

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 251 OF 2017

AGNETA MASHA MSECHU.....PLAINTIFF

VERSUS

NAOMI WANJIRU KAMAU.....DEFENDANT

RULING

(Application for injunction; principles to be considered; plaintiff being registered proprietor of the suit properties and being in occupation; plaintiff asserting that the suit properties were transferred to her by her late husband; defendant claiming to have a child with the late husband of the plaintiff and claiming that the transfer to the plaintiff was fraudulent; since plaintiff is the registered proprietor and in possession, she has established a prima facie case and would suffer irreparably if the injunction is not granted; issue of fraudulent transfer is a matter that can only be determined upon a full hearing of the case; application allowed)

1. This ruling is in respect of the application dated 17 July 2017 which was filed contemporaneously with the plaint. It is an application for injunction vide which the plaintiff seeks to have the defendant restrained from the land parcels Kwale/Galu Kinondo/1258 and Kwale/Galu Kinondo/ 1259 (the suit properties) pending the hearing and determination of this suit. The application has taken a considerable period of time to be finalised for there was another intervening application filed by the defendant which was given priority.

2. This being an application for injunction, I stand guided by the principles laid down in the case of *Giella vs Cassman Brown (1973) EA 358*. The applicant needs to satisfy this court that she has a prima facie case with a probability of success; show that she stands to suffer irreparable loss if the injunction is not issued; and if this court will be in doubt, it will decide the application on a balance of convenience.

3. What then is the plaintiff's case? The plaintiff has pleaded that she is the owner of the two suit properties having received the same from her husband, one Albert Keiser Friedrich, as a wedding gift soon after their marriage. The properties were subsequently transferred into her name. The plaintiff has pleaded that her husband left for Germany to seek treatment upon which the defendant started harassing her and her workers on the suit properties. In this suit, the plaintiff wants to have the defendant permanently restrained from the suit properties and for a declaration that she is the absolute owner of the same. To her supporting affidavit, the plaintiff has attached a search showing that she is the registered owner of the suit properties. She has deposed that on 9 December 2016, she learnt that the defendant had obtained some orders under the case TCC No. 108 of 2013.

4. The defendant filed a replying affidavit. She deposed that Albert Keiser Friedrich died on 5 June 2017 and that he (the deceased) has been the owner of the suit properties. She contended that any transfer of title to the plaintiff is fraudulent. She stated that she had sued the deceased in Tononoka Children's Court, Case No. 108 of 2013, for maintenance of a child that she had with the deceased, and she has averred that it was decided that part of the suit properties, containing two cottages, would be managed by her and the income used for the upkeep of the child. She has averred that she had obtained orders restraining the deceased from transferring ownership of the suit properties. She has contended that the dates upon which the plaintiff claims to have transferred the properties fall on days that the deceased was out of the country. She has further deposed that the Land Registrar had at some point cancelled the entry registering the plaintiff as proprietor. She deposed that the deceased was mentally unstable having been diagnosed with dementia in the year 2012. She has thus challenged the transfers of the suit properties to the plaintiff.

5. I have considered the application.

6. I can see that the plaintiff appears to have title to the suit properties albeit that the defendant challenges her ownership of the same. That will be an issue for determination after a full hearing on merits. From the material before me, it also does seem that it is the plaintiff who is in possession of the properties. Given that position, I am of the view that the plaintiff has established a prima facie case and I am further persuaded that she stands to suffer irreparably if the injunction is not granted. I am not in doubt, but if I was, and I was to consider the balance of convenience, it would tilt towards maintaining the status quo ante, that is, the status that prevailed before the defendant started interfering with the suit property. I am aware that the defendant claims to have orders from the Children's Court, but those orders were obtained against the deceased, and not the defendant. I do not see how the defendant can seek to apply orders of maintenance against a property which is not registered in the name of the deceased, but is in the name of the plaintiff.

7. For the above reasons, I do allow this application for injunction. The defendant is hereby restrained from interfering with the possession of the suit properties until this case is finalized. However, I also order the plaintiff not to enter into any dealings in respect of the suit properties and I do issue an order of inhibition, restricting the registration of any disposition in the register of the suit properties until this case is finalized.

8. Costs of this application will be costs in the cause.

9. It is so ordered.

DATED AND DELIVERED THIS 18 TH DAY OF FEBRUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.