



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC. NO. 541 OF 2010 (OS)

**IN THE MATTER OF THE ESTATE OF SUSAN WAIHERA FISCHER THUO ALIAS SUSAN
WAIHERA THUO (DECEASED)**

BETWEEN

KESSIAH WAIRIMU.....APPLICANT

AND

MARY WANJIRU WAMBUI.....1ST RESPONDENT
MATHEW GICHIA WAINAINA.....2ND RESPONDENT
KIAMBU COUNTY LAND REGISTRAR.....3RD RESPONDENT

RULING

There is no dispute that the Plaintiff was on 13th September 2010 appointed the legal administrator of the estate of the deceased Susan Waithera Fischer Thuo alias Susan Waithera Thuo who was her daughter and who died on 28th June 2007. The deceased was the registered proprietor of the suit land, that is Kabete/Muthumu/T.178 on which she had constructed a block of eight residential flats she was renting to tenants. The monthly income was in excess of KShs. 50,000/=.

The deceased was married to a German called Edgar Werner Lorenz who took over the management of the property after she died. She apparently had two sons who now stay with the Plaintiff. Edgar had not taken out letters of administration following the deceased's death.

On 3rd November 2009 the Plaintiff went to the lands office and found that on 3rd July 2009 the suit property had been transferred to the 1st Defendant and title deed issued to her on the same day. After she obtained the letters of administration, the Plaintiff did another search on 12th October 2010 and found the suit property had on 6th November 2009 been transferred to the 2nd Defendant and title deed issued on 9th November 2009. On the same day she filed the present suit by way of originating summons under Order 36 rule 1 (a), (c), (d), (e) and (g) of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking a declaration that the suit property and all its developments belong to the estate of the deceased; that the purported transfers to the 1st Defendant and 2nd Defendant were illegal, null and void; that the Land Registrar Kiambu be directed to cancel the entries in the register relating to the transfers; and that the 1st and 2nd Defendants be ordered to account to the estate the monthly income from the rental houses. With the suit was filed a chamber application for temporary injunction which is the subject of this Ruling.

The 1st Defendant did not respond to the application, although served. The 2nd Defendant swore a replying affidavit to say that he bought the property from the 1st Defendant, who was then the registered owner, vide Agreement made on 6th November 2009 for KShs. 4,200,000/=. He stated that he was a *bonafide* buyer for value without notice; that there is no fraud that he was engaged in during the transaction.

I received oral submissions from Mr. Mwangi Gathuri for the Plaintiff and Mr. Mwangi for the Defendant. Mr. Mwangi relied on the decision in **Giella –Vs- Cassman Brown & Co.Ltd [1973] EA 358** to urge that the Plaintiff had not established a *prima facie* case with a probability of success; had not shown that she stood to suffer irreparable damage; or that the balance of convenience tilted in her favour.

The 1st Defendant did not defend the application. However, the suit property is now in the hands of the 2nd Defendant who is also collecting rent from the houses built thereon. He is effectively the person against whom the application is directed. As the registered proprietor of the suit property, he is protected by sections 27 and 28 of the Registered Land Act (Cap. 300) which provide that such a proprietor has a *prima facie* absolute and indefeasible claim to the property. He is also in possession. Ideally, a temporary injunction should not issue against him.

However, his claim that the 1st Defendant bought the land from Edgar is not legally tenable. This is because Edgar had no capacity to deal with the deceased's property by way of selling it when he was not a holder of letters of administration. Under section 82 (b) of the Law of Succession Act (Cap. 160) the only person legally entitled to sell the suit property is the Plaintiff. There was no title, therefore, that Edgar passed to the 1st Defendant. The Defendant says he is a *bona fide* purchaser for value without notice. From his replying affidavit, however, he knows quite a lot about the family of the deceased. In paragraph 7 of the affidavit, he knew the deceased was married to Edgar. He says Edgar was the deceased's legal representative/administrator when he sold the suit property to the 1st Defendant. Paragraph 8 is even more telling. He swore as follows:-

“8. That the applicant has never stepped on the property or attempted to collect the rent since her daughter (Susan Waithera Thuo) died in 2007. I established this from the tenants before I bought the property. If indeed the Applicant had a legal interest in the suit premises, why didn't she enforce it, and start to collect the rent immediately her daughter died. The applicant lives few kilometers from the suit premises.”

In paragraph 9 he states:

“9. That before I bought the property, I conducted a search at the land registry and established it was

clean in all respects. It had no encumbrances and there was no pending litigation concerning it. Further, the vendor (the 1st Respondent) informed me she was legally married to Edger Werner Corenz. Edger had earlier been married to the applicant's daughter, Susan Waithera Thuo before Susan died."

In paragraph 7 the 2nd Defendant knew that the deceased was married to Edgar up to when she died. If, according to paragraph 9, Edgar got married to the 1st Defendant after the death of the deceased, why was he (Edgar) selling the suit property to his wife (the 1st Defendant)? If at the time the deceased died the suit property was in her name, what due diligence was done to find out whether either Edgar or the 1st Defendant had capacity to sell the suit property? The 2nd Defendant was, before buying the suit property, making inquiries from the tenants to find out whether the Plaintiff had ever come here to collect rent from the tenants. With all that knowledge, can the Defendant say he was a *bona fide* purchaser for value without notice?

Based on the material made available at this stage of the case, it is my preliminary finding that the 2nd Defendant does not have a clean title to the property. It would appear the suit property legally belongs to the estate of the deceased. The other way of looking at it is that until the suit is heard and determined it is prudent to secure the suit property and the rents therefrom and that is why an injunction is hereby issued in terms of prayer 3 of the chamber application. This will be with costs.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2011

A. O. MUCHELULE

J U D G E