



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 401 OF 2018

IN THE MATTER OF THE ESTATE OF HELLEN FLORENCE NYAMBOK (DECEASED)

JUDITH DORCUS AKINYI NYAMBOK.....1ST APPLICANT

DOROTHEA NYAMBOK MCNELL.....2ND APPLICANT

JAMES HENRY MBAI.....3RD APPLICANT

VERSUS

SURRIEL MBAI NYAMBOK.....1ST RESPONDENT

ELIJAH MUTHUTHYA WAMBUA.....2ND RESPONDENT

THE REGISTRAR OF LANDS AT NAIROBI.....3RD RESPONDENT

RULING

1. The deceased Hellen Florence Nyambok and the 1st respondent Surriel Mbai Nyambok got married on 18th November 1967. They got four children:-

- (a) Dorothea Nyambok (1st applicant);
- (b) Judith D. Nyambok (2nd applicant);
- (c) James Henry Mbai Nyambok; and
- (d) David S.M. Nyambok.

The couple lived on property LR No. Nairobi/Block 93/468 measuring 0.0277 Ha which they bought on mortgage. The property was registered in their joint names.

2. The deceased died intestate on 10th January 2011. On the basis that the property was jointly registered, and that each party had undivided share in the whole, the 1st respondent was able to persuade the Registrar of Lands in Nairobi (the 3rd respondent) that the deceased's interest in the title was extinguished and that the right of survivorship had come into play. The 3rd respondent transmitted the title in the property to him. Holding the new title, the 1st respondent sold the property to the 2nd respondent Elijah Muniyithya Wambua. The 2nd respondent secured a loan facility from Barclays Bank of Kenya towards the purchase of the property. The Bank charged the property to secure the loan. The 2nd respondent evicted the applicants from the property.

3. The applicants have a grant of letters of administration *ad litem* in respect of the estate of the deceased, and a limited grant *ad colligenda*

bona to allow them to gather, protect and secure the estate of the deceased. The latter grant was obtained on 17th January 2019, and was on condition that they petition for a full grant within 90 days. There is no evidence that the applicants have petitioned the court for the grant of letters of administration intestate.

4. The applicants filed the present application dated 26th September 2019 seeking several orders. They include an order for the 3rd respondent to cancel the transfer of the property to the 2nd respondent; an order to disposes the 2nd respondent of the property and evict him from there; to restrain the 1st respondent from disposing of the proceeds of the sale of the property to the 2nd respondent; an order to the 1st respondent's bank to produce his bank statements from 2nd February 2019 to establish the origin and destination of all funds pertaining to the sale of the property; an order to compel Barclays Bank of Kenya to produce all documents pertaining to the loan that it extended to the 2nd respondent to buy the property; a temporary injunction to freeze all bank accounts and mobile money accounts of the 1st respondent's present wife Valery Ochieng Mbai; and so on.

5. The applicants' case is the property was part of the estate of the deceased to which they were beneficially entitled; and that by selling the property the 1st respondent has in effect disinherited them. The orders sought seek to protect the property and/or what is left by way of proceeds so that they can become available for distribution to the beneficiaries. They state that at the time the 1st respondent sold the property he knew that it was part of the succession proceedings, and therefore his action amounted to intermeddling and the sale was a nullity, and inconsequential.

6. The 1st respondent's response was that he jointly owned the property with the deceased and that, upon her death, the same passed over to him by right of survivorship. His case was that after the deceased died her rights to the property got extinguished; and that the property was not part of the property of the deceased over which succession proceedings could be conducted. On his part, the 2nd respondent reiterated what the 1st respondent said and added that he was a *bonafide* purchaser for value without notice, and therefore his title to the property could not be impeached. Further, the property was charged to the Bank whose beneficial rights of a charge could not be interfered with. Lastly, he stated that the court lacked jurisdiction to issue any orders as prayed by the applicants as their application was not grounded on any substantive claim against him.

7. The applicants were represented by Kilomen & Co. Advocates, the 1st respondent Ocharo & Co. Advocates and the 2nd respondent by M.D. Masire & Co. Advocates. They each filed written submissions on the application. I have considered them.

8. The application was brought under **Articles 40(6) and 159 of the Constitution, sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 rule 3(1) of the Civil Procedure Rules, Order 51 rule 1 of the Civil Procedure Rules, section 45 of the Law of Succession Act and rules 59(3) and 73 of the Probate and Administration Rules.** The prayers sought were intended to remain in place while awaiting the hearing and determination of the succession cause in respect of the estate of the deceased. However, some prayers (like the cancellation of the title issued to the 2nd respondent) were substantive and final. Let me observe that, the object of an interlocutory injunction is to protect the applicant against injury by violation of his rights to the subject matter for which he may not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial (**Gujarat Bottling Co. Ltd –v- Coca Cola Company 1995(5) SCC 545**).

9. Interlocutory injunctions are granted in civil proceedings under **Order 40 rules 1(a) and (b) of the Civil Procedure Rules** that provides as follows:-

“40(1)(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

10. There has to be a suit in which it is proved by affidavit or otherwise that the property in dispute is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or that the defendant is threatening or intends to remove or dispose of his property in a manner that may ultimately be injurious to the rights of the applicant. The injunction is sought to protect the rights of the applicant in the property until such time that the suit is heard and determined. The starting point is that there exists a suit between the applicant and the respondent. In **Geoffrey Ndungu Theuri –v- Law Society of Kenya [1988]eKLR**, the Court of Appeal emphasized that there has to be a suit which has been commenced in any manner (plaint, petition, originating summons, etc) for the jurisdiction to seek an interlocutory injunction to be invoked. No suit exists in this matter. The applicants have not petitioned for the grant of letters of administration intestate in respect of the estate of the deceased. When they obtained the grant of letters of administration *ad litem* their stated intention was to initiate or defend any suit –

“to which the deceased was a party before her demise, and in representing, defending the interests of her Estate.”

The suit has not been initiated. Instead, they filed this application. I agree with the 2nd respondent that the application is incompetent and misconceived in view of the fact that it is not grounded on a suit.

11. Secondly, this property is now in the name of the 2nd respondent and charged to Barclays Bank of Kenya. The applicants have been evicted from the property, and the 2nd respondent put in possession. A number of issues arise. To cancel the title in the property, or to

remove the 2nd respondent and put the applicants back into possession, are all acts that would require an interlocutory mandatory injunction, assuming there exists a suit. No such injunction was sought. The Bank enjoys a chargee's right over the property. The charge is intended by the Bank to protect the money it lent to the 2nd respondent to buy the property. No orders can be given to affect the rights of the Bank over the property without reference to it. It (the Bank) was not made a party to the application.

12. The property in question may very well belong to the estate. The applicants may very well be beneficiaries to the estate of the deceased. However, the journey towards the discussion and resolution of these questions has not been properly initiated by the applicants.

13. In conclusion, I dismiss the application with costs.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 7TH day of MAY 2020

A.O. MUCHELULE

JUDGE