



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 14 OF 2016

(An appeal from the Ruling of the Ag. Principal Magistrate, Embu in CMCC No. 29 of 2016 dated 3/6/2010)

JOSEPH MUTWIRI NYAGAAPPELLANT

VERSUS

JOHNSON MUGAMBI MUNYI.....RESPONDENT

J U D G M E N T

1. This is an appeal against the ruling of Embu Principal Magistrate R.O. Oigara delivered on 1/3/2016 in which he granted injunctive orders against the appellant not to bury the remains of his mother on L.R. Ngandor/Kirigi/5425 and 6680. The appellant was dissatisfied with the ruling and lodged this appeal.
2. The grounds of appeal are that the magistrate failed to consider that the respondent did not make out a case with any chances of success, the magistrate failed to address the fact that the land LR. Nos. Ngandori/Kirigi/ 5425 and 6680 do not belong to the respondent and failed to give reasons for his finding.
3. It was claimed that the magistrate erred in concluding that the issues raised in the application could be addressed during the full hearing.
4. The appellant submitted that the basis of the suit is an agreement dated 18/1/16 which was entered between the respondent and the appellant's mother(deceased). The deceased died on 12/2/16. The agreement was for the sale Ngandori/Kirigi/5475 and Ngandori/Kirigi/6680.
5. According to the said agreement, the two parcels of land each measuring 0.10 Ha. were in the name of the deceased. After her death, her children including the respondent sought to bury her on the said parcels of land. This prompted the respondent to file to file Embu PMCC 29 of 2016 via a plaint dated 18/2/2016 together with the application in issue seeking a permanent injunction preventing the defendant from interfering with the plaintiff's quiet possession of both parcels of land. The said prayer was allowed prompting the current appeal.
6. The appellant herein opposed the said application arguing that the parcels of land were still in the names of their deceased father and that their deceased mother had never been appointed as a legal representative for their deceased father's estate. The magistrate only gave a one line ruling and never gave reasons for his finding. The respondent did not make out a prima facie case. The orders issued in the ruling stopped the burial of the deceased on the said parcels.
7. The respondent in his submissions stated that the agreement was valid even if the vendor passed on. The respondent took possession of the land. He stated that Nyaga Kariema, the late husband of the deceased vendor had three wives. The vendor Ann Gatambe Nyaga was the youngest wife and was given the two parcels of land which she sold to the respondent. There was an understanding between the vendor and her children who include the appellant that upon selling both parcels of land she would use the sale proceeds to buy another parcel of land.

8. The vendor as agreed purchased land parcel Mbeti/ Gachuriri/3463 measuring 0.40 ha. from Mary Nderi Ngari. The respondent issues raised by the respondent are weighty and cannot be dispensed with in an application but in a full hearing where the parties can ventilate their issues. The respondent further states that he has demonstrated that he has a good case with high chances of success and that allowing the deceased to be buried on the parcel of land will greatly prejudice him.
9. The duty of the 1st appellate court was explained in the case of **SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968] EA 123**, where it was observed thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally”

10. The application dated 18/02/2016 sought for orders that the defendant/respondent be restrained from burying the remains of Ann Gatambe Nyaga in Ngandori/Kirigi/ 5425 and Ngandori/Kirigi/6680 and that he OCS Ngandori police station and chief Ngandori location be ordered to ensure that this order is complied with.
11. In the supporting affidavit, the respondent stated that he entered into a sale agreement of Ngandori/Kirigi/ 5475 and 6680 with the late Ann Gatambe Nyaga. The applicant paid the entire purchase price. The vendor died less than a month after the transaction was closed. The respondent and his family had intentions of burying the remains of the late Ann Gatambe on the above mentioned parcels of land. The respondent stated that if the respondent was not restrained from proceeding the burial he would suffer loss and damage.
12. The appellant stated that the respondent's application was based on the fact that their late mother sold Ngandori /Kirigi/5547 and 6680 to him but the said parcels of land were still registered in the names of their deceased father. The appellant urged that the respondent fraudulently obtained the title to parcel number Ngandori/Kirigi/5475 there were no succession proceedings filed in respect of their father's estate and that their late mother had no capacity to enter into a binding contract for sale in respect of their late father's estate as she was not an administrator of the said estate.
13. In a further affidavit, the appellant stated that the respondent was present when he purchased the said parcel of land. The title deed he holds for parcel number Ngandori/Kirigi/5475 is valid.
14. According to the sale agreement annexed to the supporting affidavit in the application dated 18/2/2016, the respondent entered into a sale agreement with the widow of the deceased. The lack of capacity on part of the widow was raised by the appellant for the reason that she had not been appointed as an administrator of the said estate.
15. I note that the respondent did not respond to this issue in his further affidavit. The respondent did not attach proof that the deceased Ann Gatambe Nyaga was a bonafide administrator of the estate of the deceased and that the grant had been confirmed when the parties entered into the said agreement.
16. Parcels Ngandori/Kirigi/5547 and 6680 belonging to the deceased Nyaga Kariema were to be administered according to the provisions of Law of Succession Act. Section 82(b)(ii) of the said Act provides that no immovable property shall be sold before confirmation of the grant.
17. In the case of **JECINTA WANJA KAMAU VS ROSEMARY WANJIRU WANYOIKE & ANOTHER [2013] eKLR** the court held that it would have been illegal for the legal representative of the deceased's estate to sell the land before the confirmation of the grant.
18. *The principles of granting an injunction were discussed in the case of GIELLA VS CASSMAN BROWN & CO LTD [1973] EA 358.* The applicant must show a *prima facie* case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable

- injury that cannot be compensated by an award or damages. If in doubt the court shall decide the application on the balance of convenience.
19. In the case of **KIBUTIRI VS KENYA SHELL Nairobi High Court Civil Case No. 3398 of 1980 [1981] KLR 390**. It was held that the conditions of granting a temporary injunction are as follows:-
- First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.*
20. Similarly, it was held in the case of **KISUMU MARKET VS BP(K) LTD High Court Civil Case No. 255 of 1990 [1990] LLR 8090** that:-
- The grounds on which an interlocutory injunction may be granted are that the applicant must show a prima facie case with a probability of success; that unless he is granted a temporary injunction, he may otherwise suffer irreparable injury which would not be adequately compensated by an award of damages and; lastly that if the court is in doubt then it will decide the application on a balance of convenience.*
21. The ruling of the court in the respondent's application was briefly stated:-
- I have read and carefully considered the papers filed for and against the application. The arguments by the counsel for the defendant/respondent. I find that the issues raised can best be addressed in a full hearing. In the circumstances, I shall allow the application order the parties to fix the matter to a full hearing. The orders to be in force until the case is heard and determined.*
22. The magistrate proceeded to grant the orders sought in the application without evaluating the evidence placed before him by the respondent which would have helped him to decide on whether the respondent has satisfied the court on the principles laid down for granting a temporary injunction.
23. The court was duty bound to determine whether the applicant had made a *prima facie* case with a probability of success. Secondly that the respondent had shown that he would suffer injury or substantial loss if the orders were not granted, and that the loss would not be adequately compensated by way of damages.
24. If the court was in doubt in regard to the first requirements, then it would have decided the case on the balance of convenience.
25. The court decided to preserve the status quo pending the hearing of the case but failed to lay a basis of granting the injunction restraining the appellant from burying their mother on the land.
26. The other issues raised on the validity or otherwise of the transaction are matters that can only be determined after hearing the parties so that the process of obtaining the title LR. Ngandori/Kirigi/5475 can be interrogated through evidence. It is also worthy noting that succession proceedings in respect of the deceased's estate and which are mandatory have not been done.
27. I will not dwell with these issues in this appeal which will be subject of the hearing before the learned magistrate. The appeal focuses on the manner in which the injunction was granted.
28. It is my considered opinion the trial court erred in fact and in law in failing to determine whether the respondent had made a *prima facie* case and whether he had satisfied the other requirements for the application of that nature as by law established.
29. The ruling of the magistrate delivered on 1/03/2016 has not legal or evidential basis and it is hereby set aside.
30. The appeal is accordingly allowed.
31. The respondent to meet the cost of this appeal.
32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF APRIL, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Migwi for Wairimu Rugaita for the appellant

Ms. Muriuki for R. Njeru for respondent