



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 673 OF 2004

LUCY WANJA IRUNGU (Suing on her own behalf

and on behalf of the Estate of the deceased

RABURA DANIEL MUNUA).....PLAINTIFF

VERSUS

KAMAU KABUGI THAYU.....DEFENDANT

R U L I N G

1. The Plaintiff herein by her Chamber Summons dated 22nd June 2004 brought under Order XXXIX Rules 1 and 2 and Order XX Rule 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks the following prayers: -

1. That this Application be certified urgent and be heard ex-parte in the first instance.
2. That the defendant either by himself, employees, servants, agents or otherwise howsoever be stopped by an interim injunction from levying and distress and/or evicting the Plaintiff herein from the suit premises known as L.R. No. 209/4401/680 Makadara Estate pending the hearing and determination of this Application and/or suit.
3. That the Defendant either by himself, employees, servants, agents or otherwise howsoever be stopped by a temporary order of injunction from collecting rent proceeds from the suit premises or houses – L.R. 209/4401/680 – Hamza Road Makadara Estate and the said rent due be payable to and/or collected by the Plaintiff and/or as the court may direct until the determination of this suit and/or application.
4. That the defendant be ordered to account for all rent collected from the suit premises since 1993 to date which rent has never been shared with and/or given to the Plaintiff.
5. That pending the hearing and determination of this Application interim orders do issue in terms of prayers 2 and 3 above.
6. That costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff, Lucy Wanja Irungu sworn on 22.6.2004 and in it the genesis of the dispute is set out. The suit property is known as L.R. No. 209/4401/680 and it is not disputed that it was originally registered in the names of Kabura Daniel Munyua since deceased as

Lessee. Sometime since that registration, the Defendant came into the picture and on 12th April 1967 was registered as a joint tenant together with Kabura Daniel Munyua aforesaid.

3. The Plaintiff obtained Letters of Administration to the estate of the deceased who was her grandmother, the grant limited only to the filing of this suit. She contends that the Defendant was only contracted to make repairs to the suit property and has been collecting rent to off-set the costs thereby incurred. Further, that the registration of the Defendant as joint tenant was fraudulent and based on a misrepresentation.

4. On the Defendant's part, it is argued that the deceased left a will which is contestable but in any event, the suit property was bequeathed to one Joseph Irungu who died a year after Kabura. The Applicant has not taken out Letters of Administration to his estate. The allegations of fraud and misrepresentation are baseless as all the legal procedures leading to the joint tenancy were followed. An injunction cannot issue against an owner of property. There being no *prima facie* case, I am asked to dismiss the Application. I will do so for the following reasons;-

Firstly, in a joint tenancy and pursuant to Section 102(1) (b) of the Registered Land Act, Cap 300 where one joint tenant dies, the property shall vest exclusively in the surviving tenant. In this case, the property upon the demise of Kabura should by law vest in the Defendant. Secondly, I have a problem with the manner in which the Plaintiff has attempted to establish her locus standi in bringing these proceedings. She is claiming the property as the daughter of Joseph Irungu to whom the property was bequeathed by Kabura. Yet she goes and gets a grant to the estate of Kabura without getting Letters of Administration to the estate of Joseph Irungu through whom she is making her claim. This is clearly not the way to establish her entitlement to the suit property. Thirdly, and following up on these two points, the Will of Kabura relied on by the Plaintiff clearly admits that a house was built, "**at Makadara with Kamau son of Kabugi**", the Defendant and therefore, Kabura herself recognized the Defendant's interest. The Plaintiff does not, but it is instructive that the Will was made on 24th November 1974 and whatever its probative value; Kabura did not change it by the time of her death in 1992. I am inclined to believe the dead in this regard.

5. For these reasons, I don't see that a *prima facie* case with a probability of success has been established and if the suit should succeed in any event, damages would be an adequate pacification remedy for the Plaintiff. On the whole and on a balance of probabilities, equity should tilt in favour of the Defendant and I so hold.

6. The Application dated 22.6.2004 is hereby dismissed with costs to the Defendant.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of September 2004.

I. LENAOLA

Ag. JUDGE

24/9/2004

Coram: Makhandia, Ag. J.

Ngoi for the Applicant

Chefe for the Respondent

CC: Ndung'u

Ruling delivered in court by Justice Makhandia on behalf of Justice Lenaola who is away on duty at

Embu High Court.

MAKHANDIA

Ag. JUDGE