



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC CAUSE NO. 430 OF 2018

THERESA WANJIRO (Suing as the administrator of the Estate of

JOSEPH GICHUKI RIUNGE).....PLAINTIFF

=VERSUS=

ANDREW KIMATA GACHANGA.....1ST DEFENDANT

SOLOMON GACHANJA MUKOI.....2ND DEFENDANT

AND

GEORGE MWAI MBUARU.....3RD PARTY

RULING

1. This is the Notice of Motion brought under order 40 rules 1, 2, 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders:-

(1) Spent.

(2) Spent.

(3) That an injunction do issue restraining the defendants by themselves or by their agents and or servants or otherwise howsoever from developing, selling and/or interfering with LR No. 57/673 in any way until the hearing and determination of this suit.

(4) That the costs of this application be provided for.

3. The grounds are on the face of the application and are:-

(a) The 1st defendant has commenced construction on LR No. 57/673, with he alleges was sold to him by the 2nd defendant who also alleges that the suit property was sold to him by the plaintiff's deceased father yet no such transaction took place during the lifetime of the deceased.

(b) The plaintiff stands to suffer irreparable harm should the order sought not be granted.

(c) The plaintiff is ready to abide by any conditions that this honourable court may impose upon granting the orders sought herein.

(d) No prejudice shall be occasioned upon the Defendant should the orders sought herein be granted.

4. The application is supported by the affidavit of Theresa Wanjiro Riunge, the plaintiff/applicant herein sworn on the 2nd October 2018 and a supplementary affidavit sworn on the 11th March 2019.

5. The application is opposed. There is a replying affidavit sworn by Solomon Gachanja Mukoi, the 2nd defendant/respondent sworn on the 30th November 2018. He has sworn the affidavit on his own behalf and that of the 1st defendant/respondent.

6. On the 25th April 2019, the court with the consent of the parties directed that the application be canvassed by way of written submissions. On the 25th September 2019, the plaintiff/applicant sought seven (7) days to put in their written submissions. The court granted the plaintiff/applicant time and a date for ruling was given. By the time of writing this ruling, the plaintiff/applicant had not filed her submissions.

7. I have considered the notice of motion and the affidavits in support together with the annexures. I have also considered the affidavits in reply, the written submissions made on behalf of parties and the authorities cited. The issue for determination are:-

(i) Whether the plaintiff's/applicant's application meet the threshold for grant of temporary injunctions.

(ii) Who should bear costs?

8. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for injunction, the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Limited vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR 125** the Court of Appeal states what amounts to a prima facie case. I am guided by the above authorities.

9. In the case **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was)** held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

I am not satisfied that the plaintiff/applicant deserves this kind of protection

10. The plaintiff/applicant is one of the administrators of the Estate of Joseph Gichuki Riunge. In paragraph 7 of the supporting affidavit sworn on 2nd October 2018 she depones:-

“That my co administrators being in possession of the title documents for the suit property deliberately omitted to list it in the list of assets of the deceased for the purpose of perpetrating the illegal sale but it has now come to light that this property which formed part of the estate of the deceased estate was sold after the death of the deceased; the more reason this court should stop any dealings on the same (annexed hereto and marked “TWR2” are the relevant documentation relation to the fraudulent transfer).”

From the foregoing it is very clear that the suit property was not listed among the suit properties which formed part of the estate of the deceased.

11. I find that the plaintiff/applicant has not demonstrated that she is likely to suffer irreparable injury that cannot be compensated by an award of damages if these orders are not granted.

12. The defendants'/respondents' on the other hand have annexed photographs of an almost complete storeyed building on the suit property. It is their case that they bought the same from the third party herein. I find that the balance of convenience tilts in favour of the defendants/respondents who are in possession of the suit property and have developed the same.

13. The upshot of the matter is that I find no merit in this application and the same is dismissed.

14. The costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 6th day of February 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

Ms Otieno for Kiarie 1st Defendant

Kajuju - Court Assistant