



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

P&A NO. 30 OF 2013

IN THE MATTER ESTATE OF THE LATE GIDEON MULI MWAKE, DECEASED

FLORIAN MUINDI MWAKE.....APPLICANT

VERSUS

TOM MUTUNGA.....RESPONDENT

RULING

1. The Applicant herein filed a Notice of Motion dated 4/6/2018 seeking the following orders namely:-

(1) (spent)

(2) (spent)

(3) That orders of injunction do issue restraining the Respondent by himself, his servants or agents from occupying MWALA/MANYANI/929 situated in Kangundo Machakos County in the Republic of Kenya pending the hearing and determination of the Succession Cause.

(4) That the orders of the Honourable Court be enforced by the OCS Kangundo police station.

(5) That costs of the application be in the cause.

2. The Application is supported by the Affidavit of the Applicant herein sworn on even date as well as grounds on the face of the application. The Applicant's case *inter alia*; is that he is the Objector and one of the beneficiaries of the estate; that the deceased was his grandfather and who owned parcel number Mwala/Manyani/929; that in the year 2012 the Respondent coerced one Esther Kavive Muli wife of the deceased to enter into an illegal sale of the said property at a sum of Kshs.700,000/= yet she had not yet been confirmed as the Administrator of the estate of the deceased. It is further the Applicant's case that the purported sale is illegal and amounts to intermeddling with the estate. The Respondent was later requested by the deceased's family to accept a refund of the purchase price but he refused; that the Respondent's actions on the property threatens the rightful use of the same by the Applicant and other beneficiaries of the estate of the deceased; that unless the Respondent is restrained by orders of this court then the Applicant and other beneficiaries will suffer irreparable harm which cannot be compensated by way of damages. It was finally the Applicant's case that she has already filed summons for revocation of grant which is still pending determination by this court.

3. The application was strenuously opposed by the Respondent who filed a replying affidavit dated 19/06/2018 in which he deponed *inter alia*; that the administrator of the estate of the deceased herein upon receipt of a certificate of confirmation of grant sold the suit land Mwala/Manyani/929 to the Respondent at a purchase consideration of Kshs.700, 000/=which he paid in full; that he is an innocent purchaser for value; that the administrator had the power to sell the said property as at 18/09/2013 because the grant had already been confirmed; that the Respondent has not intermeddled with the estate as alleged; that the Applicant has no legal capacity to sue on behalf of the estate of the deceased as she does not possess letters of administration in respect to the deceased Gideon Muli Mwake. It was finally the Respondent's case that the Applicant has not established a prima facie case against the Respondent to warrant an order for injunction.

4. The application was canvassed by way of written submissions.

5. Learned Counsel for the Applicant submitted that the Administrator of the estate colluded with the Respondent and rushed the application for confirmation of grant and thereafter purported to enter into a sale agreement over the suit land while the beneficiaries were kept in the dark and this amounts to intermeddling. It was further submitted that the suit property was sold by the Administrator way back in 2011 before confirmation of grant and thereafter the Respondent hoodwinked the administrator to rush through the Succession in a bid to sanitize the illegal sale. This was contrary to Section 55 and 82 of the Law of Succession Act where it is clear that no immovable property shall be sold before confirmation of a grant hence the Respondent's ownership of the suit property is not protected even under Article 40(6) of the

Constitution which provides as follows:-

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”.

It was further the submission of the Applicant’s Counsel that the Administrator at the time of the alleged sale transaction had no capacity to do so as she had no grant of letters of administration and therefore the Respondent entered into a fraudulent agreement knowingly and cannot now seek the protection of the law to cure that illegality.

Finally it was submitted that the Applicant is capable of swearing the supporting affidavit and bringing this suit on behalf of the estate of the deceased as he is a son of one of the excluded beneficiaries. Further it was submitted that the Applicant has already filed objection proceedings to the making of grant with a view to annulling the same since the Administrator had concealed material facts from the court. The Applicant now pleads with this court to grant the orders sought so as to protect the properties of the estate.

6. Learned counsel for the Respondent submitted that the purchase of the suit property was neither illegal nor amounts to intermeddling with the estate of the deceased because the Administrator was duly authorized by law to sell the property as she had a confirmed grant of letters of administration. It was further submitted that the sale transaction was on the basis of a willing buyer and willing seller and that there was no coercion whatsoever on the seller. It was finally submitted that the Applicant has not established a prima facie case against the Respondent as he is neither an administrator nor a beneficiary of the estate and has not demonstrated that he will suffer irreparable injury which cannot be compensated by way of damages in the event the orders sought are not granted.

7. I have considered the rival affidavits as well as the submissions of Learned Counsels for the parties herein. It is not in dispute that the Administrator to the estate Esther Kavive Muli has since obtained a confirmed grant to the estate of the late Gedion Muli Mwake. It is also not in dispute that the said administrator has since entered into a sale agreement with the Respondent over land parcel Mwala/Mwanyani/929 and that the Respondent is currently in possession thereof. It is also not in dispute that the Applicant has since filed objection proceedings to the making of grant seeking for its annulment on the ground that the administrator had concealed material facts from the court and that the said objection is yet to be determined. That being the position I find the following issues necessary for determination namely:-

(i) Whether the sale transaction involving the Respondent and the Administrator over parcel number Mwala/Mwanyani/929 amounts to intermeddling with the estate of the deceased.

(ii) Whether the Applicant has made out a prima facie case to warrant the grant of conservatory orders.

8. As regards the first issue, it is noted that the sale transaction was entered on the 18/09/2013 and that a certificate of confirmation of grant was issued on the 26/7/2013. It follows therefore that the administrator dealt with the property after the grant had been confirmed. Indeed Section 82 of the law of Succession Act provides as follows:

“Powers of personal representatives shall, subject only to any limitation imposed by their grant the following powers:

(a) To enforce by suit or otherwise all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(b) To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best;

Provided that:-

(i) The purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) No immovable property shall be sold before confirmation of the grant.

The need to protect properties of deceased persons from being intermeddled is necessary since deceased persons are not available to say anything about their properties. The sanctions against intermeddling with the estate of deceased persons is found in Section 45 of the Law of Succession Act which provides as follows:-

“Except as far as expressly authorized by this Act or by any other written law or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose or otherwise intermeddle with any free property of a deceased person. Any person who contravenes the provision of this Section shall be guilty of an offence and liable to a fine not exceeding Ten thousand shilling or to a term of imprisonment not exceeding one year or to both such fine and imprisonment and be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the in the course of administration.”

As the sale was entered into after the confirmation of grant, I find that the Administrator Esther Kavive Muli had the requisite capacity to do so. Although the Applicant has claimed that the sale of the suit property **Mwala/Mwanyani/929** was entered into in the year 2011, no such evidence was availed by him in the form of a copy of a sale agreement. At best it might have been an intention on the part of the parties which crystallized after the confirmation of the grant when the parties entered into the sale now complained of upon the confirmation of the grant as the administrator was at liberty to deal with the property the way she wished. In any event the confirmed grant issued on the 26/07/2013 clearly indicated that the said property was to be registered wholly in the names of the Administrator Esther Kavive Muli.

Further the summons for confirmation of grant by the Administrator had been accompanied by the requisite consent by the beneficiaries to the mode of the distribution of the estate duly signed by the beneficiaries whose names appear in forms P & A 5 as well as form 38. Even though the Applicant has already filed objection to the making of a grant and presented summons for revocation of the grant on grounds of concealment of material facts to the court, I find that until the said objection is determined and the grant annulled, the certificate of confirmation of grant issued to the Administrator remains valid for all intents and purposes. That being the position, I find that the transaction involving the Respondent and the Administrator over parcel number Mwala/Mwanyani/929 did not amount to intermeddling with the estate of the estate of the deceased.

9. As regards the second issue, it is noted that the Applicant has castigated the conduct of the Respondent over the suit land and seeks to have him restrained from occupying it pending the hearing and determination of the succession cause. Since the Applicant is seeking for a discretionary order of temporary injunction, he is under obligation to establish that he has a prima facie case with a probability of success. In the celebrated case of **Giella =Vs= Cassman Brown [1973] EA 358** the Court of Appeal laid the principles to be considered where the discretionary order of temporary injunction is being sought namely: that an applicant must show a prima facie case with a probability of success; an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury and lastly when the court is in doubt, it will decide the Application on the balance of convenience. I now proceed to determine whether or not the Applicant's application herein meets this threshold.

10. The Applicant has claimed that he is a grandson to the deceased Gedion Muli Mwake and that he is a beneficiary and further has the consent from some of the beneficiaries to swear the affidavit in support of the present application. However the Applicant has not annexed any such consent. Other than filing an objection to the making of grant, the Applicant has not presented any other evidence to the effect that he has authority from his family or beneficiaries to file the application. It is disclosed that the Applicant's father one Daniel Mwake is deceased and there is no evidence that the Applicant has letters of grant in respect to the estate of his late father Daniel Mwake so as to give him capacity to sue on behalf of that estate. Again it is disclosed that the Applicant's mother one Angelina Mwake is alive and who has not given him authority to make this application in the form of a consent. Further it is noted that the objection proceedings lodged by the Applicant are yet to be determined and hence at this stage, it is not yet clear whether or not the Applicant's objection will succeed. The Applicant ought to have sought for conservatory orders within the objection proceedings lodged but not to file an independent application for injunction. If the Applicant felt that the status quo on the ground regarding the suit land was taking a different dimension, then he ought to have set down the objection proceedings for hearing as a matter of priority. It is further noted that at the time the Applicant took out summons for revocation of grant, a certificate of confirmation of grant had been issued way back on 26/07/2013 and that the administrator entered into a sale agreement over the land in favour of the Respondent. This was on 18/09/2013 yet the summons for revocation of grant were lodged on the 14/11/2013. The Respondent has maintained that he is an innocent purchaser for value and has already taken possession of the suit property upon paying the requisite purchase price consideration of Kshs.700,000/=. It is also noted that the Administrator already had a confirmed grant by the time she sold the suit land to the Respondent. Further the Applicant has not seen it fit to enjoin the said Administrator into these proceedings so that she could respond to the issues levelled against her by the Applicant. The certificate of confirmation of grant clearly indicated that the suit land was to be wholly owned by the Administrator who has already passed a good title to the Respondent. I find in the circumstances that the Applicant has not shown a prima facie case with a probability of success. Even if the Applicant's objection succeeds in the end and all assets of the deceased gathered and distributed there is no likelihood that the Applicant would be allocated the entire suit land.

11. On the question of whether the Applicant will suffer irreparable injury which cannot be compensated by an award of damages if the injunction order is not granted, it is noted that the sale transaction between Respondent and Administrator was entered into after the confirmation of the grant and that the Respondent has already taken possession of the land upon payment of the purchase price. It is the Respondent who stands to suffer greater harm than the Applicant whose objection proceedings are yet to be determined. In any event the Applicant could be compensated by way of damages. Suffice to add that some properties in succession causes which cannot be adequately divided among beneficiaries are always sold off and the proceeds shared. Therefore there is no certainty that the Applicant's eventual asset would be immovable property. I am of the view therefore that the Applicant could be adequately compensated by an award of damages as he is not likely to suffer irreparable harm if the injunction order herein is not granted.

12. On the question of balance of convenience, it is noted that the Applicant's summons for revocation of grant are yet to be determined. There is no certainty that the same will succeed in view of the fact that the Applicant seems to be acting alone as there is no consent from the other beneficiaries such as his mother. The Administrator who has not been enjoined herein had duly entered into a sale agreement over the suit land since the said property had been wholly distributed to her during the confirmation hearing. The Respondent is for all intents and purposes an innocent purchaser for value and has already paid the purchase price. It would be fair and just to allow the Respondent quiet possession of the land as the applicant in the meantime prosecutes his summons for revocation of grant. I find the balance tilts in favour of declining an order of injunction.

13. In the result it is the finding of this court that the Applicant's application dated 4/06/2018 lacks merit. The same is ordered dismissed. Each party to bear their own costs.

Orders accordingly.

Dated and delivered at Machakos this 7th day of May, 2019.

.....

D. K. KEMEI

JUDGE