



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E23 OF 2020

FIDELIS NDONYE MAKENZI.....1ST PLAINTIFF

JOHN NDONYE MISI.....2ND PLAINTIFF

VERSUS

GEOFFREY MISI MUTUA.....1ST DEFENDANT

MBULA MBILIKA.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' Notice of Motion Application dated the 7th September, 2020 where they seek the following orders:

1. Spent
2. Spent
3. That an order of temporary injunction do issue restraining the Respondents and/or agents from selling, transferring, evicting any/or dealing with the Lands known as Mavoko Town Block 3/3523 and Mavoko Town 3/2640 and Commercial Plot Nos. 161 and 87, Lukenya Ranching Ltd in any manner adverse to the Plaintiffs' interest pending the hearing and determination of this application.

The application is premised on the grounds on the face of it and the supporting affidavit of JOHN NDONYE MISI where he deposes that the Respondents are administrators to the estate of Jonathan Mutua Misi and he is a blood brother to the deceased while the 1st Applicant is their nephew. He claims the deceased Jonathan Mutua Misi, Misi Makenzo Wilson who is the father to the 1st Applicant and himself purchased a share at Lukenya Ranching and Farming Cooperative Society in 1964 by delivering a cow at the society, which cow they were given by their mother. Further, they elected to have Jonathan Mutua Misi registered as a shareholder to hold the share in trust for Misi Makenzi Wilson and himself, on the basis that he was the first born and on mutual understanding they would distribute proceeds emanating from the said share. He explains that out of the Share No. 290, they were issued with land known as Mavoko Town Block 3/3523; Mavoko Town 3/2640; Commercial Plot No. 161 and 87; Lukenya Ranching and Farming Cooperative Society. Further, they were issued with other parcels of land which were sold to members of the three families and proceeds shared equally. He confirms that land known as Mavoko Town Block 3/3523 is still registered in the name of the deceased Jonathan Mutua Misi while the 2nd Administrator who is his widow has settled thereon. Further, the land known as Mavoko Town 3/ 2640 is still registered in the name of the deceased but he has built a permanent home and settled thereon. He avers that the Administrators in their application for confirmation of Grant have completely refused to acknowledge and/or share out the portions which rightfully belong to them and their families. He reiterates that unless the application is allowed, together with their families, they will suffer irreparable harm by virtue of being dispossessed of their rightful inheritance.

The Defendants opposed the application and filed a replying affidavit sworn by GEOFFREY MISI MUTUA where he deposes that the application is bad in law, frivolous, vexatious and ought to be struck out in limine. He insists the Applicants' claim that the deceased with his mother purchased a share at Lukenya Ranching and Farming Cooperative Society Limited by delivering a cow is false, misleading as well as unsubstantiated misrepresentation of facts. He contends that the available records at the society clarified that Jonathan Mutua Misi is the holder of share No. 290 solely in his name and not in trust of anybody. Further, all the benefits of his shareholding being Land parcel number Mavoko Town Block 3/3523, Mavoko Town Block 3/2640, Commercial Plot No. 161 and 187 are registered solely in the deceased's name and not in trust for anyone. He avers that the Applicants claiming an interest in their brother's estate are driven by greed so as to disinherit the children and deceased's dependants. He denies that proceeds were shared equally by members of the three families. He explains that in 1993 when Jonathan Mutua Misi was involved in a tragic road accident, Mavoko Town Block 3/179 was sold to cater for legal costs and upkeep of the family. He confirms that the deceased constructed a house and settled his 2nd wife (the 2nd Administrator) on Mavoko Town Block 3/3523. He claims that the 1st Applicant through intermeddling with an estate has illegally trespassed thereon and constructed a temporary structure. Further, that he should be evicted therefrom so as to preserve the deceased estate pending distribution in the Machakos

High Court P& A No. 95 of 1995.

The Applicants filed a further affidavit sworn by JOHN NDONYE MISI where reiterates the averments in the instant Notice of Motion application and insists the matter is properly before this court. He insists that the contents of the replying affidavit confirm the share was registered in the name of Jonathan Mutua Misi but no evidence has been annexed to rebut their claim of existence of a trust. He avers that they mutually consented between the deceased, his brother Misi Makenzi Wilson and himself to register the share in the name of the deceased. He denied that they are greedy but insist they seek their rightful share of the land. He confirms that indeed he has constructed on Mavoko Town Block 3/2640 and has resided thereon for over ten (10) years and use it with his family for subsistence farming and the same cannot amount to intermeddling as it arises out of trust. Further, owing to confusion and the joint ownership of the said parcel of land known as Mavoko Town Block 3/2640 as the Certificate of Title appears in the deceased name but the number of the National Identity Card in his name. He states that the Defendants petitioned the High Court for grant of representation and they applied to be enjoined as interested parties. Further, Justice Odunga stayed confirmation of the properties pending the outcome of the instant suit.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 7th September, 2020 including the respective affidavits and rivalling submissions, the only issue for determination is whether the Plaintiffs are entitled to orders of a temporary injunction pending the outcome of the suit.

The Plaintiffs in their submissions reiterate their averments above and insists they have met the threshold set on injunctions. To support their arguments they have relied on various authorities including: **Giella Vs Cassman Brown (1973) EALR 358; Mrao Ltd V First American Bank of Kenya Ltd (2003) eKLR; Habib Bank AG Zurich Vs Eugene Marion Yakub Civil Application No. Nairobi 43 of 1982; Francis Jumba Enziano & Others V Bishop Philip Okeyo & Another Nairobi HCCC No. 1128 of 2001 (unreported); Pius Kipchirchir Kogo V Frank Kimeli Tenai (2018) eKLR; Evans Otieno Nyakwana V Cleophas Bwana Ongaro (2015) eKLR; Margaret Ngoiri Ngotho V Joyce Njeri Njau; and Exclusive Estate Ltd Vs Kenya Posts & Telecommunications Corporation & Another, Civil Appeal No. 62 of 2004.**

The Defendants in their submissions relied on the averments in their replying affidavit and insist the Plaintiffs have not proved trust. They contend that the Plaintiffs have not established a prima facie case with a probability of success. To buttress their averments, they have relied on the following decisions: **Patrick Mathenge Gachii & 3 Other V Karumi Wambugu & Another (2010) eKLR; Manasseh Osiako Nyawira (deceased); and Giella Vs Cassman Brown (1973) EALR 358**

In reference to the decisions of **Giella Vs Cassman Brown (1973) EALR 358 and Mrao Ltd V First American Bank of Kenya Ltd (2003) eKLR**, I will proceed to decipher whether the Plaintiff has established a prima facie case with a probability of success at the trial.

It is not in dispute that the suit land was registered in the name of the deceased. It is further not in dispute that the deceased was a brother and uncle to the Plaintiffs. It has emerged that the Defendants are administrators of the deceased estate while the Plaintiffs lodged objections to the confirmation of the Grant in respect to the said estate. Further, that the High Court has stayed the confirmation of the Grant in respect to the deceased estate pending the outcome of this suit. What is in dispute is the Plaintiffs averments that the deceased held the suit lands in trust for them as their mother paid the purchase price through offering a cow to the aforementioned ranching society which fact is disputed by the Defendants. The Defendants admit the 1st Plaintiff has put up temporary structures on the suit land. Looking at the documents annexed to the supporting affidavit, I find the Plaintiffs' claim is not baseless. I further note that the Plaintiffs had actually objected to the confirmation of Grant in respect to the deceased estate claiming that the deceased held the land in trust for them. Even though the Plaintiffs are not registered as proprietors of the suit lands but noting that the 1st Plaintiff resides in one of the said lands having constructed a permanent home thereon, I opine that it is pertinent to protect the substratum of the suit.

Insofar I find that the Plaintiffs have established a prima facie case, I will not grant the orders as sought but direct that the obtaining status quo be maintained wherein the Plaintiffs should not be evicted from the suit lands, pending the hearing and determination of the suit.

It is against the foregoing that I find that the instant application merited and will allow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1ST DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE