



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Election Petition 375 of 2008

EDWARD KHAEMBA MULONGO &

COSTIN SIMIYU MULONGO (suing as administrators

of the Estate of the late Gladys wanjala Mulongo) PLAINTIFFS

VS.

JOSEPH WANGOMBE NGATIA 1ST DEFENDANT

STEPHEN KAMIRI NGANGA..... 2ND DEFENDANT

DANIEL KABUGI NGANGA 3RD DEFENDANT

COMMISSIONER OF LAND 4TH DEFENDANT

RULING

The Plaintiffs herein are administrators of the estate of Gladys Wanjala Mulongo. The late Gladys is said to have been the owner of property known as LR. No.16067 and 16068 both in Nairobi. The said parcels of land were said to have been sold to the 1st defendant, Joseph Wangombe Ngatia who then sold the same to the 2nd and 3rd defendants, Stephen Kamiri Nganga and Daniel Kabuhi Nganga.

In their plaint filed herein, the plaintiffs have alleged that the transaction was fraudulent and therefore seek a declaration that the same should be declared as such and therefore null and void and that there be an injunction against the 2nd and 3rd defendants to restrain them from evicting, interfering, alienating, or otherwise dealing with the suit property in a manner prejudicial to the title and interest of the plaintiffs.

There is a prayer against the Commissioner of Lands who has been joined as the 4th defendant for an order that the transfers in respect of the suit premises be nullified. The plaint was followed by an application for an injunction by way of chamber summons filed on 5th August 2007. On the same date, the plaintiffs appeared under certificate of urgency and Okwengu J granted a temporary order against the 2nd and 3rd defendants pending the hearing inter-partes, of the said application.

Both learned counsel for the parties herein have filed their submissions relating to the said chambers summons which I have read. There appears to have been a protracted dispute between the late Gladys Wanjala Mulongo and her husband Wabulu M. Mulongo. That notwithstanding, I believe this matter can

be resolved on the facts disclosed in the pleadings and affidavits that have been filed herein.

The evidence on record shows that the late Gladys Wanjala executed a transfer in favour of the 1st defendant, Joseph Wangombe Ngatia on 12th January 2005. Subsequently, the 1st defendant executed a transfer in favour of the 2nd and 3rd defendants on 18th March 2008.

For the applicants to succeed they must show that they have a *prima facie* case with a probability of success against the 2nd and 3rd defendants because those are the parties now holding the title to the property. Additionally, they must show that if the order is not granted, they are likely to suffer injury which cannot adequately be compensated by an award of damages. If the court is in doubt, it will decide the matter on a balance of convenience.

As I have said, the title belongs to the 2nd and 3rd defendants. Having purchased the same from the 1st defendant, I have seen no evidence on record that they were aware of any disputes whatsoever between the applicant's late mother and the 1st defendant who sold the property to them. There is also the allegation that when the deceased Gladys transferred the land to the 1st defendant she was not then living. However, I have seen the death certificate relating to Gladys Wanjala Mulongo which shows that she died on 30th July, 2005. That was way after she executed the transfer to the 1st defendant i.e. 12th January, 2005.

I have also looked at the pleadings as contained in the plaint. There is no allegation whatsoever of fraud on the part of the 2nd and 3rd defendants because going by paragraph 11 of the plaint dated 4th August 2008, and filed on 5th August, 2008, the allegations of fraud are only against the 1st and 4th defendants. My evaluation and assessment of the material before me at this stage is that, the applicants have not justified the basic principles for the granting of injunctory orders. If that be the case, then there would appear to be no justification as to why this court should bar the 2nd and 3rd defendants from enjoying the benefits of property which is in their names. There are some other issues raised in this application and the affidavits filed herein. However, if I were to address the same at this stage, it may prejudice the case of both the plaintiffs and the defendants. That notwithstanding, I am persuaded that for now, the 2nd and 3rd defendants have the right to the property that they own. In that regard, the application by the plaintiffs must fail.

Accordingly, the order for injunction sought by way of chamber summons dated 4th August 2008 is refused and it therefore follows that the interim orders given by Okwengu, J on 5th August 2008 are hereby vacated.

The defendants shall have the costs of this application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 23rd day of July, 2009.

A. MBOGHOLI MSAGHA

JUDGE