



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
SUCCESSION CAUSE NO. 26 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE DANIEL NJIRAINI KARU – DECEASED

ESTHER WAITHERAOBJECTOR/APPLICANT

VERSUS

FRANCIS KAMAU NJIRAINI1ST PETITIONER/RESPONDENT

LOICE WANJAL WARUIRU.....2ND PETITIONER/RESPONDENT

PAKMANS COMPANY LIMITED.....3RD RESPONDENT/PURCHASER

RULING

1. There are 2 sets of applications presented by Esther Waithera the applicant herein. The first application dated 3rd January 2017 prays that there be stay of execution of the grant issued on 11th December 2015 pending an appeal to the Court of Appeal; that Account No. [...] at Co-operative Bank in the Names of Loice Wanja Ruiru, Florence Njeri Chege and Mary Njoki Githinji be frozen pending the intended appeal, that an injunction be issued stopping the 3rd Respondents from taking possession of land parcel No. 2116/17/11 within Kitale Municipality.

2. The same is supported by the applicant's affidavits which inter alia claims that she is a beneficiary of the suit property which was bequeathed to her late husband Samuel Karu by the deceased who was her father in law. That she has been in occupation and working in the said premises and that she was dissatisfied with the way the grant was confirmed hence her intention to appeal. She further deponed that she was never a party to the sale of the property to the 3rd respondent as the grant had not even been confirmed. That the money now at Co-operative Bank which was deposited by the 3rd respondent ought to be frozen pending the determination of the appeal.

3. On his part the 3rd respondent opposed the same arguing that he was already in occupation of the premises. That he has done extensive renovations having paid to the estate the sum of Kshs 20.5 million and as far as he was concerned they had already divided the money among themselves. In any case, the 3rd respondent stated, this issue has been litigated earlier on and the court had ordered the suit property not to be transferred at all pending the outcome of the intended appeal.

4. On her part, the 2nd respondent denied that the applicant was entitled to any such orders as the same have been overtaken by events.

5. The 2nd application dated 22nd February 2017 prays inter alia that an order be issued allowing the applicant to continue running her shop/business as well as collecting rent from LR No. 2116/17 pending

the hearing and determination of the summons dated 3rd January 2017 and that the 3rd Respondent restitute and return at its expense the applicants goods to her shop situate the said premises and do compensate her for loss of income and the damages to the goods.

6. The applicant argues that the 3rd respondent forcefully entered into her premises and evicted the applicant without any valid court orders. She has equally attached photos showing the goods from the said shop.

7. On its part the 3rd respondent contents that the company was already in occupation of the premises as it had purchased the same lawfully from the estate and that the applicant was part of the estate. That he has already paid a total sum of Kshs 20.5 Million to the beneficiaries of the estate. There were equally photographic evidence of the repairs.

8. I have read through the entire rival affidavits as well as the submissions by the parties. It is not in dispute that throughout the history of this cause, its the applicant who has filed multiplicity of applications. Her contention fundamentally is that the suit property belonged to her late husband having been given to him by the deceased. This issue was contested before my brother Karanja J and myself and there are rulings on the same.

9. It would not be prudent consequently to make any fundamental determination as the applicant shall have a 2nd chance at the Court of Appeal noting that already she has filed a notice.

10. More importantly, the question of ownership of the suit premises seemed to have passed to the 3rd respondent, a purchaser. There is sufficient evidence that it deposited the purchase consideration at a joint account at Co-operative Bank. Again this issue was raised and I have made a finding elsewhere. The purchase consideration seemed to have been shared by the beneficiaries who included the applicant. To issue an order freezing the account would be superfluous.

11. In any case as stated earlier I did order that the 3rd respondent should not transfer the suit parcel of land to any other 3rd party pending the intended appeal.

12. What prejudice will the applicant suffer? Already she conceded that she has left the premises whether lawfully or unlawfully. The 3rd respondent has already taken possession. The logical thing for the applicant to do is to seek damages in a court of law. That prayer cannot suffice in the current application.

13. I equally note that the applicant is not discussing how if her prayers are granted the 3rd respondent shall be idemnified. Already the sum of Kshs 20.5 Million has been paid to the estate. This sum has been shared among the beneficiaries. For such an application to succeed it would be necessary that security be given, an issue which the applicant has chosen to ignore.

14. From my above observations I find that both applications ought to fail for the simple reasons that the issues raised had been discussed before and the only remedy is to seek redress at the court of appeal. Secondly and more fundamental should the two applications be granted, then the other beneficiaries to the estate stand prejudiced as they have already collected their portion of the money.

15. Needless to state that the applicant can still get perfect recourse in damages especially if her goods were damaged or if she lost business opportunities.

16. In my view the fact that there is a stay against any transfer of the parcel of land LR. No. 2116/17/11 by the 3rd respondent clearly insulates the applicant as well as the estate at large from any danger of wastage should the Court of Appeal agree with her.

17. In the premises the two applications dated 3rd January 2017 and 22nd February 2017 are dismissed

with costs.

Delivered this 19th day of July, 2017.

H. K. CHEMITEI

JUDGE

In the presence of:

Nyamu for the 2nd Administrator

No appearance for the other parties.

Silvia – Court Assistant

H. K. CHEMITEI

JUDGE

19/7/2017