



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 11 OF 2020

MULEE KIOKO MULWA1ST PLAINTIFF

ROBERT MUTUKU KIOKO (*Suing as the next of kin to and on behalf of the estate of Benard Kioko Mulwa-Deceased*) 2ND PLAINTIFF

-VERSUS-

MARGARET MWIKALI MUSYIMI 1ST DEFENDANT

PETER MWANGANGI MUSYIMI (*Being sued as the next of kin to and on behalf of the estate of Musyimi*

***Musila Mweki alias David-Deceased*) 2ND DEFENDANT**

RULING

1. The application for determination is dated 10th July, 2020 and filed by the Plaintiffs/Applicants under certificate of urgency of even date. It is brought under Order 40 Rules 1(a) and 2(1) of the Civil Procedure Rules, Sections 1A(1),2,3 and 3A of the Civil Procedure Act and all enabling provisions of the Law.

2. The Applicants seek the following Orders:

i) Spent.

ii) Spent.

iii) THAT this Honourable Court be pleased to order that Succession Cause No. 59 of 2013 – Makueni Chief Magistrates Court be stayed pending the hearing and determination of this application.

iv) THAT an order of temporary injunction do issue against the Defendants/Respondents, their agents and/or any other persons claiming under them restraining them from subdividing, alienating, disposing of and/or in any other way interfering with land parcel No. Makueni/Unoa/346 or any other plots emanating from any subdivision therefrom which form part of Makueni/Unoa/346 pending the hearing and determination of this suit.

v) Spent.

vi) THAT any such other or further orders as may serve the ends of justice.

vii) THAT the costs of this application be provided for.

3. The application is supported by the affidavit of Robert Mutuku Kioko sworn on 10th July, 2020 on his behalf and that of the 1st Plaintiff/Applicant. The basis of the application is that Benard Kioko Mulwa (Deceased) lawfully purchased 4.5 acres of land from Musyimi Musila Mweki alias David (Deceased) which were to be excised from Makueni/Unoa/346 (the suit property) measuring approximately 29.5 acres. That upon receipt of the title deed to the suit property, the late Musyimi Musila Mweki did not excise the agreed portion from the suit property. That the Defendants/Respondents took out a grant of letters of administration in respect of the estate of the late Musyimi Musila vide Makueni PMCC Succession Cause No. 59 of 2013 but failed to disclose the purchaser's interest in the suit property. That the letters of

administration issued to the Defendants/Respondents could be confirmed at any moment risking the suit property to being transmitted to other persons and thus necessitating the stay of the succession proceedings. That the Plaintiffs/Applicants have established a *prima facie* case with a high probability of success. That the Applicants have also established that they would suffer irreparable harm incapable of being compensated with money since land disputes are highly emotive. That the balance of convenience favours the issuance of the orders sought so as to preserve the suit property.

4. Opposing the application is the 2nd Defendant/Respondent vide the Replying Affidavit sworn by Peter Mwangangi on 24th July, 2020. The affiant deposed that the sale agreements relied on by the Applicants were not valid because the Applicants' deceased father (Purchaser) did not obtain the requisite Land Control Board consent within six months of execution of the agreements. That the Respondents' deceased father (Vendor) could not have given possession of the 4.5 acres to the purchaser. That the Purchaser rescinded the agreement after he was unable to have the 4.5 acres excised from the suit property before the Vendor obtained his title deed. That in 1971 at the time when the sale agreements were being done, the Vendor had no saleable interests in the suit property which only accrued to him after registration of the land in the year 2008. That the Applicants had also applied for revocation of the grant issued to the Respondents in Makueni Succession Cause No. 59 of 20113 but their application was dismissed. Lastly, the affiant deposed that the application has no merit and that the suit lacks any probability of success.

5. In a further affidavit sworn by Robert Mutuku Kioko on 28th July, 2020, the 2nd Applicant deposed that the 2nd Respondent had acknowledged that there indeed had been a sale of land to the Purchaser. That at the time of sale, there was no land control board consent to be obtained since the suit property was unadjudicated. That the 2nd Respondent also acknowledged that the suit property had not been surveyed hence explaining the lack of a particular registration number. That the averment by the 2nd Respondent that the Vendor sold the 4.5 acres to the 2nd Respondent is an afterthought because the Vendor was already dead in 2008. Lastly, he deposed that the agreement between the Vendor and the Purchaser was never rescinded especially at the behest of the Purchaser.

6. The 1st Respondent, who is the mother to the 2nd Respondent, elected not to oppose the application when the matter was before court on 29th July, 2020 for directions, admitting through her advocates on record that the 4.5 acres claimed herein was indeed sold by the Vendor to the Purchaser.

7. The Applicants filed their submissions on 22nd October, 2020. It is their submission therein that they have satisfied the legal requirements set out under Order 40 of the Civil Procedure Rules, 2010. Again, they submitted that they have established the principles for grant of the injunctive orders sought as outlined in the case of **Giella -Vs- Cassman Brown & Co. Limited [1973] 1 EA 358.**

8. Firstly, in submitting that they have established a *prima facie* case, the Applicants asserted that the 2nd Respondent had acknowledged in paragraphs 4, 5, 6, 7 and 9 of his replying affidavit that a sale agreement had been executed by the Vendor and the Purchaser. Further, the 2nd Respondent had alleged rescission of the agreement for sale in paragraph 8 of his replying affidavit yet no evidence was presented to confirm that the Vendor refunded the purchase price. Secondly, the Applicants have submitted that they stand to suffer irreparable harm should this court decline to grant the injunctive orders. This is because the 2nd Respondent has refused to acknowledge the Applicants' interest in the suit property and further, the letters of administration in Makueni PMCC Succession Cause No. 59 of 2013 are set for confirmation without having ascertained ownership of the suit property. The said confirmation of grant will avail the suit property for distribution and loss of the suit property cannot be recompensed by way of damages. Lastly, the Applicants submitted that the balance of convenience tilts in favour of the injunctive orders being granted. They submit that the suit property is at the risk of being distributed and hence diminishing their claim against the Respondents. Also, it is submitted that the Respondents will suffer no prejudice because should the Plaintiff's claim collapse then the Respondents can freely proceed to subdivide the property in terms of the confirmed grant of the probate court.

9. The Applicants relied on the following sets of authorities: -

Ø **Naftali Ruthi Kinyua -Vs- Patrick Thuita Gachure & another [2015] eKLR;**

Ø **Samuel Ouma Omoro -Vs- Michael Okinyi Otieno & 3 others [2012] eKLR;**

Ø **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR**

10. The Respondents did not file submissions as per the directions of this court issued on 29th July, 2020. I have examined the application, the affidavits in support thereof and the reply together with the submissions on record. The prerequisite conditions for a grant of the orders sought under Order 40 Rule 1(a) were determined in the celebrated case of **Giella -Vs- Cassman Brown & Co Ltd [1973] 1 EA 358 at 360 (CAK)** as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

11. On the aspect of whether the Plaintiffs/Applicants have established a *prima facie* case, I am guided by the Court of Appeal findings in **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR** wherein it held:

“4. 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.”

12. From the annexures “**RMK 1a & 1b**” placed before me, it is not in doubt that part of the suit property measuring 4.5 acres was sold to the Purchaser by the Vendor in or about 1971. The suit property measures approximately 29.5 acres. This fact has been admitted by both Respondents herein. Nonetheless, the 2nd Respondent has contested that the said sale agreements were invalid and further that the Applicants’ deceased father rescinded the sale agreements after being unable to pay the full purchase price. However, I have not seen the alleged rescission notice that was issued by the Purchaser. I have also not seen any acknowledgement of refund of purchase price paid in 1971. In the absence of any contrary evidence against the sale agreements herein, I am convinced that the Plaintiffs/Applicants have established a *prima facie* case with a high probability of success that they hold purchaser’s interest in the suit property.

13. On irreparable injury/loss, the basis of the application is that the Applicants stand to lose property which was purchased in 1971 by their late father. This apprehension is buttressed with the fact that the entire suit property has been earmarked for distribution should the letters of grant issued in Makueni PMCC Succession Cause No. 59 of 2013 be confirmed. I find that apprehension of irreparable loss justified in the circumstances.

14. Lastly, the balance of convenience must at all times tilt towards safeguarding the property from transmission to unsuspecting third parties who may not be aware of the property dispute. It is therefore right to surmise that the balance of convenience tilts in favour of issuance of injunctive orders in favour of the Applicants.

15. Given my findings above, it is my view that the Applicants have established sufficient basis for the grant of injunctive orders. I am however disinclined to stay the succession proceedings for want of jurisdiction in accordance with Section 13 of the Environment and Land Court Act, 2011. The application is accordingly allowed in terms of Prayer 4. Costs shall abide the outcome of the main suit.

Signed, dated and delivered via email at Makueni this 4th day of **August, 2021**.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi.