



Nzioka & another v Mutisya & 6 others (Environment & Land Case E034 of 2023) [2024] KEELC 548 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEELC 548 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E034 OF 2023
CA OCHIENG, J
FEBRUARY 8, 2024**

BETWEEN

STELLAMARIS NDINDA NZIOKA 1ST PLAINTIFF

LYDIA N. WAMBUA 2ND PLAINTIFF

AND

ALICE MWIKALI MUTISYA 1ST DEFENDANT

JOYCE KAMENE MUTISYA KASIMBI 2ND DEFENDANT

GLOBAL TRUCKS LIMITED 3RD DEFENDANT

ABSA BANK PLC 4TH DEFENDANT

MAKUMBI DEVELOPERS LIMITED 5TH DEFENDANT

LAND REGISTRAR, NAIROBI 6TH DEFENDANT

ATTORNEY GENERAL 7TH DEFENDANT

RULING

2. What is before Court for determination is the Plaintiffs' Notice of Motion Application dated the 29th April, 2023 where they seek the following Orders:-
 1. Spent
 2. That pending the hearing and determination of this Application, the 1st, 2nd, 3rd and 5th Respondents, their servants, and agents, or persons acting on their behalf be stopped and retrained from selling, disposing off, leasing, attempting to sell, charging, mortgaging or in any manner alienating or dealing further with properties known as L.R. No. 7149/138, L.R. No. 7149/146 (I.R No. 146134) and L.R. No. 7149/147(I.R. 146135).



3. That pending the hearing and determination of the main suit, the 1st, 2nd, 3rd and 5th Respondents, their servants, and agents, or persons acting on their behalf be stopped and restrained from selling, disposing off, leasing, attempting to sell, charging, mortgaging or in any manner alienating or dealing further with properties known as L.R No. 7149/138, L.R. No. 7149/146 (I.R No. 146134) and L.R. No. 7149/147 (I.R 146135).
4. That the cost of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Stellamaris Ndinda Nzioka. The Plaintiffs' contend that the late David Mutisya Makumbi was the registered proprietor of lease title known as L.R. No. 7149/138, L.R. No. 7149/146 (I.R. No. 146134) and L.R No. 7149/147 (I.R 146135). They claim that in November, 2008 the 1st Defendant, who was the 1st wife of the late David Mutisya Makumbi, took him to Dr. J.K. Mutiso (Specialist Psychiatrist), who found the deceased to suffer from dementia and organic personality syndrome amongst other medical illnesses. Further, the said Dr. J.K. Mutiso, recommended that the deceased be assisted by his family and his estate and business ventures be protected as he was not mentally fit to manage either himself, the family or the estate on account of mental illness according to the provisions of Mental Health Act (Cap 248). They aver that on 12th September, 2015, the Land Registrar, Nairobi gazetted the loss of original Title Deed for the suit lands. They explain that the 1st Defendant in a sworn Affidavit dated the 4th December, 2017 in Machakos ELC Case No. 210 of 2016, confirmed that she had placed Caveats on some of the properties, more specifically land titles L.R No. 7149/146, L.R. No.7149/147 and 7149/138 after the deceased was declared to be mentally sick on or about November, 2008. Further, that the said Caveats had been removed under unclear circumstances. They state that the 5th Defendant through unknown scheme transferred L.R Nos. 7149/146 and L.R No. 7149/147, via a purported sale and purchase agreement while in actual fact the deceased did not have the mental capacity to enter into a contract of sale and purchase of land being L.R No. 7149/146, L.R. No. 7149/147 and L.R 7149/138 respectively. Further, that the deceased was not privy to any contractual relationship between himself and the 5th Defendant, as any title document to L.R No. 7149/147 was invalid as the original title documents were nullified by gazettelement as lost/stolen by virtue of the Kenya Gazette Notice No. 6377 dated the 12th November, 2014. They reiterate that there could not have been any valid contract for sale and purchase between the 5th Defendant and the deceased, as all the directors/shareholders of the 5th Defendant are children of the 1st Defendant and were aware that the deceased did not have the mental capacity to contract (by virtue of his mental health), the sale and purchase for land L.R No. 7149/146, L.R. No. 7149/147 and LR. 7149/138 respectively. Further, that all directors of the 5th Defendant were aware that the deceased had accused some of them of stealing and selling his properties, and were now grossly intermeddling, with the properties having fraudulently transferred land LR. Nos. 7149/146 and L.R. No. 7149/147 to the 5th Defendant, which is a special purpose vehicle (SPV) for the 1st and 2nd Defendants, to shield their intermeddling, with the deceased estate. They explain that there are ongoing Succession proceedings at Machakos High Court being Succession Cause No. E53 of 2021. They reaffirm that L.R No. 7149/146, L.R. No. 7149/147 and L.R 7149/138 are matrimonial properties and part of the deceased estate to which no grant of representation has been given, and they are apprehensive that unless the orders prayed for are granted, the 1st, 2nd, 3rd and 5th Defendants will dispose-off by sale, charge, mortgaging or in any manner alienate the properties, thus deprive them including the 2nd, 3rd and 4th families their beneficial share of the deceased estate.
3. The 1st Defendant opposed the instant Application and filed a Replying Affidavit sworn by Alice Mwikali Mutisya where she confirms that she makes the said Affidavit on her own behalf and on behalf



of the 2nd Defendant, Joyce Kamene Mutisya Kasimbi. She states that she is the first wife of the late David Mutisya Makumbi who died on 13th August, 2019 and there is still pending Machakos High Court Succession Cause No. E53 of 2021 wherein the Applicants' had petitioned for a Grant of Letters of Administration to the deceased's estate and she has also cross-petitioned for a Grant and none of them is yet to be issued with Letters of Administration to the deceased's estate. She argues that since none of them has been granted Letters of Administration in respect to the deceased's estate, no one has capacity to institute any suit or court action in respect to the deceased's estate and the Plaintiffs' present action is incompetent and a nullity. She explains that the properties being L.R. No. 7149/146 and L.R. No. 7149/147 which are the subject matter of these proceedings are also the subject of a dispute between herself and the deceased under the Matrimonial Property Act in Machakos ELC No. 210 of 2016, which properties were sold and transferred by the deceased to the 3rd Defendant in the year 2014 long before he died and do form part of his estate. She avers that the other property, the subject matter of this suit i.e. LR. No. 7149/138 was sold and transferred inter vivos to Makumbi Investment Limited sometime in the year 2015, which was four (4) years before the deceased died. Further, that the Applicants who are not Administrators of the deceased's estate cannot seek to obtain orders in respect to properties which do not form part of the said estate.

3. The 2nd Defendant opposed the instant Application and filed a Replying Affidavit where she confirms being the Director of the 5th Defendant. She contends that the 5th Defendant is not the owner of LR No. 7149/138 and neither did it acquire the said property from the deceased. She contends that the deceased died on 13th August, 2019 long after he had sold and transferred LR No. 7149/138 and this property did not form part of his estate. She reiterates that no one is interfering with or dealing with properties which truly belong to the deceased estate.
4. The 4th Defendant opposed the instant Application by filing Grounds of Opposition dated the 16th May, 2023 where it contends that the Plaintiffs' have not met any of the prerequisites for grant of an injunction. It contends that no proof has been provided for the current ownership of the suit properties. Further, that there is no proof of the Applicants' relationship with the deceased David Mutisya Makumbi. It insists that no good grounds have been set out to warrant a grant of the orders sought. Further, the Application is otherwise an abuse of the process of the court.
5. The Plaintiffs filed a Supplementary Affidavit sworn by Stellamaris Ndinda Nzioka where she insists that the suit properties were not free assets of the estate of the late David Mutisya Makumbi and are therefore not subject of the Machakos High Court Succession Cause No. E 053 of 2021. She contends that the suit properties were transferred from the deceased name when he was mentally certified unfit. She claims that Machakos ELC No. 210 of 2016 was a further scheme to perfect the fraud as the Plaintiff therein, deliberately sued a stranger in the place of the late David Mutisya Makumbi. Further, that there was a consent entered into, in Machakos ELC No. 210 of 2016 while the purported David Mutisya Makumbi was dead and the same was not regularized in the proceedings nor notified to the Court. She states that the actions of the 1st to 6th Defendants were in breach of Section 45 of the Law of Succession Act and hence grants anyone locus standi to institute an Application as in this instance, to protect and preserve the suit lands.
6. The 1st, 2nd and 5th Defendants further filed a Notice of Preliminary Objection in opposition to the instant Notice of Motion Application and suit insisting that this suit is incompetent as the Plaintiffs' are not administrators of the deceased estate. Further, that it discloses no reasonable cause of action against the Defendants.
7. The instant Application including Notice of Preliminary Objection were canvassed by way of written submissions.



Analysis and Determination

8. Upon consideration of the Notice of Motion Application dated the 29th April, 2023, Notice of Preliminary objection, Grounds of opposition including the respective affidavits, annexures as well as the rivalling submissions, the only issue for determination is whether a temporary injunction should issue restraining the Defendants from transferring or interfering with L.R Nos. 7149/146, L.R. No.7149/147 and 7149/138 pending the hearing and determination of this suit.
9. In line with the principles established in the case of *Giella vs Cassman Brown & Company* (1973) EA 358 including the definition of a prima facie case as enumerated in the case of *Mrao Ltd Vs First American Bank of Kenya & 2 Others* (2003) KLR 125, I will proceed to determine whether the Plaintiffs have demonstrated a prima facie case to warrant the orders of interlocutory injunction as sought.
10. The Plaintiffs claim the Defendants are intermeddling with the deceased estate to their detriment. They insist that the deceased did not have the capacity to transact over the suit lands due to mental incapacity. Further, that the 1st Defendant has transferred some of the parcels of land to the 5th Defendant whose directors are her children. The Defendants opposed the instant application insisting that no one is intermeddling with the deceased estate. Further, that no Letters of Administration Intestate has been granted in respect to the deceased estate hence the Plaintiffs' lack locus standi to institute this suit. They explain how the deceased had transacted with the suit lands and the 1st Defendant has explained that the properties being L.R. No. 7149/146 and L.R.No. 7149/147 are the subject of a dispute between herself and the deceased under the *Matrimonial Property Act* in Machakos ELC No. 210 of 2016, which properties were sold and transferred by the deceased to the 3rd Defendant in the year 2014 long before he died and do form part of his estate. The 1st Defendant has also explained that LR. No. 7149/138 was sold and transferred inter vivos to Makumbi Investment Limited sometime in the year 2015, which was four (4) years before the deceased died.
11. I have had a chance to peruse the various annexures herein and I note the Plaintiffs' are not owners of the suit lands. The Plaintiffs have not indicated who is in possession of the suit lands. It is my considered view that since the matter in respect to administration of the deceased estate is pending before the High Court being Machakos High Court Succession Cause No. E53 of 2021, and noting that there was also a pending aforementioned matrimonial cause between the deceased and the 1st Defendant, it is better if parties awaited the outcome of the said succession cause. From the explanations by the Plaintiffs' and response of the Defendants, I am unable to decipher any damage that would impact on the deceased estate since it is still subject to the succession proceedings.
12. In the foregoing while associating myself with the decisions cited above, I find that the Plaintiffs' have not established a prima facie case to warrant the orders of temporary injunction as sought against the Defendants. Further, in relying on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the Court of Appeal had stated that where any party fails to prove a prima facie case, the court need not proceed to make a determination of the other two limbs on injunction, and I will decline to do so.
13. It is against the foregoing, that I find the Notice of Motion Application dated the 29th April, 2023 unmerited and will dismiss it.
14. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8TH DAY OF FEBRUARY, 2024



CHRISTINE OCHIENG
JUDGE

