



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 72 OF 2006

MARGARET NGINA F. MUTUA (Suing as the legal representative of the Estate of ALICE
MWOSE NZIOKA – Deceased.....CLAIMANT /APPLICANT

VERSUS

MARTIN NZIOKA MUTUA1ST RESPONDENT
JOSEPHINE MUKONYO MUTUA.....2ND RESPONDENT
LUKENYA RANCHING & FARMING CO-OPERATIVE SOCIETY...3RD RESPONDENT
DISTRICT LAND REGISTRAR, MACHAKOS.....4TH RESPONDENT
THE HON. ATTORNEY GENERAL.....5TH RESPONDENT
MAMUCO SACCO LIMITED.....6TH RESPONDENT

RULING

1. Before this Court is the Notice of Motion Application dated 4th November, 2019 and filed by the Claimant/Applicant on 4th November, 2019. Through the said Application, the Claimant/Applicant sought for the following orders: -

a. That the Honourable Court be pleased to issue prohibitory orders against all pieces or parcels of land in parcel known as Land Reference Numbers Mavoko Town Block 3/2268 registered in the name of the 2nd Respondent.

b. That the Court be pleased to grant a prohibitory injunction restraining the 2nd Respondent whether by themselves, their agents and/or servants from evicting the Claimant from all that parcel of land known as Land Reference Numbers Mavoko Town Block 3/2268.

c. That the costs of this Application be borne by the said Respondents.

I.The Claimant's/Applicant's case

2. This matter revolves around the ownership of land known as Mavoko Town Block 3/2268 (*hereinafter referred to as "the suit property"*). The Notice of Motion Application is supported by the 19 paragraphed Affidavit of one Margaret Ngina F. Mutua and the annexures attached thereof dated and sworn on 4th November, 2019 by the Deponent.

3. The Claimant/Applicant deponed that she was the co-wife to the 2nd Respondent, Ms. Josephine Mukonyo Mutua, both of them having been married to the deceased, one Geoffrey Mutua (*hereinafter referred to as "the deceased"*). The deceased was the son of Alice Mwose Nzioka, who is also deceased.

4. The Claimant/Applicant deponed that as fate would have it, upon the demise of Alice Mwose Nzioka, her mother-in-law, on 23rd October, 2003 and without a Succession Cause being filed to distribute and administer the deceased's Estate, her co-wife, the 2nd Respondent, together with her son, Martin Nzioka Mutua, the 1st Objector/Respondent herein, acting in a conspiracy to defraud the Claimant/Applicant, wrote to

Lukenya Ranching & Farming Cooperative Society, the 3rd Respondent, a letter dated 29th August, 2004 instructing the officials of the Society to transfer the suit property to the 2nd Respondent allegedly claiming that she was the sole beneficiary of the Estate.

5. The Claimant/Applicant deponed that without undertaking any investigation nor establishing the truth on the succession cause on the administration and distribution of the estate, Lukenya Ranching and Farming Cooperative Society did a mis-instruction by allegedly transferring the suit plot that was previously allocated to the Claimant's/Applicant's mother in law – Alice Mwose Nzioka to her co-wife – Josephine Mukonyo Mutua, the 2nd Respondent herein. It was deponed that the 3rd Respondent also irregularly issued to the 2nd Respondent with a title deed.

6. The Claimant/Applicant deponed that upon noting the fraud meted by these parties, she applied for the Grant of Letters of Administration Ad-litem on 17th July, 2006 with respect to the deceased's Estate for the purpose of instituting a suit and it was at that point that she filed the current suit seeking for the following orders:

- a. The cancellation of the Title Deed issued to Josephine Mukonyo Mutua, the 2nd Respondent; and
- b. An order for injunction to issue against the 1st, 2nd, 3rd & 4th Defendants/Respondents restraining them from interfering in any manner the said suit plots.

7. It is the Claimant's/Applicant's deposition that the suit has been pending hearing for a while and that on 24th October, 2019, she was served with a demand letter dated 12th September, 2019 authored by the 2nd Respondent demanding that she demolishes the building structure on the suit land – Mavoko Town Block 3/2268 and vacate from it within 65 days from the date of service of the letter or else she would be forcefully evicted.

8. According to the Claimant/Applicant, she has lived on the land for over 25 years; that the 2nd Respondent had on several occasions tried to evict her from the suit land; that the 2nd Respondent previously filed several court suits to this effect and that these suits had been dismissed and the court had directed that the matter be heard at a full trial.

9. It's the Claimant/Applicant prayers that she be granted prohibitory injunction orders restraining the 2nd Respondent from evicting her from the land as she was bound to suffer great prejudice should that happen and that the 2nd Respondent was likely to alienate the land thereby rendering the whole suit nugatory and causing her and her family irreparable harm.

II. The Respondent's Case

10. There does not seem to be any replies by the 1st, 3rd, 4th and 5th Respondents placed on record. However, in the course of time, the 6th Respondent sought to be enjoined as an interested party in this matter and the request was granted.

11. The 2nd Respondent filed her Replying Affidavit dated 4th November, 2020 on 6th November, 2020. Subsequently, upon being enjoined, the 6th Respondent also filed both Grounds of Opposition dated 9th February, 2021 and an 18 paragraphed Replying Affidavit dated 9th February, 2021 and filed in court on 9th February, 2021 together with written submissions dated 22nd March, 2021 and filed in court on 24th March, 2021.

12. The 2nd Respondent deponed that she was the registered and absolute proprietor of the suit property. She annexed a copy of the Title Deed. 2nd Respondent deponed that the Claimant/Applicant has no right to the suit property; that the Applicant was a trespasser having erected structures on the suit land and that the Claimant/Applicant has no equitable, legal or any protectable right or interest over the suit land.

13. It was the deposition of the 2nd Respondent that the Claimant's/Applicant's Application did not meet the logical threshold to be granted prohibitory injunction as she had no *prima facie* case with a probability of success and that there was no evidence of irreparable damage that could not be remedied by an award of damages or that the balance of convenient tilts in her favour.

14. The 6th Respondent's Chairman deponed that through a purchase agreement dated 18th June, 2020, the Sacco purchased the suit land as a purchaser for value from Josephine Mukonyo Mutua, the 2nd Respondent, who was the absolute and legally registered owner of the parcel of land with all rights of its ownership. He asserted that the Title Deed was not jointly or severally owned between the Claimant/Applicant and the 2nd Respondent.

15. The deposition by the Chairman for the 6th Respondent was that before purchasing the suit land, the SACCO conducted due diligence; that the SACCO conducted an official search in the year 2010 and established that the suit land belongs to the 2nd Respondent and that the suit property was free from any encumbrances or Caution.

16. According to the 6th Respondent, the Claimant/Applicant has failed to provide any proof of marriage, whether traditional or civil, nor filed any succession cause in respect to the Estate of the deceased who died in the year 1999; that the Claimant/Applicant had not attached any Grant of Letters of Administration for either the said husband- Mr. Geoffrey Mutua Nzioka's Estate or Alice Mwose Nzioka who died in the year 2003.

III. The Submissions:

17. The Advocate for the Claimant/Applicant submitted that the 2nd Respondent was the wife of Geoffrey Mutua Titus – the deceased, who was the only child of Alice Mwose Nzioka who is also deceased and that the Applicant’s mother-in-law was a bona fide member No. 66 of Lukenya Ranching and Farming Cooperative Society, the 3rd Respondent.

18. Accordingly, it was submitted, upon the death of the aforementioned mother-in-law on 23rd October, 2003 and without the Claimant’s/Applicant’s knowledge or the filing of the succession cause, the 2nd Respondent, together with the 1st Respondent in a conspiracy to defraud the Claimant/Applicant, wrote to the 3rd Respondent instructing the officials of the 3rd Respondent to transfer the suit property to the 2nd Respondent on the ground that she was the sole beneficiary of the estate. The Advocate submitted that as a result, the 3rd Respondent illegally transferred the suit land and irregularly issued the Title Deed to the 2nd Respondent.

The submission by the 6th Respondent

19. The Advocate for the 6th Respondent submitted that in the year 2010, while searching for a parcel of land to purchase for its members, the 2nd Respondent offered to the 6th Respondent the suit property and that the 6th Respondent conducted an official search at the Machakos Land Registry and the outcome showed that the 2nd Respondent was the legal and absolute registered owner to the property.

20. It was submitted that as at the time of the search, there was no caution or prohibition registered against the land; that the 6th Respondent bought the land at the sum of Kenya shillings twenty two million seven hundred and ninety thousand (*Kshs. 22,790,000.00*) and that the 6th Respondent moved onto the land, sub-divided and apportioned it to its registered members who took occupation of the same.

21. Counsel submitted that the 6th Respondent came to learn that the Claimant/Applicant had filed two civil suits being Succession Cause (*Machakos*) No. 352 of 2006 in the year 2006 and ELC (*Machakos*) No. 72 of 2006 and that the two suits remained unprosecuted until the year 2017.

22. To support their submission, the Advocate for the 6th Respondent relied on two authorities being ***High Court (ELC) (Kiambu) Civil No. 5 of 2015 (OS) MWK vs. AMW*** on the interpretation of the term “contribution” and who was a spouse and whether such a spouse was entitled to the Estate of the deceased and ***ELC (Nyeri) No. 96 of 2016 – Edward Mwangi Irungu vs. The Chief Land Registrar And 3 Others*** where the court held:-

“The Registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described on the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

23. The Advocate for the 6th Respondent urged this Honourable Court to dismiss the Application with costs.

IV. Analysis and Determination

24. This court has considered the Affidavits and the annexures, the Submissions, the authorities filed by the parties and the relevant law with regard to the Notice of Motion Application filed herein by the Claimant dated 4th November, 2019. From the filed pleadings, the issues for determination are as follows:

1. Whether the Claimant/Applicant is entitled to the prohibitory injunction orders sought.
2. Who shall bear the costs of the application.

Whether the Claimant/Applicant is entitled to the prohibitory injunction orders sought?

25. In deciding whether or not to grant the prohibitory temporary injunction orders, I will rely on the precedent set out in the now famous case of ***Giella vs. Cassman Brown (1973) EA 358*** in which the conditions for the grant of an interlocutory injunction as the one sought herein by the Claimant/Applicant have been settled as follows:-

“The conditions for the grant of 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 be normally 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.”

26. The main issue to consider is whether the Claimant/Applicant, while seeking prohibitory injunction orders has made out a prima facie case with a probability of success. In the case of ***Mrao vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125***, “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 equitable case.” It is a case which, on the matter 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 explanation or rebuttal from the latter.”

27. The Claimant/Applicant’s case is that she was a co-wife to the 2nd Respondent, both having been married to one Geoffrey Mutua Titus

Nzioka who died on 29th April, 1999. According to the Applicant, the deceased was the only son to one Alice Mwose Nzioka who is also deceased.

28. It was the deposition of the Applicant that before her death, Alice Mwose Nzioka held shares in the Society which gave rise to the suit land and that she has lived on the suit land all along. However, by way of a letter dated 29th August, 2014, the 1st and 2nd Respondents informed the 3rd Respondent that the 2nd Respondent is the sole beneficiary of the Estate of Alice Mwose Nzioka.

29. It is the Applicant's case that on the basis of the said letter, the 3rd Respondent issued to the 2nd Respondent a Title Deed for land known as Mavoko Town Block 3/2268 (*the suit property*). In the course of time, and while this case was still subsisting, the 2nd Respondent sold the suit property to the 6th Respondent who caused it to be sub-divided and issued shares to its registered members.

30. It is not in dispute that the Claimant/Applicant has been in possession and occupation of the suit property in whatever capacity for the time being. The 2nd Respondent has not denied that indeed the suit property was owned by her mother in law, and that she was issued with a Title Deed by the 3rd Respondent on the basis that she was the only one entitled to the said land.

31. In view of the fact that the Applicant has pleaded that she was a co wife of the 2nd Respondent, and that she was equally entitled to inherit that which belonged to her late mother in law and husband, she has shown that she has a right which has apparently been infringed by the opposite parties as to call for an explanation or rebuttal from them. The said rebuttal can only be conclusively determined by the court upon trial.

32. Considering that the Applicant is in occupation of the land, she will suffer irreparable injury that cannot be compensated by way of damages if the injunctive order is not issued. Indeed, no prejudice nor damage will be suffered by the Respondents if the Applicant continues to be in occupation of the suit land until the matter is heard and determined.

33. To that extent, therefore, I am of the view that at this interlocutory stage, the Claimant/Applicant has established a '*prima facie*' case with probability of success, and will suffer irreparably unless the order of injunction is issued.

34. For those reasons, the Application dated 4th November, 2019 is allowed as follows:

a. A temporary order of injunction is hereby issued restraining the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents by themselves, their agents and/or servants from dealing in any manner whatsoever or evicting the Claimant/Applicant from all that parcel of land known as Land Reference Number Mavoko Town Block 3/2268 pending the hearing and final determination of this suit.

b. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021

O. A. ANGOTE

JUDGE