



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 20 OF 2020

1. RACHEL OKUMU

2. KENNETH OUNDO MBOYA

(Suing as the administrators of the Estate of

MICHAEL OKUMU ACHOKA).....PLAINTIFF

VERSUS

ESTHER KAHAYI MUJUMBA

(Sued as an Administrator of the Estate of

MARCO MUJUMBA BUSOLO)DEFENDANT

RULING

The Application

1. By a notice of motion dated **17/3/2020** and filed on the same date the plaintiffs seek the following orders against the defendant:

(1) spent

(2) spent

(3) That this court be pleased to issue a temporary injunction restraining the defendant/respondent servants and/or agents from selling, charging, leasing or in any other way interfering with the plaintiff/applicants' peaceful possession, use and occupation of land parcel No. KAKAMEGA/NZOIA/51, pending hearing and determination of the main suit.

(4) spent

(5) That costs be provided for.

2. The application is brought under **Sections 3 and 3A of the Civil Procedure Act and Order 63 of the Civil Procedure Rules 2010.**

3. The application is grounded on the following grounds: that the plaintiffs are the administrators of the estate of the late **Michael Okumu Achoka** who cultivate the suit land for subsistence and income; that they have lived on the suit land since childhood and upon attaining maturity they moved out; that even after moving out they continued cultivating the suit land; that their parents also lived thereon in their lifetime; that the suit land was co-owned in equal shares by the plaintiff's father and the defendant's husband; that the defendant's husband caused the land to be registered in his name; that now that the defendant's husband has met his demise, the defendant has obtained letters of administration over her deceased husband's estate; that the defendant has had the land registered in her name and is purporting to administer over the entire suit land, and she wants to evict the applicants and stop them from using the land; the plaintiffs claim fraud against the defendant. They aver that failure to grant the orders sought will occasion the applicants irreparable damage.

4. The application is supported by an affidavit of Rachael Okumu on her own behalf and on behalf of her co-plaintiff sworn on **17/3/2020**. It reiterates the above grounds.

The Response

5. The defendant filed a replying affidavit dated 27/5/2020. Her response is that she became the registered owner of the suit land on 31/7/2015 by way of transmission in **Kitale High Court Succession Cause No 193 of 2014** in respect of her late husband's estate and neither the plaintiffs nor their father had any beneficial interest in that estate and none of them has challenged the grant; she states that she occupies the land with her children. She further avers that *Wilson Busolo*, the second husband to *Mary Minayo Busolo* (the latter whom the plaintiffs claim to be their mother) bought the suit land using his own resources and had it registered in his wife's name. Consequently she disputes that the plaintiff's claim to inheritance of the suit land, saying that their father was a mere licensee on the suit land. She maintains that the plaintiffs' father was evicted pursuant to legal proceedings instituted by her husband, but the judgment was subsequently set aside and he returned to the suit land; that the plaintiffs' father attempted to have the grant to Mary Minayo's state which had been issued to the defendant's husband revoked, but he later died and the suit abated and the grant to the defendant's husband remains valid; that the plaintiffs were enjoined by a court order in **Kitale ELC 13 of 2014** against interring the remains of their deceased father on the suit land but they proceeded to do so and they have hence come to court with unclean hands; that the plaintiffs are therefore trespassers and they have leased 15 acres of the suit land to one *Kamau* and that the plaintiffs would not suffer any irreparable damage if the orders sought are not granted.

6. There was no reply to the defendant's replying affidavit. However it is noted that the reply to defence and counterclaim was filed after the replying affidavit. It states that the registration of the defendant's husband was tainted with fraud.

Submissions

7. The plaintiffs filed their submissions on 27/5/2020. The defendant filed her submissions on 5/6/2020. I have considered the application and the response as well as the filed submissions.

Determination

8. The sole issue that arises in the instant application is whether a temporary injunction should issue in favour of the plaintiffs.

9. The test for the grant of a temporary injunction was set out in the case of **Giella -vs Cassman Brown 1973 EA 358**. The three limbs are whether the applicant has established a *prima facie* case and whether he or she would suffer irreparable loss that may not be compensable by way of damages and, finally, that if the court is in doubt it may rule on a balance of convenience.

10. It is agreed that the suit land was registered in the names of *Mary Minayo Busolo*, the plaintiffs' grandmother. The defendant's averment that her husband and the plaintiff's husband are mere half-brothers who were not sired by the same father may be correct, but the conclusion as to whether the two half-brothers are equally entitled to the suit land should be a legal conclusion to be arrived at after the hearing of the suit.

11. I have also considered the several instances of litigation mentioned by the defendant. There have been two succession cases one on respect of the plaintiffs' grandmother's estate and another in respect of the defendant's husband's estate. These are the channels through which the suit land was finally transmitted to the defendant.

12. It is not disputed that the grants that led to the registration of the defendant as the owner of the land have not been revoked and the only persons responsible for the pursuit of that revocation are the plaintiffs now that their father is deceased. They would also be responsible for the pursuit of finalization of the eviction case that their uncle had filed against their father and whose judgment is admitted by the defendant to have been set aside to pave the way for a hearing, which hearing was thwarted by their father's demise.

13. Considering all the multiple avenues of alternative redress available to the plaintiffs and the familial nature of this dispute I find that the plaintiffs have failed to establish a *prima facie* case with a probability of success.

14. The land is already registered in the name of the defendant. I find that the plaintiffs may suffer loss but they have not also established that the loss may be incapable of reparation by way of damages.

15. However notwithstanding the above findings, this court notes that conclusive as the succession proceedings may seem at the moment, they should not be allowed to obfuscate the fact that one of the final prayers that the plaintiffs seek is a declaration that the defendant holds the land in trust for the plaintiffs and that the trust should now terminate and the land be shared out equally between both families.

16. Ordinarily, trust is proved by way of evidence and it may not be implied. However the same theme of trust may be pursued in ordinary civil proceedings such as these and may be proved at a hearing. It has not been disputed that the plaintiffs have been resident on the land for many years and that their father also resided thereon while he was alive. Whatever kind of trust that the plaintiff claim it can only be established at the hearing of the main suit. In the circumstances it would not be in order for this court to allow the eviction of the plaintiffs before the suit is heard and determined and the only course of action that appeals to this court is to ensure the preservation of the existing *status quo* pending the hearing and determination of this suit.

17. I therefore dispose of the application dated 17/3/2020 by issuing the following orders:

(a) The *status quo* existing on the suit land shall be maintained till the hearing and determination of this suit.

(b) The costs of this application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 21st day of July, 2020.

MWANGI NJORGE

JUDGE, ELC, KITALE.