



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC 51 OF 2019

MIRIAM NYAMBURA MWENJA.....1st APPLICANT/PLAINTIFF

FLORA MUTHONI MWENJA.....2nd APPLICANT/PLAINTIFF

(Suing as the legal representatives

of the Estate of Mwenja Ngure

Alias Ezekiel Mwenja Ngure alias

Ezekiel Mwenja Ngure)

VERSUS

SUSAN MURINGI WACHIRA.....RESPONDENT/DEFENDANT

RULING

1. Vide an Application by way of Notice of Motion dated 17th October 2019 brought under *Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules, Section 1A, 1B and 3A, of the Civil Procedure Act and Section 45 of the Law of Succession Act, and all enabling provisions of the law applicable, the Applicants seeks for the following orders:*

i. Spent

ii. Spent.

iii. Spent.

iv. Spent

v. That pending the hearing and determination of this suit, a temporal injunction do issue restraining the Respondent by herself, her children, her agents and/or employees from entering, remaining, occupying, leasing out and/or in any other way interfering with LR No. 6585/185, 6585/197 and 6585/268 Nyahururu Municipality.

vi. That costs of this Application be provided for.

2. The Application was supported on the grounds on the face of the same and the affidavit of Miriam Nyambura Mwenja sworn on an equal date.

3. It is worth noting that after the above Application was filed. The Applicant sought for ex-parte orders for prayers No. 1, 2 and 3 of the Application citing the fact that the Respondent had trespassed on the suit property and taken possession where she was demanding rent from the tenants thereof despite the fact that she neither a family member nor a beneficiary of the deceased's estate. That further, the Respondent had placed a padlock on the entrance door of 1st floor building where the electricity meter box was placed thereby hampering the reading of the same by the KPLC personnel thus risking disconnection of power if the said personnel were to be denied access to the meter box.

4. The Court having considered the submissions by Counsel for the Applicant ex-parte granted prayer 1 and 2 of their Application to the effect that the matter was certified as urgent, and the Respondent was directed to remove the padlock placed on the main entrance of the 1st floor on LR. No. 6585/268- Nyahururu Municipality with immediate effect. In the alternative, the Applicant was allowed to break it open

under the supervision of the OCS Nyahururu Police Station.

5. The Application was served upon the Respondent wherein she filed her Replying Affidavit on the 1st November 2019.

6. On the 5th November 2019 when the matter came up for hearing, the Court was informed that although prayer 2 of the Application had been complied with, parties were not ready to proceed as the Respondent had served her response that morning.

7. The matter was then rescheduled for hearing for the 19th November 2019 where Counsel for the Applicants, pursuant to the provisions of Order 19 Rule 2 of the Civil Procedure Rule, sought to Cross examine the Respondent on the contents of her Replying Affidavit sworn on 1st November 2019 on the allegation made against his firm to the effect that since they had been acting for her previously, they were holding vital documents including a Will which she intended to rely on in this matter.

8. The Application was allowed and the Court conducted a trial within a trial wherein it delivered its ruling dismissing the Respondent's allegations as being baseless.

9. The Court then set down the matter for hearing of the main Application dated 17th October 2019 inter-parties for the 3rd February 2020 on which day the Applicants' Counsel submitted that they now sought for orders in prayers 5 and 6 on the face of their Application, prayer No. 4 having been executed.

10. That they were relying on the grounds set out on the face of the Application and on the two affidavits dated the 17th October 2019 and 18th November 2019 sworn by the Applicants respectively as well as the annexures attached thereto.

11. That prayer No. 5 of their Application sought temporal injunctive orders restraining the Respondent from committing the acts mentioned thereto in respect of LR. No. 6585/185, 6855/197 and 6585/268.

12. That as per annexure marked as MNM2 which were copies of certificate of titles, it was clear that the properties were registered to the deceased, one Ezekiel Ngunjiri.

13. That the Applicants were the legal Administrators of the deceased registered proprietor as per the attached Grants issued to them on the 7th May 2018 by the Nakuru High Court in Succession Cause No. 257 of 2017 herein marked as MNM1.

14. That pursuant to the provisions of Section 79 of Law of Succession Act, the Administrators to whom representation had been granted, were the personal representatives of the deceased for all purpose of that grant and all properties of the deceased vested in them therein.

15. He further submitted that one of the powers granted under Section 82 (a) of the Law of Succession Act was the power to enforce by suit or otherwise all causes of action which by virtue of law survived the deceased or arose out of his death for his estate.

16. That it was vide the said provision of the law that the Applicants were exercising that power in seeking orders of injunction to protect the deceased's Estate comprised of the suit properties, from being interfered with by the Respondent in this matter.

17. That the acts of interference had been set out in paragraphs 5, 6, 7, and 8 of their Supplementary Affidavit sworn on 12th October 2019 wherein they had attached a copy of the demand notice issued by the Respondent to the tenants in occupation of parcel No. 6585/268 demanding for rent in her capacity as owner of the property.

18. That the interference of the property had been exhibited when the Respondent placed a padlock on the entrance of the 1st floor of the properties on the 12th October 2019 thereby denying the Applicants and tenants access. That the matter had been reported at Nyahururu Police Station as per annexure No. MNM 5.

19. That the Respondent had not denied these allegations in her Replying Affidavit dated 1st November 2019 but had sought to justify her acts by claiming to be a beneficiary of the estate of the deceased on allegations that she had been bequeathed the property through an alleged will which did not exist and in addition that her name did not appear on the Chief's letter dated 5th September 2017 as one of the beneficiaries of the estate of the deceased, as per their annexure marked as MNM 3.

20. That her assertion that she was a beneficiary of the estate of the deceased should have been channeled through Succession Cause No. 257 of 2017 pending in Nakuru High Court . But she had not filed any pleadings for the suit properties to be transferred to her.

21. That the allegations of the existence of a will was dismissed in a trial within a trial held on the 26th November 2019 by the Court. That the Respondent was yet to file an Appeal upon the said dismissal. The Respondent had also not filed a counter claim against the Applicants.

22. That the Applicants had demonstrated that they had a prima facie case against the Respondent whereby should the orders for injunction not be issued, there would be irreparable loss and damage occasioned on the suit properties to the effect that the tenants would flee from the premises and rent would be lost to the deceased's Estate. That further, there would be a threat of disconnection of electricity from the main meter box if the entrance to the 1st floor was kept locked. That the interference would subsequently lead to depreciation of the estate with the result that there would be nothing left to distribute in the Succession Cause.

23. Counsel submitted that the Court do protect the interested proprietors against trespass. They relied on the case of **Mohammed T Komen**

& 2 Others vs Abdulghani Mohammed Komen & 2 Others [2009] eKLR and urged the Court to allow their Application.

24. That on the balance of convenience, the same tilted in their favor.

25. In response and in opposition of the Applicant's Application the Respondent who appeared in person submitted that she was the beneficiary of plot No. 197, 185 and 268. That she lived on plot No. 197 and 185 which was a double plot. That Plot No. 268 was about 100 meters from where she lived.

26. She submitted that she had objected to the proceedings in the Nakuru High Court Succession Cause and that the Applicants were the ones who had interfered with her properties when they broke the padlock she had placed thereon.

27. She further submitted that the deceased was her father's father, making him her grandfather and she, his granddaughter.

28. When questioned by the Court, the Respondent had submitted that although her father was alive, he had sided with the Applicants and had her mother had sometimes sided with her. She confirmed that although the suit properties belonged to Ezekiel Mwenja, yet he had signed a Will bequeathing them to her.

Analyses and Determination.

29. Having heard submissions by both sides as well as having regard to the annexures filed herein, the pending issue for determination is whether this Court should grant the Applicants the interim injunction sought pending the hearing of the suit.

30. The celebrated case of **Giella vs Cassman Brown (1973) EA 358** sets out the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction by firstly establishing and demonstrating that they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

31. On the first issue as to whether the Applicant/Applicants in this matter had made out a prima facie case with a probability of success. I am guided by the case of **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125**, where a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

32. Looking at the facts of this case, the Court has been moved under certificate of urgency, by the Applicant, to issue temporary injunction against the Respondent. At this stage, the Court is only required to determine whether the Applicants are deserving of the Orders sought. The Court is not required to determine the merit of the case.

33. Have the Applicants herein demonstrated that they have a genuine and arguable case? In asserting their ownership rights over the suit property, they annexed a copy of a letter from the Chief of Viwanda Location showing the dependents of the deceased Ezekiel Mwenja Ngire, they also attached a copy of the Grant of letters of Administration interstate issued in High Court at Nakuru in Succession Cause No. 259 of 2019 to show that they were administrators of the deceased's Estate, and copies of titles to parcels of land No. *LR No. 6585/185, 6585/197 as well as a letter of allotment to plot No. 6585/268* showing that the deceased was the registered proprietor of the suit properties. Save for the letter of allotment, the law is very clear on the position of a holder of a title deed in respect of land.

34. **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible ownerand the title of that proprietor shall not be subject to challenge...”

35. In light of the above, this Court finds that the Applicants have established that indeed the deceased was the duly registered proprietor of the suit properties and therefore entitled to all the rights appurtenant thereto unless otherwise proved during the hearing of the main suit. They further established that the Applicants were the deceased's legal administrators and therefore under Section 82(a) of the Law of Succession Act had power to enforce by suit or otherwise all causes of action which by virtue of any law survive the deceased or arise out of his death for his personal representative.

36. By virtue of the fact that the deceased had been issued with a certificate of lease, prima facie his titles were indefeasible and the burden therefore shifted to the Respondent to show or demonstrate that the titles were challengeable within the provisions of the law.

37. On the second issue as to whether the Applicants would suffer irreparable harm if the injunction was not granted, I have considered the Applicants' submissions and seen the attached a copy of the demand notice allegedly issued by the Respondent to the tenants in occupation of parcel No. 6585/268 where she was demanding for rent in her capacity as owner of the property.

38. With due respect, the said notice bears neither date, nor reference to any of the suit properties herein. However the mere fact that the Respondent herein had interfered with the deceased's property by placing a padlock on the entrance of the 1st floor of the properties thereby

denying the Applicants and tenants therein access to the building in my view consisted of actions which would have led to the tenants fleeing from the premises hence depriving the estate of its rent thereby leading to irreparable loss and damage as submitted by Counsel herein.

39. It was wrong for the Respondent to interfere with the deceased's estate without following the due process. The balance of convenience if I had doubt, tilts in favour of the Applicants who have the letters of Administration.

40. However, since it is not denied that the Respondent resides on plot No. 6585/185 and 6585/197, (see para 5 of the supporting Affidavit) it is herein ordered as follows:

i. Parties shall maintain status quo as granting the orders so sought would lead to the eviction of the Respondent which is premature at this stage.

ii. So that the *status quo* is not changed through the Respondent's illegal actions, although she shall remain on the plots she is in occupation of at the moment, she *is hereby injuncted, by herself, her children, her agents and/or employees from leasing out, and/or in any other way interfering with LR No. 6585/185, 6585/197 and 6585/268 in a manner that would lead to its alienation and/or depreciation, pending the hearing and determination of this suit.*

iii. Further orders are that no party shall sell, dispose or transfer the suit properties until the suit is heard and determined.

iv. The interim order granted herein on 22nd October 2019 is accordingly vacated and varied in terms of (i), (ii) and (iii) above.

v. The result is that the Applicant's Notice of Motion dated 17th October 2019 succeeds partially.

vi. The costs of the Application shall be in cause.

vii. The parties are hereby directed to comply with the provisions of Order 11 of the Civil Procedure Rules within 30 days from today so that the matter can be set down for hearing.

Dated and delivered at Nyahururu this 6th day of May 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE