



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 431 OF 2014

DENNIS ONGANYO OMBUI PLAINTIFF

VERSUS

YOBESH OGWANGI OMBUI 1ST DEFENDANT

EVANS NYAOSI OMBUI 2ND DEFENDANT

GEORGE OMBUI 3RD DEFENDANT

RULING

1. The plaintiff is a son and a legal representative of one, Elmelda Ariri Ombui, deceased (hereinafter referred to only as “the deceased”). The deceased was married to one, Gerishon Ombui Kemaisa, deceased (hereinafter referred to only as “Kemaisa”). Kemaisa had two wives namely, Briscila Nyangweso Ombui, deceased who was his first wife (hereinafter referred to where the context so admits as “Nyangweso”) and the deceased who was his second wife. Nyangweso, Kemaisa and the deceased died on 2nd November 2009, 24th September 2013 and 18th October, 2013 respectively. The defendants are the children of Nyangweso with Kemaisa. At all material times, Kemaisa was registered as the proprietor of two parcels of land known as LR No. Gesima Settlement Scheme/117 (hereinafter referred to as “Plot No. 117”) and LR No. Majoge/Bokimonge/616 (hereinafter referred to as “Plot No. 616”). The plaintiff has contended that with a view to share the two parcels of land aforesaid among his two wives (houses), Kemaisa sub-divided each into two (2) portions before he died. Plot No. 117 upon the said sub-division gave rise to LR No. Gesima Settlement Scheme/886 (“Plot No. 886”) and LR No. Gesima Settlement Scheme/887 (“Plot No. 887”). Plot No. 616 on the other hand, gave rise to LR No. Majoge/Bokimonge/2807 (“Plot No. 2807”) and LR No. Majoge/ Bokimonge/2808 (“Plot No. 2808”). Plot No. 886 which measures 5.4ha. and Plot No. 2808 which measures 0.68ha. (hereinafter referred to together as “the suit properties”) are said to have been transferred and registered in the name of the deceased by Kemaisa as her (second house) share of his (Kemaisa’s) land while Plot No. 887 which measures 6.2ha and Plot No. 2807 which measures 0.88ha. remained registered in the name of Kemaisa and are said to have been reserved for the first house where the defendants herein belong as their share of Kemaisa’s land.

2. The plaintiff brought this suit against the defendants on 11th November 2014 seeking;- a permanent injunction to restrain the defendants from in any manner whatsoever entering, encroaching and/or doing anything on the suit properties. The plaintiff has contended that although Kemaisa had shared Plot No. 117 and Plot No. 616 during his lifetime among his two houses as aforesaid and caused the suit properties to be registered in the name of the deceased, the defendants on or about October, 2013 soon after the death of the deceased laid a claim to tea bushes on Plot No. 886 contending that the same belong to their mother Nyangweso. The defendants at the same time proceeded to Plot No. 2808 and destroyed the

deceased's house that was standing thereon together with the maize plants that the plaintiff had planted and planted their own maize on the said property contending that the plaintiff's family that belongs to the second house has no right over the property. The plaintiff has contended that the defendants have now prevented the plaintiff and his siblings from accessing the suit properties more particularly from plucking tea from Plot No. 886. The plaintiff has contended that since the suit properties are registered in the name of the deceased, the defendants have no right over the same that can justify their acts aforesaid. It is on account of the foregoing that the injunctive relief mentioned above has been sought by the plaintiff against the defendants.

3. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 10th November 2014 seeking a temporary injunction to restrain the defendants from entering, encroaching on or interfering with the plaintiff's peaceful occupation of the suit properties. The plaintiff's application was supported by the plaintiff's own affidavit sworn on 10th November 2014 in which he reiterated the contents of the plaint that I have highlighted above. The plaintiff annexed to the said affidavit; a copy of a Limited Grant of Letters of administration Ad Litem in respect of the estate of the deceased that was issued to him on 10th September 2014, copies of death certificates for Kemaisa and the deceased, a copy of the title deed for Plot No. 2808, a copy of the title deed for Plot No. 886, a copy of a letter dated 14th January 2014 from the Assistant Chief, Nyansiongo Gesima Sub-location and photographs of a house and a parcel of land that has been ploughed. The plaintiff has stated that the acts of the defendants complained of are illegal and if allowed to continue would subject him to irreparable loss.

4. The plaintiff's application was opposed by the defendants through a replying affidavit sworn by the 1st defendant on 5th December 2014. The 1st defendant admitted that Kemaisa owned Plot No. 117 and Plot No.616 and that he had two wives (houses), the deceased and Nyangweso. The 1st defendant denied however that Kamaisa had shared his two parcels of land namely, Plot No. 117 and Plot No. 616 among his two houses during his lifetime. He denied further that Kemaisa had caused the said parcels of land to be sub-divided and portions thereof registered in the name of the deceased as contended by the plaintiff. The 1st defendant contended that Kemaisa could not have sub-divided and registered portions of Plot No. 117 and Plot No.616 in the name of the deceased without the defendants' knowledge. The 1st defendant contended further that Kemaisa had allowed them to use at random portions of Plot No. 117 and Plot No. 616 awaiting proper division of the same between the two houses. The 1st defendant contended that before his death, Kemaisa held a series of meetings with members of his family and clan elders in which he expressed his wish that the deceased and her family (second house) should vacate Plot No. 117 and relocate to Plot No. 616.

5. He contended further that after the death of Kemaisa, the deceased was asked to account for the title deeds for Plot No. 117 and Plot No. 616 but she failed to do so. The 1st defendant maintained that the tea bushes in dispute belong to his mother Nyangweso and as such the plaintiff has no right over the same. On the allegation that they demolished the deceased's house on Plot No. 2808, the 1st defendant contended that the house that they demolished belonged to their mother, Nyangweso and not to the deceased as claimed. He contended further that the said house was demolished in the year 2009 and not in the year 2013 as claimed by the plaintiff. The 1st defendant contended that the title deeds for the suit properties in the name of the deceased are not genuine since the same were acquired by the deceased irregularly. The 1st defendant termed the plaintiff's application herein as lacking in merit and urged the court to dismiss the same. The 1st defendant annexed to his affidavit, what are said to be copies of the minutes of the various meetings that were held by the family of Kemaisa in which the issue of Plot No. 117 and Plot No. 616 were discussed.

6. When the plaintiff's application came up for hearing on 25th February, 2015, the parties agreed to argue the same by way of written submissions. The plaintiff filed his submissions on 18th March, 2015 while the defendants did so on 26th March, 2015. I have considered the application together with the affidavit filed in opposition thereto. I have also considered the submissions by the parties' respective advocates and the authorities cited in support thereof. The principles for granting interlocutory injunction

are now well settled. In the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** that was cited by the defendants in their submissions, it was held that an applicant for a temporary injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that if the order is not granted, he would suffer irreparable injury. If the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. The same principles were adopted in the case of **Suleiman –vs- Amboseli Resort Ltd [2004] 2 KLR 589** that was cited by the plaintiff.

7. On the material before me, it is not in dispute that Plot No. 117 and Plot No. 616 were registered in the name of Kemaisa. It is also not in dispute that the two parcels of land were sub-divided and portions thereof namely, Plot No. 887 and Plot No. 2808 registered in the name of the deceased during the lifetime of Kemaisa. As at the date of the death of Kemaisa, the suit properties were already registered in the name of the deceased. The suit properties do not therefore form part of the estate of Kemaisa. Rather, they are part of the estate of the deceased. The defendants have contended that the deceased acquired the suit properties fraudulently in that, Kemaisa could not have sub-divided Plot No. 117 and Plot No. 616 without informing them. The defendants have also wondered why Kemaisa would have issued the deceased with title deeds for the suit properties and failed to issue the defendants with title deeds for the portions of Plot No. 117 and Plot No. 616 that remained registered in his name.

8. As I have stated above, Plot No. 117 and Plot No. 616 were registered in the name of Kemaisa as the sole proprietor thereof. He had the right to deal with the same in whatsoever manner he deemed fit. He had no obligation or duty to consult the defendants before sub-dividing the same or transferring portions thereof to anyone. The mere fact that he may not have consulted or informed the defendants of his intention to sub-divide and transfer portions of the said parcels of land to the deceased is inconsequential as far as the validity of the said transactions are concerned. The defendants have not placed any material or evidence before the court to show the alleged irregularity or fraud in the acquisition of the suit properties by the deceased. In the case of, **Virani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Co. Ltd [2004] 2 E.A KLR 269**, the court of appeal held that, “**Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt**”. In the case of **Kampala Bottlers Ltd. vs. Damanico (UG) Ltd. East Africa Law Reports [1990-1994] E.A141(SCU)**, the Supreme Court of Uganda held that, “**To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.**” There is no iota of evidence before the court pointing at the deceased’s alleged acts of fraud. I am not persuaded on the material before me that the deceased acquired the suit properties fraudulently or irregularly as claimed by the defendants. There is nothing in the minutes annexed to the 1st defendant’s affidavit which suggests that the deceased acquired the suit properties through fraudulent means.

9. Section 24 of the Land Registration Act, 2012 provides that the registration of a person as the proprietor of land confers upon that person the absolute ownership of the land together with all privileges and rights associated with such ownership. The plaintiff as the legal representative of the deceased is entitled to enjoy all the rights that the deceased had on the suit properties which include the right to occupy and use the suit properties. The plaintiff’s contention in this suit is that the defendants are interfering with his enjoyment of the suit properties by preventing him from plucking tea bushes on one of the properties and by cultivating the other. The plaintiff has proved on a prima facie basis that the suit properties are registered in the name of the deceased. The defendants have not denied that they have prevented the plaintiff from plucking tea bushes on the suit property. The defendants have also not denied that they have planted maize on one of the properties. The acts of the defendants’ aforesaid amount to trespass on the suit properties because the defendants’ entry onto the said properties was without the permission of the plaintiff or lawful excuse. I am satisfied therefore that the plaintiff has established a prima facie case with a probability of success against the defendants. I am also persuaded that the plaintiff stands to suffer irreparable harm if the orders sought are not granted. The plaintiff is unable to use the suit properties and the situation will remain the same. The plaintiff will no doubt suffer irreparable injury if he is kept away from the suit properties.

10. Due to the foregoing, I am satisfied that the plaintiff has satisfied the conditions for granting interlocutory injunction. Consequently, the application dated 10th November 2014 is allowed in terms of prayer 3 thereof. The plaintiff shall have the costs of the application.

Delivered, Dated and Signed at Kisii this 17th day of July, 2015.

S.OKONG'O

JUDGE

In the presence of:

N/A for the plaintiff

Mr. Okenye for the defendants

Milcent Court Assistant

S.OKONG'O

JUDGE