



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

(CORAM: OJWANG, J.)

CIVIL SUIT NO. 290 OF 2009

1. JOHN FEFFREY MITCHELL..... PLAINTIFF/APPLICANT

2. NELLY CHIKU FARRAR PLAINTIFF/APPLICANT

VERSUS

MICHAEL GONA MASKINI.....DEFENDANT/RESPONDENT

VICTOR MPNDA MASKINI.....DEFENDANT/RESPONDENT

HALIMA MOHAMED ABDIRAHMAN.....DEFENDANT/RESPONDENT

RULING

The Plaintiffs moved the Court by Chamber Summons dated 26th August, 2009 and brought under Order XXXIX rules 1,2,3 and 9 of the Civil Procedure Rules, and ss.3A and 63(e) of the Civil Procedure Act (Cap 21, Laws of Kenya). The application carried two substantive prayers:

(i) That the Court be pleased to issue temporary injunctive orders restraining the defendants and/or their agents and/or their servants and/or their relatives and/or whoever acting on their behalf, from invading and/or entering and/or trespassing upon and/or constructing any structures and/or disposing and/or alienating the suit premises being plot No. 439/I/MN, Bombolulu or doing anything detrimental to the plaintiffs' inters tot rights over the suit premises herein, pending the hearing and determination of the suits.

(ii) That this court be pleased to issue a mandatory injunction ordering the defendants to demolish the wall under construction on the suit premises pending the hearing and determination of the suit.

The application is anchored on the following grounds:

(a) that the plaintiffs are the registered owners of undivided shares on plot No.439/I/MN, Bombolulu alongside their brothers and/or sisters and/or relatives now deceased

(b) that 1st and 2nd defendants have invaded and/or trespassed onto the suit premises and purported to have powers and/or mandate to sell portions of land on the suit premises to unsuspecting individuals, yet they do not have letters of administrative as the basis for the disposal of portions of the suit land.

(c) That in January, 2009 1st and 2nd defendants sold a portion of the land to 3rd defendant, who is now constructing a building on the suit premises, yet the said transaction was without the plaintiffs' consent and/or authority, and without any colour of right under the succession laws;

(d) That the defendants' actions herein are unlawful and/or illegal and/or without any colour of right;

(e) That the plaintiffs/applicants shall suffer irreparably and be greatly prejudiced, if the orders sought are not granted.

The first applicant has given supporting evidence in the form of an affidavit. He depones that he is one of the owners of plot No.439/MN, Bombolulu, owing 2/18th undivided share of the same, alongside his brothers and/or sisters and/or relatives who are now deceased but own similar shares (and he annexes copy of the relevant certificate of title, No. C.R. 8405 dated 18th August, 1931).

The deponent deposes that 1st and 2nd defendants, in January, 2009 invaded and/or trespassed on the suit premises, purporting to have power and/or authority to dispose of portion of land on the suit premises – and subsequently sold a portion thereof to 3rd defendant who has now begun the construction of a structure on the property so purportedly sold. The deponent avers that the said construction by 3rd defendant has been accompanied by a denial of the Plaintiffs' right to access their parcel of land or even to tend their crops growing on the land in question.

The 2nd defendant, in a response to the supporting affidavit, deposes that –

(i) the suit plot was originally owned by Harry Anderson Mitchell, one whose children was Anderson Victor Mitchell;

(ii) Anderson Victor Mitchell is one of registered owners of the suit premises'

(iii) the suit premises has not been sub-divided to any beneficiary, and so none of the parties can attach his claims to any particular portion of the same;

(iv) the deponent has “ never interfered with the suit premises”

(v) the deponent is not aware of any sale transaction involving the suit premises, and the only plot affected by such transaction was Plot No.438.

Learned counsel **Mr. Kenga**, in his submissions on behalf of the plaintiffs, urged that the defendants had erected a wall on Plot No.439 (the suit premises): and that this amounted to intermeddling with the property of the deceased,, the said Anderson Victor Mitchell – and so the act of constructing the wall was in breach of s. 45 of the Laws of Succession Act (Cap 160, Laws of Kenya). Counsel asked this Court to protect the suit property, and in this way, to preserve the subject-matter of the suit.

From the respondents, it was urged that the application be rejected, for not satisfying the test of the *prima facie* case as set out in the Court of Appeal decision in **Giella v. Cassman Brown** (1973). Counsel submitted that 1st and 2nd defendant had shown that they were the grandchildren of one **Anderson Victor Mitchell** who has 2/18 undivided share of plot 439 aforesiad. The 1st and 2nd defendant, counsel urged, did have proprietary rights to the suit premises.

Counsel urged that the plaintiffs have not shown that they will suffer irreparable injury if their prayers are not granted. Counsel thus remarked:

“The suit premises is undivided. The same is available and has not been disposed of. The plaint doesn't detail any loss anticipated. There are so many beneficiaries herein.

From the last statement of counsel set out above, it is clear to me that the defendants have not focused their case on a choice between Plot NO. 438 as the one they have sold, and the status of plot 439 as a plot in respect of which the respective claims of beneficiaries are yet to be defined. The error is to mix up the two issues. There is no conclusive evidence that 1st and 2nd defendant's sale transaction related exclusively to plot 438; and therefore the basis of this Court's decision must be whether or not 1st and 2nd defendants undertook a transaction on plot 439 without authority.

Counsel for the defendants has consistently urged that 1st and 2nd defendants too have proprietary rights on Plot 439. But as a matter of law, it is clear that such alleged right cannot, at this stage, be a basis for a unilateral transaction by 1st and 2nd defendants, involving Plot 39.

At this interlocutory stage, in my judgment, the plaintiffs have made a good case for the grant of one prayer; and I will hereby order as follows:

1. I hereby issue temporary injunctive orders restraining the defendants and/or their agents and/or their servants and/or their relatives and/or whoever may be acting on their behalf, from invading and/or entering and/or trespassing upon and/or constructing any structures and/or disposing of and/or alienating the suit premises, being Plot No. 439/1/MN/Bombululu or doing anything detrimental to the plaintiffs' interest or rights over the suit premises herein, pending the hearing and determination of the suit.

2. The costs of this application shall be in the main cause.

DATED and DELIVERED at Mombasa this 26th day of March, 2010.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Ibrahim

For the Plaintiffs/Applicants:

For the Defendants/Respondents