



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE 76 OF 2007

GIDA AWITI MIGWALAPLAINTIFF

VERSUS

MICHAEL TIMOTHY ADEDE1st DEFENDANT

PIATA SINAWA 2nd DEFENDANT

RULING

The applicant in the Chamber Summons dated 14th June 2007, seeks injunctive relief against the Respondents in relation to a parcel of Land known as Kisumu/Wanganyi/4140 which she claims to be entitled to as a bequest from her late husband, Abednego Migwala Isaka, who died on 16th January 1993. In her suit, filed under a plaint dated 14th June 2007, the applicant prays that she be declared the rightful owner of the said parcel of land, which she alleges the 1st Defendant has fraudulently caused to be transferred to him and registered in his name. She prays that the said registration be cancelled and the respective land register rectified to represent her as the true owner, and that the (1st) Defendant be restrained from entering or interfering with the said parcel of land.

Pending the hearing and determination of the suit the applicant now seeks interim orders of injunction restraining the (1st ?) Defendant

“ by himself and/or his agent’s howsoever or whosoever acting (sic) from developing, alienating and or transferring Land Parcel Number KISUMU/WANGAYI/4140 and/or in any manner interfering with the Plaintiffs peace.....”

Never mind the above wording but after reading the application and supporting affidavit as a whole, the court’s understanding of the applicant’s prayer is that the 1st Defendant, his agents and/or anyone acting for or on his behalf be restrained from developing, alienating or transferring the suit land pending the hearing and determination of the applicant’s suit. The 1st Defendant is the undisputed step son of the applicant and the registered proprietor of the disputed parcel of land. The applicant alleges that such registration was effected following a conspiracy between the 1st Defendant and the 2nd Defendant, who, from the supporting affidavit, the applicant says is the son of one Sinawa Sinawa, from whom the applicant claims (but without proof), her deceased husband had brought the subject piece of land. The applicant claims that the 1st Defendant holds the suit land in trust for herself and her children, including grandchildren, whom she claims would be rendered landless if the interim injunction sought is not

granted,

“ to avert the imminent fraud and consequential breach of trust and peace occasioned to the applicants (sic) a fact which will expose the Plaintiff to irreparable loss”.

The Chamber Summons is opposed on the strength of a Replying Affidavit sworn by the 1st Respondent in which he accuses the applicant of having obtained a Grant of Letters of Administration Intestate in relation to the deceased estate, fraudulently and without the knowledge or consent of the adult children of the deceased, including her own adult children. As regards knowledge, I have observed that a gazette notice was published as required by law on 27th August 2004 and a 30 days Notice of petition issued and posted by the honourable court on 13th July 2004. It would appear therefore that no objections were raised to the petition. The applicant says as much in her “ **Further supporting Affidavit**” of 4th July 2007. The 1st Respondent however maintains his position that the applicant having obtained the Grant of Letters of Administration without the consent of the beneficiaries then she comes to court with tainted hands and should not benefit from the court’s discretionary power to grant an equitable relief by way of an injunction. To this end the 1st Respondent filed a “ **further Replying Affidavit**” sworn on 13th July 2007 in which he depones to having filed an application for the revocation of the applicant’s Grant and annexing as “**MTA 1**” a temporary injunctive order obtained against the applicant in that application.

It is along the above lines and against that background that the injunction application was argued at length and authorities cited by counsel on both sides. There is agreement from both sides that injunctive orders are discretionary remedies in equity. As is well settled in several legal authorities, the leading one in our jurisdiction being the case of **GIELLA =vs= CASMAN BROWN & CO LTD [1973] E. A. 358**, it is mandatory for an applicant to satisfy the court that he or she has a prima facie case with a probability of success and that he or she risks incurring suffer irreparable loss or harm not capable of being compensated in damages in the event that the injunction is not granted. Where the court is in doubt as regards the above two essentials then it should be persuaded that the balance of convenience lies in favour of the applicant. It is also a cardinal requirement of the law of equity that those who seek equity must come to court with clean hands and demonstrate utmost good faith.

Applying the above principals, I find first of all that the applicant has not told the court exactly when or in what circumstances she inherited the suit land from her deceased husband. She says the parcel of land had been bought from one Sinawa Sinawa in 1987 but has not produced any document to demonstrate that, or whether, prior to its being registered in the 1st Respondents’ name it was registered in the name of the said Sinawa Sinawa or her late husband. She has annexed to her supporting affidavit a certified copy of the original Register (Green card) showing that the 1st Defendant is the registered owner. In paragraph 18 of her supporting affidavit the applicant claims to have been holding the suit land in trust for her family particularly (her) two sons whom she says were not bequeathed with any land by her late husband. In paragraph 20, she seems to bestow that trust on the 1st Defendant as the 1st son in the family and proceeds to accuse him of breaching that trust by allocating himself the disputed parcel of land.

For reasons only known to the applicant she did not, either in her plaint or in the present application, disclose that she had taken out Letters of Administration and had obtained a Grant in respect of her late husband’s estate in which the subject parcel had been listed in the Affidavit filed in support of the Petition apparently, and which was, sworn before the Chief Magistrate (!) Kisumu on an undisclosed date. It was filed with her petition on 7th July 2004. In a curious twist of events the disputed parcel of land did not appear in the inventory of assets appearing in the Affidavit in support of her summons for Confirmation of Grant sworn on 23rd February 2005 and did not form part of the assets listed in the Certificate of Confirmed Grant issued on 13th April 2005, with the beneficiaries’ shares being noted therein. Yet the applicant has not sought to have the said Grant rectified, which would be expected, if at all the subject parcel of land was erroneously left out in the Confirmed Grant.

It does not take a legal mind, given the circumstances of this case to notice that the applicant appears to be unsure of her real entitlement to the said parcel of land. A strong legal challenge has been put up

against her claim and a defence of indefeasible title raised yet she has not challenged the same. She has not given any reasonable answer to the allegation that she has fraudulently obtained letters of administration wherein documents have been placed before court to show that, whereas she admits the existence of two households, she neither mentioned the step-children nor obtained their consent when petitioning for the Grant. I am not, after considering all the facts of this case, which were not before court when the interim stay was granted (owing to the material non-disclosure by the applicant) persuaded that the applicant has established a prima facie case against the Respondents. Her cause of action against the 2nd Respondent is not even clear. In granting the interim order, the court expected that the applicant would, at the interparties hearing, prove to an acceptable degree of probability, the grounds stated in her application and supporting affidavit. Unfortunately, the opposite is the case. The applicant's mala fides has been exposed and her application proved to be an abuse of the process of the court.

The applicant has not even attempted to demonstrate possible irreparable loss and has instead told this court that she stopped cultivating on the disputed piece of land in 1999. Save for attempting to acquire the parcel through the Succession Cause now being challenged by the 1st Respondent, the applicant has done nothing for eight years to establish her claim to the same. Neither has she ever been in possession thereof. I am persuaded and do find that she comes to court with dirty hands and is therefore not entitled to the injunction sought for the reasons given.

In the premises the Chambers Summons dated 14th June 2007 is hereby dismissed with costs to the Respondents.

Dated at Kisumu this 6th day of December 2007.

M. G. MUGO

JUDGE

Delivered in the presence of:

Mr. Oluoch holding brief for Mr. Ouma for Applicant

No appearance for the Respondent

No appearance for the third party

MGM/aao