REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Appeal 56 of 2009

RODAH MUNINI KANAKE …… APPELLANT/APPLICANT

VERSUS

ARON KIOKO MUTUNE …… 1ST RESPONDENT

OGUTU NDUTE …… 2ND RESPONDENT

MR OWINO PAUL ……... 3RD RESPONDENT

NZAMU VONGO …… 4TH RESPONDENT

NZUKI MUTAMBU …….. 5TH RESPONDENT

(Being an appeal from the Ruling of Honourable Mr A.W. Mwangi, Ag. Senior Resident Magistrate dated 25th March 2009 in Yatta Civil Suit No. 180 of 2008)

RULING

1. The Appeal herein was instituted by Rodah Munini Kanake against a Ruling delivered on 25/3/2009 by Hon. Mwangi, Ag. SRM at Yatta Law Courts. The learned magistrate in that Ruling declined to grant interlocutory orders of injunction and instead issued orders staying all proceedings in SRMCC No. 180 of 2008 ostensibly because of H.C.Succ. Cause No. 550 of 2008 which is pending before this court. The proceedings revolve around the ownership of title number Yatta/Mathingau/146 and the claim by the Respondents that they were entitled to portions of that land as purchasers for value.

2. By a Chamber Summons dated 24/4/2009 premised on Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules the Appellant/Applicant sought an injunction to restrain the Respondents, their servants, agents and employees from excavating, cutting trees or removing stones on land parcel number Yatta/Mathingau/146 until the hearing of the Appeal.

3. From her Supporting Affidavit sworn on 24/4/2009, the Appellant depones that the suit land is registered in the names of one Stephen Mungai Kanake who had died on 9/8/2004. That she was granted letters of administration to his estate on 25/11/2008 and that sometime in the year 2004, the Respondents entered into the suit land and started excavating stones and continue to do so to-date. She denies the allegation that they are purchasers of parts of the land and adds that the land will be extensively damaged if the orders sought are not granted.

4. The Respondents' case is that they entered the land in the lifetime of the registered proprietor and that they purchased portions of it and are therefore lawfully on the land. They concede that although only

the 3rd Respondent has erected a structure thereon, others excavate building stones from it and that fact is conceded by the Applicant.

5. I have taken into account the submissions made but my mind is clear that the Application does not meet the expectations of the laws. I say so because the Applicant admits that she is not the registered proprietor of the suit property but she has a temporary grant of letters of administration. She has not responded to the contention that the Respondents entered the land as purchasers and that her late husband may have lawfully allowed them to do so. The Senior Resident Magistrate was exercising discretion in refusing granting an injunction based on the facts placed before her and if this court now grants an injunction as is sought, there would be an undue interference with that exercise of discretion and that is not the role of this court in its appellate jurisdiction – see Giciem Construction Company Ltd vs Amalgamated Trades & Services (1983) KLR 156.

6. Secondly, the orders issued were temporary and the substantive suit was not heard at all and the present Application would seem in my view to pre-empt both that suit and crucially H.C.Succ.550 of 2008. In that case the issue whether the Applicant was or was not a wife of the deceased would be determined and the claim by the Respondents will ultimately have to be resolved *vis-à-vis* the suit land. It follows therefore that the learned trial magistrate was *prima facie* right in staying the proceedings before her until the Succession Cause is determined.

7. Thirdly, in an application of this nature, the Applicant ought to establish that on the face of it, her appeal may succeed. I have said that I do not think that the Appeal has a probability of success and whatever damage may be occasioned to the land can be compensated in damages.

8. On a balance of convenience I also find that equity must favour the Respondents – See Giella vs Cassman Brown (1973) E.A 358.

9. In the end, I see no merit in this Application, and I will dismiss it with costs to the Respondents.

10. Orders accordingly.

Dated and delivered at Machakos this 13th day of October 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mrs Mwangangi h/b for Mr Uvyu for Applicant

N/A for Respondent

ISAAC LENAOLA

JUDGE