



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.83 OF 2010

MARY WANGUI KARANJA.....1ST
PLAINTIFF

SALOME NJERI KARANJA.....2ND
PLAINTIFF

VERSUS

RHODA WAIRIMU KARANJA.....1ST
DEFENDANT

JOHN KIOI KARANJA.....2ND
DEFENDANT

R U L I N G

1. What is before me is a notice of motion dated 12th July 2010 brought by the plaintiff/applicants under Section 3A of the Judicature Act and Order XXXIX Rules 1 to 3 of the Civil Procedure Rules. The plaintiffs are the executrix of the will of the late James Karanja Kio (Deceased). LR No.11595 (hereinafter referred to as the suit property) is one of the assets in the deceased's estate. The plaintiffs contend that according to the deceased's will the suit property was bequeathed to the plaintiffs and their sister Lucy Wambui Karanja. On the suit property there are two houses, the 1st plaintiff is in occupation of one house which is an old house whilst the 1st defendant has since 3rd February 1995 occupied the 2nd house which is a new one. The 1st defendant is a widow to the deceased. She was joined in the new house

by the 2nd defendant who is a son to the deceased.

2. The plaintiffs explain that the 1st defendant has unsuccessfully challenged the will of the deceased in the High Court laying claim to the suit property. The Court of Appeal having struck out the 1st defendant's notice of appeal, against the High Court's Judgment the plaintiffs have now filed this suit seeking an order of eviction against the defendants.

3. The 1st plaintiff swears that since the beginning of July 2010 the defendants have amassed building materials such as stones, sand, concrete and building materials and have started altering the structure of the kitchen on the new house which is on the suit property. The defendants have also pulled down 3 electrical posts on which are anchored security lights.

4. The plaintiffs are apprehensive that unless the defendants are restrained they will make alterations to the house and the beneficiaries to whom the house was bequeathed will suffer irreparable loss. Therefore seek orders restraining the defendants or their servants or agents from altering the house which they occupy pending the hearing and determination of the suit. Secondly the plaintiffs seek an order of mandatory injunction directing the defendants to pull down the structure which they have put on the second house. In support of the prayer for the mandatory injunction, counsel for the plaintiffs relied on ***Stephen Kipkebut t/a Riverside Lodge and Rooms vs Naftali Ogola (2009) eKLR.***

5. The defendant/respondents object to the application through grounds of objection filed on 23rd July 2010, and an affidavit sworn by the 1st defendant on 23rd July 2010. In short the defendants dispute the facts given by the plaintiffs concerning the estate of the deceased. The 1st defendant maintains that she is entitled to the suit property and has filed an appropriate application in succession cause No.1366 of 1995. The 1st defendant categorically denies the allegations that she is damaging the suit property. She explains that the suit property is her matrimonial home which she contributed money to build with her late husband the deceased and she cannot therefore damage the property.

6. Counsel for the defendants has submitted that the plaintiffs have not shown that there is substantial interference with the house nor have they demonstrated that they stand to suffer any substantial loss. Counsel argued that the balance of convenience is in favour of the 1st defendant as the house is her matrimonial home where she has lived for an uninterrupted period of 30 years. Counsel for the defendant further pointed out that the defendants have a judgment against the plaintiffs on the counter claim, which judgment has not been set aside.

7. I have given due consideration to this application. The orders sought being orders of an interlocutory nature the applicant must meet the threshold set out in the case of ***Giella vs Cassman Brown [1973] EA***

358. In this case it is evident that the dispute herein is essentially a succession dispute. The defendants appear to be questioning the validity of the disposition made to the plaintiffs in regard to the suit property. There is also an issue as to whether the suit property was the matrimonial home of the 1st defendant and if so whether the 1st Defendant can be dispossessed of her matrimonial home. Since these issues remain unresolved, it cannot be said that the plaintiff's case is clear and straight forward or that the situation is such as would justify instant action by way of a mandatory injunction.

8. Moreover there is also the judgment in favour of the defendants on the counter claim as against the plaintiffs. I find that an order of mandatory injunction would not be appropriate. Nonetheless, the plaintiffs have demonstrated that the suit property was bequeathed to them by the deceased. It is only fair and just that the property be preserved until this suit is determined.

9. Accordingly, I will grant the application to the extent of issuing an order of interlocutory injunction restraining the defendants, their servants or agents, during the pendency of this suit from altering in any manner the house on the suit property which they occupy.

10. To this extent only does the application succeed. Costs shall be in the cause.

Dated and delivered this 4th day of February, 2011

H. M. OKWENGU

JUDGE

In the presence of: -
Gicheru for the plaintiffs/applicants
Njiru H/B for the defendants
B. Kosgei - Court clerk