



REPUBLIC OF KENYA

High Court at Machakos

Civil Suit 50 of 2012

**CECILIA WANJIKU NJAGA.....PLAINTIFF
VERSUS**

G.N NJENDU.....1ST DEFENDANT

JOHN CHEGE NGIGI.....2ND DEFENDANT

MICHAEL GITAU NJAGA.....3RD DEFENDANT

OLKEJUADO COUNTY COUNCIL.....4TH DEFENDANT

RULING

The applicant, **Cecilia Wanjiku Njaga** moved this court through the amended application dated 28th May 2012, seeking for Orders that the application be certified urgent, the respondents be restrained from alienating, constructing, disposing, transferring or in any manner from dealing with the parcel of land known as plot no. 766 R Ongata Rongai, hereinafter referred to as the “suit premises” until the hearing and determination of the application and/ or the suit and that the costs of this application be provided for.

The application was premised on the grounds that the 2nd respondent has constructed a perimeter fence in the suit premises without the knowledge of the applicant who is the administrator of the estate of **Boniface Njaga Gitau**, deceased, the registered proprietor of the suit premises. Thereafter, the 1st respondent unlawfully started constructing a storeyed building on the same without the knowledge or consent of the applicant, that the applicant was likely to suffer irreparable damage from the unlawful acts of the respondents and finally that the applicant had established a prima facie case therefore.

In her supporting affidavit, she deponed that she is the widow and administrator of the estate of the deceased. She was issued with the grant of letters of administration on 22nd July 2011 vide HCC. Succ cause no. 1836 of 2010 Nairobi, that the 3rd respondent filed another succession cause being HCC. Cause no. 411 of 2011 Machakos but it was struck out on 5th December 2011. The suit premises is one of the deceased’s assets, the grant to the deceased’s estate has not been confirmed yet and as such no one has the capacity to sell the suit premises. The 1st respondent had commenced construction on the suit premises claiming ownership having purchased the same. The respondents’ action had put the estate to great risk as the construction will affect the distribution of the estate thereof.

The 3rd respondent in his replying affidavit stated inter alia that; he is the eldest son of the deceased. The deceased gave him the suit premises in the 1990’s as a gift intervivos and he moved in or about 2006 when his father passed away. The deceased executed the transfer documents and managed to transfer the same into his name in 2010. He thereafter subdivided the suit premises into plot numbers 766A and 766B

and sold them to 2nd and 1st respondents respectively. That he is in the process of filing an application to revoke the grant of letters of administration issued to the applicant since his signature was obtained falsely. That the deceased had two wives and the letters of administration ought to have been issued to two different administrators representing both families. The applicant knew that the suit premises belonged to him.

The 1st respondent in his replying affidavit stated that; he purchased plot number 766B from the 3rd respondent on 5th May 2011 and paid the full purchase price. A Sale Agreement was duly executed. He thereafter had the said land transferred to his name. He subsequently built a two storeyed building which is currently fully occupied and he is not aware of any dispute over the suit premises. He was therefore an innocent bona-fide purchaser for value. He had carried out due diligence before he acquired the suit premises.

The 2nd respondent in his replying affidavit deponed that; he is the owner of plot number 766A Ongata Rongai. He purchased the same on 13th October 2011 from the 3rd Respondent and duly executed a Sale Agreement. Subsequently, he had the suit premises transferred to him. At the time, there was a church known as Neno Church that was in occupation of the suit premises. The church thereafter vacated when its lease term expired. He then put up a perimeter wall in readiness to develop the same. In the premises he was also an innocent bona-fide purchaser for value. Before entering the transaction he had carried out due diligence.

In her supplementary affidavit the applicant denied that the deceased had bequeathed to the 3rd respondent the suit premises since the two had a fall out and the 3rd respondent relocated to Bungoma. The deceased was taken ill in 1999 and the 3rd respondent was never present. Furthermore, the applicant married the deceased in 1966 and the deceased did not have two wives as the 3rd respondent's mother had abandoned him. The 3rd respondent and his siblings were taken in by the authorities and it is the applicant who took them back from the children's home. That she was married to the deceased in a catholic church that does not allow polygamy. That after the death of the deceased, she took out grant of letters of administration. The 3rd respondent went to her advocate's office and willingly executed the petition of the grant of the letters of administration. The said transfer of the suit premises was done after the demise of the deceased. That when the 1st respondent started the construction, she went to the area chief and the District Officer, but did not receive any assistance. The search carried out by the 1st respondent was not done diligently and he cannot therefore be considered an innocent purchaser for value without notice.

The application later came up before me for interpartes hearing on 27th July 2012. The respective counsels agreed to canvass the application by way of written submissions which I have carefully read and considered alongside cited authorities.

The only issue to consider here is whether the application satisfies the principles as set out in the classic case of **Giella vs Cassman Brown & Co. Ltd (1973) E.A 358** for the grant or refusal of an interlocutory injunctions to wit that:-

§ The plaintiff must establish a prima facie case with probability of success.

§ The plaintiff shall suffer irreparable injury if the injunction is not granted that cannot be compensated by an award of damages and,

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

It is also essential to note that an Injunction is a discretionary as well as an equitable remedy so that the conduct of the applicant prior and subsequent to the mounting of the application may come in focus.

The applicant claims that the suit premises belongs to the estate of the deceased whereas the 3rd respondent takes the position that the suit premises were passed to him by the deceased in his life time as a

gift intervivos. The 1st and 2nd respondents claim to have acquired the suit premises from the rightful owner, the 3rd respondent, as bonafide purchasers for value. Whether the deceased had transferred the suit premises to the 3rd respondent or not is an issue that can be best addressed at the substantive hearing of the main suit. However on the evidence and documentation availed, the scales tilt in favour of the respondent. The applicant having taken out the Letters of Administration should have acted in haste to seek an injunctive Order as soon as she realized that the 3rd respondent was disposing off the suit premises. Instead of seeking the assistance of the Chief and District Officer, she should have moved this court so as to stop the 1st and 2nd respondents from developing the suit premises. The 3rd respondent claims to have been given the land as a gift intervivos by the deceased and that he had previously been collecting rent from the structures that were on the suit premises before it was disposed off. This must have been well within the knowledge of the applicant who did nothing about it. I do not think that the applicant is candid in her allegations and with the court. Why did she allow the 1st and 2nd respondents to pump money into developing the suit premises by putting up storeyed buildings before she rushed to court? She should have sought these Orders immediately she discovered that the 3rd respondent was collecting rent from the structures, which included the Neno Church which was put up on the suit premises in the first place. Having said so, I find that the applicant has not shown a prima facie case with probability of success.

Further to the foregoing, the applicant will not suffer irreparable damage that cannot be easily compensated by way an award of damages. The value of the suit premises is easily quantifiable. The 1st and 2nd respondents appear to be men of means. It cannot be beyond them to offer appropriate compensation.

Finally this court is not in any doubt that the balance of convenience tilts in favour of the respondents. They are in occupation and have already developed the suit premises. It is them who would in the circumstances suffer great loss if the injunction sought is granted.

Everything considered, I am satisfied that the applicant has not satisfied the conditions to be considered before granting an injunction at this interlocutory stage

I therefore dismiss the application in its entirety. Each party will however bear their own costs.

DATED at MACHAKOS this 29th day of NOVEMBER, 2012

ASIKE- MAKHANDIA
JUDGE

DATED, SIGNED and DELIVERED at MACHAKOS this 30th NOVEMBER 2012.

GEORGE DULU
JUDGE