



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELCC NO. 19 OF 2020**

**MARYANNE CHEPKORIR & NATHAN WILLIAM HINGA**

**(Suing as the administrators of the estate of TONY HINGA NJENGA alias**

**LAWRENCE ANTHONY HINGA (Deceased).....PLAINTIFFS**

**VERSUS**

**NYOIKE NJENGA HINGA.....1<sup>ST</sup> DEFENDANT**

**CHARLES KIBANDI KAGUOYA**

**(Sued as the executor of the will of ISABELLA MUTHONI NJENGA alias ISABELLA**

**MUTHONI HINGA alias MUTHONI NYOIKE HINGA).....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**SETTLEMENT FUND TRUSTEES.....4<sup>TH</sup> DEFENDANT**

**DIRECTOR OF PHYSICAL PLANNING.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. By Notice of Motion dated 3<sup>rd</sup> March 2020, the plaintiffs seek the following orders:

1. [Spent]

2. [Spent]

3. THAT pending the hearing and determination of this suit this Honourable Court be pleased to issue a temporary injunction restraining the Defendants/Respondents by themselves, their agents and or servants from selling, leasing, occupying allocating, transferring and or subdividing the parcel of Land known as L.R NO. 9216 or in any way interfering in any manner whatsoever.

4. THAT the costs of this application be provided for.

2. The application is supported by an affidavit sworn by Maryanne Chepkorir, who deposed that she is an administrator of the estate of the late Tony Hinga Njenga alias Lawrence Anthony Hinga. She deposed further that Tony Hinga Njenga was the first-born child of the late Benard Njenga Hinga who passed away on 27<sup>th</sup> December, 2006 and who by a written will bequeathed to the late Lawrence Anthony Hinga L.R 9216 (the suit property) among other assets. That upon the death of Benard Njenga Hinga, Nairobi H.C Succession Cause No. 796 of 2007 was filed in court by the late Lawrence Anthony Hinga and the matter is still pending in court. That while the succession cause was still pending, the 1<sup>st</sup> Defendant purporting to be the executor of the will of Isabella Muthoni Hinga alias Muthoni Nyoike Hinga transferred the suit property to the 1<sup>st</sup> Defendant who thereafter transferred it to the 4<sup>th</sup> Defendant herein.

3. The applicant further stated that she has also become aware that the 4<sup>th</sup> Defendant wishes to subdivide the suit property and has already

commissioned the 5<sup>th</sup> Defendant to plan and cause subdivision of the said property for settlement of third parties. She added that the 3<sup>rd</sup> defendant caused transfer of the suit property from Benard Njenga Hinga on the basis of forged transfer documents and that she has reported the matter to the police who are investigating the same with a view of preferring charges to those who were involved in the fraud.

4. She went on to depose that at the time of registering the transfer of the suit property in favour of Isabella Muthoni Njenga there was a charge in favour of A.F.C and thus by the time of the purchase, the property was not available for sale as it was still charged in favour of AFC and no such sale would take place before discharge of title.

5. In response to the application, replying affidavits sworn by Nyoike Njenga Hinga, Charles Kibandi Kaguoya and Paul Kiiru Mwangi were separately filed.

6. Nyoike Njenga Hinga deposed that he is the sole beneficiary of the estate of Isabella Muthoni Njenga alias Isabella Muthoni Hinga alias Muthoni Njenga Hinga who was his mother who passed away on 25<sup>th</sup> September, 2011 and that upon her demise, the 2<sup>nd</sup> defendant who is the executor of her estate transferred various properties to him by virtue of him being the sole beneficiary of her estate. That the suit property was initially owned by his father Benard Njenga Hinga (deceased) and that during his lifetime, through a transfer dated 29<sup>th</sup> November 2005 and registered on 30<sup>th</sup> November 2005, his said father transferred the property to Muthoni Nyoike Hinga (deceased) and himself to hold as joint proprietors.

7. Mr Nyoike further deposed that due to the joint proprietorship, upon the death of his father the property vested in Muthoni Njenga Hinga (deceased). Upon her demise, the 2<sup>nd</sup> respondent being the executor of her estate transferred the property to him as the only beneficiary to the estate and that upon the property vesting in him, he subsequently discharged the charge and sold it to the 4<sup>th</sup> Defendant. According to him, the applicants have not established a prima facie case and compensation by way of damages would in any case be adequate. He therefore urged the court to dismiss the application with costs.

8. In his affidavit, Charles Kibandi Kaguoya deposed that he is the executor of the estate of Isabella Muthoni Njenga (deceased). That Benard Njenga Hinga (deceased) was the father of Nyoike Hinga and also the husband of Isabella Muthoni Njenga (deceased). That through will dated 17<sup>th</sup> September 1986, Benard Njenga Hinga bequeathed the suit property to Tony Njenga Hinga and vide transfer dated 29<sup>th</sup> November, 2005 and registered on 30<sup>th</sup> November 2005, Benard Njenga Hinga (deceased) transferred the suit property to his wife Muthoni Njenga Nyoike (deceased) and himself as joint proprietors. That he witnessed both parties to the transfer sign it before it was lodged for registration and that upon registration the suit property vested in both Benard Njenga Hinga (deceased) and Muthoni Njenga Hinga (deceased) as joint proprietors. He added that as a result, the gift failed due to the doctrine of ademption and the property subsequently passed on to Muthoni Njenga Nyoike due to the right of survivorship. That upon Muthoni Njenga Nyoike's demise, being the executor of the estate, he transferred the property to 1<sup>st</sup> respondent who was the sole beneficiary of Muthoni Njenga Nyoike (deceased). He further deposed that upon vesting in the 1<sup>st</sup> respondent, he discharged the charge and sold the property to the 3<sup>rd</sup> respondents herein. He added that the transaction in favour of the fourth defendant took place while Tony Njenga Hinga was alive and he never had any objection. He too urged the court to dismiss the application with costs.

9. Paul Kiiru Mwangi deposed that he is the Director of Land Adjudication and Settlement in the Ministry of Lands. He stated that in 2012, in execution of a program of resettling the internally displaced persons (IDPs) consequent to the 2007/2008 post-election violence, the government through the Ministry of Lands advertised for an expression of interest for sale of arable land from members of the public. That the government identified the suit property and sent a letter of notification of award dated 22<sup>nd</sup> June 2012 to the owner through his advocates and after verification as to ownership and status, a proposal for the purchase of the suit property was tabled before the Ministerial Tender Committee where it was approved on 23<sup>rd</sup> August 2012. That thereafter, parties entered discussions and a draft sale agreement was forwarded to the Attorney General for legal advice. That following advice from the Attorney General, the 4<sup>th</sup> respondent and the vendor Nyoike Njenga Hinga executed an agreement for sale on 3<sup>rd</sup> October 2012 at a purchase price of KShs 396,984,000 and the vendor transferred the suit property to the 4<sup>th</sup> respondent on 2<sup>nd</sup> November 2013. He concluded that the sale was proper and the plaintiff's case has little or no chances of success as against 3<sup>rd</sup>-5<sup>th</sup> respondents.

10. On 31<sup>st</sup> May 2021, the application was withdrawn as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

11. The application was canvassed by way of written submissions. I have carefully considered the application, the affidavits and the submissions.

12. The principles that govern whether an interlocutory injunction should issue are long established. They were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** and reiterated in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**. Simply put, the applicant must establish a *prima facie* case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

13. As to what constitutes a *prima facie* case, Bosire JA defined it in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** as follows:

**..It is a case in 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... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.**

14. I remind myself that in considering whether or not a *prima facie* case has been established, I am not supposed to hold a mini trial and I must not examine the merits of the case closely. It suffices for the applicants to show that they have bona fide question to raise regarding existence of a right and a threat thereto.

15. From the material on record, the applicants have demonstrated that the suit property was at some point owned by the late Benard Njenga Hinga. It is listed as one of the assets for distribution in Nairobi H.C. Succ Cause No. 796 of 2007. The issue of whether or not the alleged transfer of the suit property was lawful and valid is one that has to be determined upon trial. I am thus persuaded that the applicants have established a *prima facie* case.

16. Nevertheless, existence of a *prima facie* case is not the be all end all. An applicant must surmount the next obstacle: He must demonstrate that damages will not be an adequate compensation. There is no dispute that the suit property herein was purchased by the 4<sup>th</sup> respondent, a statutory corporation established under **Section 167** of the **Agriculture Act** (repealed). Its successor is the Agriculture and Food Authority, another statutory corporation established under **Section 3** of the **Agriculture and Food Authority Act, 2013**.

17. The 4<sup>th</sup> respondent has availed evidence indicating that it acquired the property at a purchase price of KShs 396,984,000. As a state corporation, the 4<sup>th</sup> respondent is a government entity. It has not been shown that the 4<sup>th</sup> respondent or indeed the government would not be in a position to pay the money value of the suit property if it turns out that its acquisition was invalid. Thus, I am not persuaded that the applicants have satisfied the second limb of the test for granting interlocutory injunctions. It seems to me that damages would be an adequate remedy, more so taking into account the public purposes for which the 4<sup>th</sup> respondent acquired the property.

18. In view of the foregoing, I am not persuaded that this is a fit and proper case in which to grant the orders sought. Notice of Motion dated 3<sup>rd</sup> March 2020 is dismissed. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021**

**D. O. OHUNGO**

**JUDGE**

Delivered through Microsoft Teams video link in the presence of:

No appearance for the Plaintiff

No appearance for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants

No appearance for the 3<sup>rd</sup> to 5<sup>th</sup> Defendants

No appearance for the Interested Party

Court Assistant: E. Juma