



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT & LAND CASE NO.160 OF 2017

ASHON SIKOLIA WANYONYI.....1ST PLAINTIFF

LUKA M. WANYONYI.....2ND PLAINTIFF

VERSUS

SELINA NAMALWA MASONI.....1ST DEFENDANT

BUNGOMA COUNTY GOVERNMENT.....2ND DEFENDANT

RULING

The subject of this dispute is plot No. WEBUYE MUNICIPALITY 7996/91 (herein the suit plot) which was among the properties owned by **REUBEN WANYONYI SIKOLIA** (the deceased) who was the father of the Plaintiffs and father in-law of the 1st defendant. It is the Plaintiff's case that following the demise of the deceased on 11th November 1978, they obtained a grant in respect of his Estate in which the 2nd Plaintiff is the Administrator and the suit Plot was among the properties bequeathed to the Plaintiffs when the grant was confirmed on 23rd April 1998.

Apart from the Plaintiffs, the deceased was also survived by **BEN MASONI WANYONYI** (the husband to the 1st defendant) who is also now deceased.

It is the Plaintiff's case that following the demise of the deceased, they have peacefully and quietly administered his Estate on behalf of the other beneficiaries having obtained the grant in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO.68 OF 1997**. However, the 1st defendant mischievously continued to intermeddle with the Estate and has colluded with officials of the 2nd defendant with the intention of defrauding the beneficiaries of the deceased's Estate including falsifying documents relating to the suit plot. The Plaintiffs therefore filed this suit on 13th December 2017 seeking the main remedy that the defendants, their agents or servants be permanently restrained from further or in any way interfering, falsifying, or attempting to procure ownership of the suit Plot and also a declaration that any transfer registration or purported re-allocation or at all be deemed null and void.

Simultaneously with that plaint, the Plaintiffs filed a Notice of Motion under Sections 3 and 3A of the Civil Procedure Act and Order 40 Rules 1 and 2 of the Civil Procedure Rules seeking the following Orders:

- 1. Spent**
- 2. Spent**
- 3. That the status quo be maintained and or preserved pending hearing and determination of this suit.**
- 4. Costs be provided for**

That application which is the subject of this ruling is predicated on the grounds set out therein and is also supported by the affidavit of **LUKA MAKOKHA WANYONYI** the 2nd Plaintiff herein.

The gravamen of the application is that the suit plot forms part of the Estate of the deceased following Succession proceedings that have never been revoked, quashed or the grant annulled and the Plaintiffs as Administrators of the said Estate have been administering it including collecting of rent. However, the 1st defendant has now transferred the suit Plot into her names and is seeking a buyer to purchase the same which would render this suit an academic exercise hence this application.

The application is opposed and the 1st defendant has filed a replying affidavit in which she has deponed that she is the Administrator to the Estate of her late husband **BEN MASONI WANYONYI** as per the annexed copy of confirmed grant (annexture SNM-1). That she could not have been a party in the **BUNGOMA HIGH COURT SUCCESSION CAUSE NO.68 OF 1997** since it was in relation to the Estate of the deceased who was her father in-law. That it is her late husband who was paying rates for the suit Plot to the 2nd defendant. That the suit Plot was the property of her late husband **BEN MASONI WANYONYI** and not the deceased. That **BEN MASONI WANYONYI** left behind children who are being educated from the rent collected from the suit Plot.

In a further affidavit however, the 1st Plaintiff **ASHON SIKOLIA WANYONYI** deponed that it is the Plaintiffs who have been collecting rent for the properties left by the deceased including the suit Plot and the 1st defendant has never laid claim to the said properties. Tenancy agreements were annexed to that further affidavit – see annexures ASW 1(a) and (b) and ASW 2(a) and (b).

The application has been canvassed by way of written submissions which have been filed both by **Mr. SICHANGI ADVOCATE** for the Plaintiffs by the 1st defendant in person.

When the application was first placed before **KANIARU J** at the Environment Land Court BUSIA, the Judge made the following Orders after considering it ex-parte.

- 1. A temporary injunction be and is hereby issued restraining the 1st Respondent, her agents or servants from alienating, disposing off and/or transfer of WEBUYE PLOT 74 pending hearing of this application.**
- 2. This Order does restrain sale of the suit property to third parties but does not restrain other aspects / rights that go with ownership.**
- 3. Inter - partes hearing on 7th February 2018 at BUSIA.**

The Judge was alive to the fact that ownership of the suit Plot had changed and he did not want to reverse the status quo then obtaining. That status quo which is indeed confirmed by the Plaintiffs themselves, is that the suit Plot is now in the names of the 1st defendant.

An application for injunction is determined in accordance with the principles set out in the Case of **GIELLA V CASSMAN BROWN & CO. LTD 1973 E.A. 358** which are:

- 1. The Applicant must show a prima facie Case with a probability of success at the trial.**
- 2. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer injury which would not adequately be compensated for by an award of damages.**
- 3. If in doubt, the Court will decide the application on the balance of convenience.**

What is clear from the record herein is that following the death of the deceased, the Plaintiffs obtained a confirmed grant in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO.68 OF 1997** in which the suit Plot was listed as part of the Estate of the deceased. That grant was confirmed by **MBITO J** on 23rd April 1998. In 2006, the 1st defendant sued the Plaintiffs in **BUNGOMA HIGH COURT CIVIL CASE NO.17 OF 2006** claiming an interest in the suit Plot. That Case was however withdrawn. The 1st defendant then filed **BUNGOMA HIGH COURT SUCCESSION CAUSE NO.51 OF 2005** in which a confirmed grant was issued by **MUCHEMI J** on 8th November 2010.

That grant also listed the suit Plot among other properties as part of the Estate of **BEN MASONI WANYONYI** who was himself a son of the deceased. We therefore now have two confirmed grants in respect to the same property but in relation to two different Estates. For now, this Court cannot go into interrogating those two grants other than to observe that it is an unfortunate situation whereby one property has been the subject of two different Succession Causes and has been bequeathed to two persons with competing interests. That will be left for trial. Suffice it to state that given those circumstances, I am not entirely persuaded that the Plaintiffs have surmounted the first hurdle in the **GIELLA Case** (supra).

On the second limb of the **GIELLA Case** (supra), there is nothing to suggest that damages cannot be an adequate remedy. The suit Plot appears to be a commercial property from which rent is being generated. Each of the Parties claim to be receiving the said rent. That is income that can be quantified and paid to the rightful owner at the end of the trial. I intend to make further orders in that regard.

In my view, this application will be determined on the balance of convenience. The Plaintiff's fear is that the 1st defendant intends to dispose off the suit Plot to third parties just the way that she transferred it to herself. That has not been rebutted. The primary purpose of an interlocutory injunction is to preserve the property in dispute while the Court determines the rightful owners after hearing evidence by both sides. If the 1st defendant transfers the suit Plot to third Parties, this trial may be rendered an academic exercise. It is therefore important that the suit Plot is preserved awaiting the outcome of this Case.

This Court will therefore make the following Orders with respect to the Plaintiff's Notice of Motion dated 11th December 2017:

- 1. An Order of injunction is issued restraining the 1st defendant, her agents, servants or any other person acting on her behalf from alienating disposing or transferring WEBUYE MUNICIPALITY PLOT NO.74 also known as WEBUYE MUNICIPALITY 7996/91 pending the hearing and determination of this suit.**

2. The Deputy Registrar to visit the suit Plot and serve notices to all the tenants thereon that w.e.f. 1st August 2018 and until further notice after this suit is finalized, all rent shall be deposited in this Court on account for both the Plaintiffs and the 1st defendant. The Court shall make further orders with regard to that rent after trial.

3. The Parties to comply with the pre-trial direction so that this suit is heard and determined in the next twelve(12) months.

4. As the Parties are a family, each shall meet their own costs.

BOAZ N. OLAO

JUDGE

19TH JULY 2018

Ruling dated, delivered and signed at Bungoma this 19th day of July 2018

Mr. Sichangi for Plaintiffs / Applicants present

1st Defendant present

BOAZ N. OLAO

JUDGE

19TH JULY 2018