

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

SUCCESSION CAUSE NO.26 OF 2007

IN THE MATTER OF THE ESTATE OF HANNAH WANGARI KAMUCHOBE (DECEASED)

JOHN WAITHAKA

KINGA'RA.....APPLICANT

VERSUS

EDWIN MWAURA MUNGAI.....1ST

RESPONDENT

PATRICK KINYUA MUNGAI.....2ND

RESPONDENT

R U L I N G

Hannah Wangari Kamuchobe (the deceased) died on 20th February 1994. Edward Mwaura Mungai and Patrick Kinyua Mungai (the respondents) petitioned the Kiambu Senior Principal Magistrate's Court in Succession Cause No.150 of 1994 to be granted with letters of administration to administer the estate of the deceased. The said letters were issued to the respondents on 23rd December 1994. The applicant herein objected to the confirmation of said letters of administration. The applicant claimed that the parcel of land (i.e. LR.No.Kiambaa/Kihara/1454) (the suit property) that was the subject of the succession proceedings had been sold to him by the deceased prior to her death. The applicant therefore argued that the respondent had no capacity to claim the suit property in their capacity as the successors of the estate of the deceased. It appeared that the applicant did not prosecute his objection before the subordinate court. The letters of administration that were issued to the respondents were duly confirmed on 7th July 2006. A certificate to that effect was duly issued.

The applicant was aggrieved by the said decision of the subordinate court. On 11th January 2007, the applicant filed summons seeking the revocation and annulment of the grant that was issued to the respondents. The applicant alleged that the respondents had obtained the said grant fraudulently by making false statements and concealing from the court material facts which are germane to the succession proceedings. The summons for revocation of grant is yet to be heard and disposed off. On 14th July 2010, the applicant filed an application seeking orders from this court to restrain the respondents, by themselves, their servants or employees from transferring, disposing off, sub-dividing or in any other way adversely dealing with the suit property pending the hearing and determination of the summons for revocation of grant. The application is supported by the annexed affidavit of the applicant. The application is opposed. The respondents filed notice of preliminary objection to the application. The respondents contend that the application is misconceived, incompetent, defective and bad in law. They argue that the entire suit was an abuse of the court process and should be struck out with costs. Edwin Mwaura Mungai, the 1st respondent, swore a replying affidavit in opposition to the application.

Prior to the hearing of the application, the respective counsel for the applicant and for the respondents filed written submissions in support of their respective opposing positions. The said submissions were highlighted by counsel during their oral submissions in court. I have carefully considered the said submissions. I have also considered the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the applicant established a case to

entitle this court grant the injunction sought. The principles to be considered by this court in determining such applications are well settled. The applicant must establish that he has a prima facie case that will likely succeed during the full hearing of the case. The applicant must also establish that if the order sought is not granted, he would suffer irreparable damage that will not likely be compensated by an award of damages. In the event that the court shall be in doubt, it shall determine the application on a balance of convenience (*see Giella vs Cassman Brown [1973] EA 358*). In the present application, the applicant argued that he purchased the suit property from the deceased prior to her death. In support of this contention, the applicant annexed a copy of the consent issued by the Land Control Board approving the said sale of the suit property. From affidavit evidence, it is apparent that the applicant is in occupation of the suit property. The allegation by the applicant that he purchased the suit property has been disputed by the respondents. The respondents contend that the applicant purchased from the deceased the adjoining parcel of land known as LR.No.Kiambaa/Kihara/1453 and not the suit property. The respondents argued that the applicant's claim, if at all sustainable, is barred by the provisions of the **Limitation of Actions Act**.

Having carefully evaluated the said rival arguments, it is this court's finding that the applicant established a prima facie case to entitle this court grant the order of injunction sought. The applicant established that the deceased attended the Land Control Board and sought the consent of the said Board to transfer the suit property to his name. He further established that he is in occupation of the suit property. The purpose of an interlocutory injunction is to maintain and preserve the status quo as it exists at the time the application was filed pending the hearing and determination of the main suit. In the present application, the applicant established, prima facie, that at least he is entitled to have his summons for revocation of grant heard on its merits. The issue regarding whether the suit property was sold to the applicant by the deceased prior to her death is the main bone of contention between the applicant and the respondents.

The respondents are therefore restrained by means of an injunction from transferring, disposing off, subdividing or in any other way interfering with the suit property (i.e.LR.No.Kiambaa/Kihara/1454) pending the hearing and determination of the application for annulment or revocation of grant. The applicant shall have the cost of the application.

DATED AT NAIROBI THIS 29TH DAY OF APRIL, 2011

L. KIMARU
JUDGE