



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 44 OF 2020

SALIM ALI SAID.....PLAINTIFF

VERSUS

SALWA ALI SAID ABDULREHMAN.....1ST DEFENDANT

AHMED ALI SAID.....2ND DEFENDANT

REGISTRAR OF LANDS.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

RULING

(Application for injunction; principles to be applied; applicant claiming that 1st and 2nd defendants are unlawfully dealing with various properties alleged to belong to their deceased father; evidence indicating that all the properties save for one were distributed in a succession matter; if there is contention in the manner of distribution, same to be considered in the succession matter and not in a separate suit; the one property not subject of the succession proceeding registered in the name of the 1st defendant in 1996; applicant claiming that it was fraudulently transferred from the name of their father; evidence showing that the property was owned by several others; no complaint from them; applicant not suing in this suit as legal representative of his late father and doubtful whether he has capacity; no prima facie case established; application dismissed)

1. This suit was commenced through a plaint which was filed on 19 March 2020. Alongside the plaint was filed an application for injunction, dated 18 March 2020, and it is that application which is the subject of this ruling. The principles for the grant of an injunction were well set out in the case of *Giella vs Cassman Brown (1973) EA 358*, and I have no intention of reinventing the wheel. To be entitled to an injunction, the applicant must demonstrate a prima facie case with a probability of success, and also show that he stands to suffer irreparable loss if the injunction is not granted. Where the court is in doubt, it will decide the application on a balance of convenience.

2. What then is the plaintiff's case? The plaintiff's case is discernible from his plaint and the affidavits filed in support of the application. The plaintiff avers that he is the administrator of the estate of the late Ali Said Abdulrehman (the deceased) following a confirmed grant issued in Succession Cause No. 15 of 2001. It is his case that the deceased owned the properties LR Nos. 343/VI/MN Chagamwe with a Swahili house; Mombasa Block XLII/467 situated in Bondeni; 236/II/MN with a bungalow; 221/II/MN; 244/II/MN; 110/II/MN; MSA/Block XLV/129; 188/II/MN (later subdivided into 6209/II/MN; and Kilifi/Mtondia/239 (the suit properties). The plaintiff contends that in the year 1996, the 1st and 2nd defendants fraudulently alienated the suit properties to themselves and other third parties using forged documents purporting to have been executed by the deceased. It is averred that on 31 July 1998, through a court order delivered in Civil Case No. 218 of 2001, the 1st and 2nd defendants were appointed trustees of Wakf properties of the late Abdulrehman. It is said that a bank account was then opened to ensure that all beneficiaries benefit from the transactions of the trustees. It is claimed that the 1st and 2nd defendants have been fraudulently using the money in the account for their sole benefit without considering other beneficiaries. In the suit, the applicant seeks the following orders (paraphrased for brevity) :-

- (a) A permanent injunction to restrain the defendants from the suit properties.
- (b) Vacant possession.
- (c) Cancellation of the title Kilifi/Mtondia/239.
- (d) Enforcement of the orders above by the OCPD Kisauni.

- (e) Account statements.
- (f) Costs of the suit.
- (g) Any other relief deemed fit.

3. In his supporting affidavit, the applicant has annexed a certificate of confirmation of grant of the estate of the late Abdulrehman issued on 29 May 2012 in Mombasa P&A No. 15 of 2001 and copies of documents over the land parcel Kilifi/Mtondia/239.

4. The 1st and 2nd respondents filed a replying affidavit sworn by Salwa Ali Said Abdulrehman, the 1st respondent. She has deposed that the applicant lacks locus standi as the suit properties, save for the parcel Kilifi/Mtondia/239, belong to the estate of the late Abdulrehman. She has pointed out that the plaintiff, the 2nd respondent and herself, are joint administrators of the estate of the deceased, and the applicant cannot file this suit in any other capacity other than the capacity of administrator of the estate of the deceased. She has averred that the deceased was the registered proprietor of the land parcels Mombasa Block XLII/467 situated in Bondeni; 188/II/MN and 110/II/MN. The deceased was also trustee under a Wakf, of the properties 343/VI/MN situated in Changamwe; 236/II/MN. 211/II/MN; 244/II/MN; and MSA/Block XLV/129. For these latter properties, the 1st and 2nd respondents were declared trustees in place of the deceased through Mombasa HCCC No. 218 of 2001 (OS) and the order is annexed to her affidavit. She has deposed that for the land parcel Kilifi/Mtondia/239, the deceased was registered as proprietor alongside 10 others. She has averred that it was family property that was overrun by squatters and was given to her to redeem. She has deposed that she paid off all squatters in the year 1996, and also purchased motor vehicles for the applicant and two other siblings, as further consideration to the family, after which a transfer was effected in her favour. The property was thus never included in the estate of the deceased. Her view is that this suit only relates to this property and not to the rest of the listed properties.

5. The applicant filed a supplementary affidavit. He averred that the deceased, in a will dated 17 March 1982, appointed Fatma Bint Mbarak Twahir (his wife) and Aisha Bint Ali Bin Said (his daughter) as his trustees, and thus the appointment of the 1st and 2nd respondents as trustees of the properties of the deceased is “untruthful and baseless.” He has averred that the distribution of the estate was to follow Sharia Law and that the 1st and 2nd respondents have contrary to the provisions of the grant unlawfully acquired and subdivided several properties unjustly. He has deposed that he has investigated the transfer of the land parcel Kilifi/Mtondia/239 and found that the signatures therein were forged. He has annexed a forensic examiner’s report. He has deposed that their late father died in the year 1991 and another of his uncle died in the year 1974 and could not therefore have signed the transfer in the year 1996. He claims that the 1st and 2nd respondents have taken over the land parcel Mombasa/Block XLII/467 in Bondeni. He has complained that he has not got his fair share in the Plot No. 343/VI/MN Changamwe. He has further claimed that the 1st and 2nd respondents have unlawfully subdivided the Plot No. 236/II/MN into 100 plots and sold them to other individuals. He has complained that his share has not been set aside as directed by the court. He has also raised complaints of subdivision and sale of the Plot No. 221/II/MN; Plot No. 110/II/MN; and mismanagement of Plot No. 244/II/MN. He has also contended alienation of the plot No. 188/II/MN.

6. I have considered the application. First, I observe that the applicant and the 1st and 2nd respondents are all siblings. They are also joint administrators of the estate of the late Abdulrehman. I have gone through the confirmed grant relating to the estate of the late Abdulrehman and I can see that his estate was distributed to the beneficiaries including the applicant and the 1st and 2nd respondents, save for the property Kilifi/Mtondia/239, which was never distributed for the court was not persuaded that it comprises the estate of the deceased. It appears to me that the applicant is now complaining that the 1st and 2nd respondents are not distributing the assigned properties following the distribution. If that is his case, then he needs to make an application within the succession cause for the court to resolve the issue of distribution of the property of the deceased. The solution is not to file a separate cause of action.

7. In relation to the property Kilifi/Mtondia/239, that property is currently in the name of the 1st respondent. I have seen that prior to the applicant becoming proprietor in the year 1996, that property was registered in the name of 11 people each owning some share. There is a transfer said to have been executed by these 11 persons in favour of the 1st respondent. If it is the case of the applicant that the said property was never properly transferred to the 1st respondent, the other 10 persons who owned it need to be made parties to the suit. I have no evidence that they are complaining. Moreover, if it is the position of the applicant that he intends to claim the share of the deceased in this land, then the applicant can only file suit in his capacity as administrator of the estate of the deceased and not in his own capacity as he has done in this case. I also question where the applicant has been for the last 24 years since the property was transferred to the 1st respondent.

8. From the above, it is apparent that, at this stage of the proceedings, based on the material that has been presented so far, I do not rate highly the case of the applicant. I am not persuaded that he has demonstrated a prima facie case with a probability of success. This is of course only a preliminary assessment aimed at determining the application for injunction. The applicant can still try to convince this court on merits upon hearing of the suit. However, he will do so without the benefit of an injunction.

9. This application is hereby dismissed with costs to the 1st and 2nd respondents.

10. Orders accordingly.

DATED AND DELIVERED THIS 30TH DAY OF JUNE 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.