



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 13 OF 2019

ALICE WANGARI RUKWARO.....PLAINTIFF

VERSUS

PATRICK KANGETHE NJUGUNA.....1ST DEFENDANT

EDWARD NJUGUNA KANGETHE.....2ND DEFENDANT

GEORGE JAMES KANGETHE.....3RD DEFENDANT

CO-OPERATIVE BANK OF KENYA LTD.....4TH DEFENDANT

CHIEF LAND REGISTRAR.....5TH DEFENDANT

RULING

The plaintiff brought this suit on 17th January, 2019 by way of a plaint of the same date. The plaintiff averred that the 1st defendant was her brother and that their mother was one, Gladys Njeri Kaguthi, deceased (hereinafter referred to only as “the deceased”). The plaintiff averred that the deceased died intestate on 8th August, 1995. The plaintiff averred that the 1st defendant secretly obtained a limited grant of letters of administration in respect of the estate of the deceased on 29th September, 1995 for the purposes only of collecting, getting in and receiving the estate and doing such things and may be necessary for the preservation of the estate until a full grant was issued by the court.

The plaintiff averred that the deceased was a joint registered owner of all those parcels of land known as L.R No. 209/136/44 and L.R No. 209/2489/31 (hereinafter referred to as “the suit properties”). The plaintiff averred that a full grant of letters of administration in respect of the estate of the deceased had not been issued. The plaintiff averred that on 30th August, 2005 and 19th February, 2008, the 1st, 2nd and 3rd defendants caused the suit properties to be transferred to their names as the owners thereof.

The plaintiff averred that the 1st, 2nd and 3rd defendants upon being registered as the proprietors of the suit properties proceeded to charge the same in favour of the 4th defendant as security for a loan that was advanced to them by the 4th defendant. The plaintiff averred that she was not aware under what circumstances the 1st, 2nd and 3rd defendants got registered as the owners of the suit properties. The plaintiff averred that whatever the process that was adopted to transfer the suit properties to the 1st, 2nd and 3rd defendants, the same was illegal and fraudulent and as such incapable of creating a good title in favour of the 1st, 2nd and 3rd defendants and a valid charge over the suit properties in favour of the 4th defendant.

The plaintiff averred that as a result of the said illegal and fraudulent transfer of the suit properties to the 1st, 2nd and 3rd defendants and subsequent charging of the same to the 4th defendant, she had been divested of her beneficial interest in the suit properties as a beneficiary of the estate of the deceased. The plaintiff averred that the limited grant of letters of administration obtained by the 1st defendant could not lawfully vest the suit properties on him. The plaintiff averred that by accepting the suit properties as security, the 4th defendant failed to exercise due diligence. The plaintiff averred that since the 1st, 2nd and 3rd defendants held an invalid title in respect of the suit properties, they were incapable of creating a valid charge in favour of the 4th defendant.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 17th January, 2019 seeking the following orders;

- a) That pending the hearing and final determination of this suit or any other related suit between the plaintiff and the 1st, 2nd, 3rd and 4th defendants, a permanent order of injunction do issue restraining the 1st, 2nd, 3rd and 4th defendants from selling or offering for sale either by public auction or otherwise, interfering, disposing, alienating or trespassing or in any other manner dealing with the suit properties.

b) The costs of the suit.

The application that was supported by the affidavit of plaintiff sworn on 17th September, 2019 was brought on the same grounds set out in the plaint that I have highlighted at the beginning of this ruling. In summary, the plaintiff averred that she was a child of the deceased and as such a beneficiary of her estate which comprised of among others the suit properties. The plaintiff averred that using a limited grant of letters of administration issued to the 1st defendant for the purposes only of collecting and preserving the estate of the deceased, the 1st, 2nd and 3rd defendants fraudulently and illegally caused the suit properties to be registered in their names after which they used the same as a security to obtain a loan from the 4th defendant. The plaintiff averred that 1st, 2nd and 3rd defendants did not have a valid title to the suit properties and as such could not create a valid charge in favour of the 4th defendant. The plaintiff averred that sometimes in January, 2018, she learnt with surprise through a notice that was served on a caretaker on one of the suit properties that that one of the suit properties, L.R No. 209/2489/31 was to be sold by public auction through Nguru Auctioneers. The plaintiff averred that she was not aware that the suit property had been used as a security to obtain a loan from a bank.

The plaintiff averred that she learnt from the said notice that L.R No. 209/2489/31 was registered in the name of the 1st defendant as the administrator of the estate of the deceased and that it was charged to the 4th defendant to secure a loan facility that was guaranteed by the 1st defendant. The plaintiff averred that she also learnt that the loan that was secured by the property was not being repaid and that the 4th defendant had planned to exercise its statutory power of sale over the property by selling the same on 26th January, 2018. The plaintiff averred that she filed a suit in the Family Division of the High Court to stop the sale that she withdrew before filing the present suit. The plaintiff averred that she had established a prima facie case with a probability of success against the defendants to warrant the grant of the orders sought.

Through an affidavit sworn by the 1st defendant on 29th June, 2020, the 1st, 2nd and 3rd defendants supported the plaintiff's application. The 1st, 2nd and 3rd defendants averred that the suit properties were registered in the name of the 1st defendant by the 1st defendant's advocate who was acting for him in the Succession Cause in which he had obtained the limited grant of letters of administration. The 1st, 2nd and 3rd defendants averred that the 1st defendant only came to learn later that it was unlawful to transfer the suit properties to his name on the basis of a limited grant of letters of administration. The 1st, 2nd and 3rd defendants averred that in view of that illegality, the validity of the charge in favour of the 4th defendant was in doubt. The 1st, 2nd and 3rd defendants averred that in the circumstances, it was only fair that the suit properties were preserved until the suit was heard and the validity of the charge in favour of the 4th defendant determined.

The application was opposed by the 4th defendant. The 4th defendant is said to have filed grounds of opposition in response to the application but I have not seen the same on record. However, from the 4th defendant's submissions, the 4th defendant opposed the application on the following grounds; the application was res judicata, the suit was an abuse of the process of the court, the plaintiff lacked *locus standi* to maintain the suit and that the balance of convenience tilted against the grant of the orders sought. In the replying affidavit sworn by its Legal Manager, Jackson Kimathi on 16th June, 2020 in which reference had been made to the said grounds of opposition, the 4th defendant contended that the plaintiff's intention was to frustrate the 4th defendant's exercise of its statutory power of sale.

The application was heard by way of written submissions. The plaintiff did not file submissions. The 1st, 2nd and 3rd defendants filed their submissions dated 8th October, 2020 while the 4th defendant filed its submissions dated 5th November, 2020. In their submissions, the 1st, 2nd and 3rd defendants reiterated the contents of their replying affidavit. The 1st, 2nd and 3rd defendants submitted that the issues of the legality of the charge that was created by the 1st, 2nd and 3rd defendants over the suit property in favor of the 4th defendant and whether the limited grant of letters of administration that was issued to the 1st defendant could confer proprietary rights over the suit property on the 1st defendant could only be determined at a full hearing of the suit.

On its part, the 4th defendant submitted that the plaintiff's application was res judicata in that a similar application for injunction that was filed by the plaintiff in the High Court in Nairobi HCCC No. 5 of 2018 was dismissed by that court on various grounds. The 4th defendant averred that whether the High Court was right or not in its decision, the issues raised in the dismissed application could not be raised again for determination before this court which is a court of concurrent jurisdiction. The 4th defendant submitted further that the plaintiff's suit was an abuse of the process of the court in that the plaintiff had filed two previous suits on the same subject matter that she withdrew when she failed to obtain an injunction. The 4th defendant cited Kivanga Estates Limited v National Bank Limited [2017] eKLR and submitted that such conduct amounted to abuse of the process of the court. The 4th defendant submitted that it was not open to the plaintiff to move from one court to the other in search of an injunction.

The 4th defendant submitted further that since the plaintiff had not obtained a full grant of letters of administration in respect of the estate of the deceased, she had no *locus standi* to assert any rights over the suit properties. The 4th defendant submitted that this was one of the grounds on which the plaintiff's application in the High Court was dismissed. The 4th defendant submitted that there was no basis upon which the plaintiff could challenge the 4th defendant's exercise of its statutory power of sale. The 4th defendant submitted that the plaintiff had not demonstrated that she could not be compensated by an award of damages if the injunction sought was not granted.

The 4th defendant submitted that the plaintiff had a remedy in damages that she could claim from the defendants if she proved fraud at the trial. The 4th defendant submitted that if the orders sought were granted, the loan secured by the suit properties would continue increasing. The 4th defendant submitted that the balance of convenience tilted in favour of refusing the orders sought. The 4th defendant submitted also that the conduct of the plaintiff of moving from one court to the other and of not bothering to find out the status of the suit properties for several years could not be rewarded by granting the equitable remedy sought.

In conclusion, the 4th defendant submitted that the plaintiff had not satisfied the principles for granting of a temporary injunction that were set out in Giella v Cassman Brown & Company Limited [1973] E.A 358.

I have considered the plaintiff's application together with the affidavits filed by the plaintiff and the 1st defendant in support thereof. I have also considered the grounds put forward by the 4th defendant in opposition to the application. Finally, I have considered the written submissions that were filed by the parties' and the authorities cited in support thereof. What the plaintiff has sought in its application is a temporary injunction pending the hearing of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In Giella v Cassman Brown & Co. Ltd.(supra), it was held that an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

From the material before the court, I am convinced that the plaintiff has satisfied the principles for grant of a temporary injunction. The plaintiff has established that Gladys Njeri Kaguthi Njuguna(deceased) was at all material times the registered proprietor of the suit properties. The plaintiff has also established that after the death of the deceased on 8th August, 1995, the 1st defendant obtained a limited grant of letters of administration on 29th September, 1995 that he used to transfer the suit properties to himself and subsequently to himself together with the 2nd and 3rd defendants. The plaintiff has also established that the 1st, 2nd and 3rd defendants subsequently charged the suit property to the 4th defendant to secure a loan that was advanced to them. The plaintiff has also demonstrated on a prima facie basis that she is a beneficiary of the estate of the deceased and as such was entitled to participate in the distribution of her estate of which the suit properties are part of.

The plaintiff has demonstrated further that the limited grant that was issued to the 1st defendant did not entitle him to acquire proprietary interest in the suit property neither did it empower him to distribute the estate of the deceased. The plaintiff has demonstrated that the legality of the 1st, 2nd and 3rd defendants' title over the suit properties is questionable and that if the court finds that the 1st, 2nd and 3rd defendants did not have a valid title over the suit properties, the charge that was created by them in favour of the 4th defendant will have no legal foundation and risk being nullified. The plaintiff has demonstrated that the 4th defendant intends to sell the suit properties in exercise of its statutory power of sale to recover a debt of over Kshs. 218,897,496.97 as at 2018 unless restrained by the court.

I am satisfied from the foregoing that the plaintiff has established a prima facie case against the defendants and that she has also demonstrated that she stands to suffer irreparable harm unless the orders sought are granted. I have not found any merit in the grounds put forward by the 4th defendant in opposition to the application. I am not satisfied that the plaintiff is abusing the process of the court. What I can gather from the material on record is that the plaintiff had gone to a wrong forum to pursue her claims against the defendants. That in my view can only be blamed on her legal advisers. There is also no basis for the 4th defendant's contention that the present application is *res judicata*. The 4th defendant has not convinced me that the issues that have been raised before this court were the same ones that were raised before the High Court. The 4th defendant did not also place before the court for perusal the ruling of Musyoka J. said to have been made in HCCC No. 5 of 2018. An issue was also raised about the plaintiff's *locus standi* to bring this suit and that the High Court had held that she had no standing. I have noted from the evidence on record that the plaintiff was issued with a limited grant of letters of administration on 30th May, 2018 in respect of the estate of the deceased for the purposes of filing a suit. There is no evidence that the said grant has been revoked. I am not persuaded therefore that the plaintiff lacks legal standing to maintain this suit.

Even if I had entertained doubt on whether the plaintiff has established a prima facie case, I would still have granted the orders sought. In Ougo and Another v Otieno [1997] KLR 364, it was held that:

“the general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”

The issues of fraud and illegalities raised by the plaintiff cannot be determined on affidavit evidence. It is necessary that the prevailing status quo be maintained pending the hearing of the suit where the said issues would be determined. The 4th defendant has not convinced me that it stands to suffer more prejudice than the plaintiff if the orders sought are granted.

The upshot of the foregoing is that the plaintiff's application dated 17th January, 2019 has merit. The same is allowed on the following terms;

1. The 1st, 2nd, 3rd and 4th defendants by themselves, their servants, agents or others claiming under them are restrained from selling or offering for sale either by public auction or otherwise, interfering, disposing, alienating or trespassing or in any other manner dealing with all those parcels of land known as L.R No. 209/136/44 and L.R No. 209/2489/31.
2. The orders granted in paragraph one (1) above shall be for a period of one (1) year from the date hereof or until the suit is heard and determined whichever comes earlier unless extended by the court for good reason.
3. The sum of Kshs. 600,000/- deposited in court on 23rd June, 2020 as security pursuant to the orders made on 17th June, 2020 shall remain so deposited pending the hearing and determination of the suit or further orders by the court.

4. The costs of the application shall be in the cause.

Dated and Delivered at Nairobi this 22nd day of April 2021.

OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

N/A for the 1st, 2nd and 3rd Defendants

Mr. Kongere for the 4th Defendant

N/A for the 5th Defendant

Ms. C. Nyokabi-Court Assistant