succession court. And it is not lost on me that not less than 7 immoveable properties were listed in the schedule. Lastly, I am alive that under section 6 of the Civil Procedure Act or even the Law of Succession Act, it is highly irregular to have two parallel causes over succession of the estate. I am thus inclined to place more weight at this stage on the grant confirmed in Nairobi at the High Court in succession cause 2407 of 2009. This I do with a little trepidation because I am not seized of all the evidence. That will be the true province of the trial court on tested evidence. And the lesser I say now, the better.

8. I have also looked at the pictures annexed to the plaintiff's affidavit. It is clear to me the 1<sup>st</sup> defendant is in possession. He has put up permanent structures on the suit land. Mains and electricity seem to be connected. The photographs disclose multiple residential units. From the evidence before me, I find the 1<sup>st</sup> defendant has made out a strong *prima facie* case. Even the balance of convenience tilts more in favour of the 1<sup>st</sup> defendant. I have formed the impression that he might have been trapped in a domestic conflict between the widow and son of the deceased. It then follows, as a logical corollary, that the plaintiff has paucity of evidence to ground the prayer for injunction. In sum, she has failed to establish a *prima facie* case with a probability of success. Even if I were in doubt, I have stated that the balance of convenience tilts more in favour of the 1<sup>st</sup> defendant who is in possession and has put up permanent rental properties.

9. In the result, the plaintiff's notice of motion dated 29<sup>th</sup> February 2012 is without merit. I order that the same be and is hereby dismissed with costs to the 1<sup>st</sup> defendant.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 24<sup>th</sup> day of July 2012.

**G.K. KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of***

Mr. Otieno for the Plaintiff.

Mr. Gachimu for Narangwi for the 1<sup>st</sup> Defendant.

No appearance for the 2<sup>nd</sup> Defendant.