



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ELC CIVIL SUIT NO. 1289 OF 2014

JOSEPH KABUGI KARANJA.....PLAINTIFF

VERSUS

BENSON MUGO MUKUNYA1ST DEFENDANT

JOYCE WAMBUI LANGAT.....2ND DEFENDANT

MILKA KANENE NDUNG’U.....3RD DEFENDANT

RULING.

The matter coming up for determination is the Plaintiff/Applicant’s Notice of Motion dated **2nd October 2014**, brought under **Article 159(2) d** of the Constitution. **Sections 1A, 1B and 3A of the Civil procedure Act, Order 40 Rules 1 & 2**, of the **Civil Procedure Rules ,2010** and **Section 68(1)** of the **Land Registration Act,2012** and any other enabling provisions of the law. The applicant has sought for these Orders;-

- i. *Spent*
- ii. *That an Order of Injunction to issue forthwith compelling the Respondents to allow the applicant to retake exclusive possession of all that parcel of land known as Location16/Kimandi–Wanyaga/775.*
- iii. *That an injunction to issue forthwith restraining the Defendants either by himself ,his servants and or agents from interfering with the plaintiff’s occupation , use and quiet enjoyment of all that parcel of land known as Location16/Kimandi–Wanyaga/775 pending hearing and determination of this suit.*
- iv. *That the County Commissioner Murang’a County and OCS Kirwara Police Station be ordered to ensure the due performance and compliance of Orders 2 and 3 above.*
- v. *That the Court be pleased to issue conservatory orders for inhibition and prohibition restricting ,restraining and barring any further dealings by the Defendants or their servants and/or agents by either sale, charging or transfer against the title number Location16/ Kimandi–Wanyaga/775 pending the hearing and determination of this suit .*
- vi. *That the 1st Respondent be compelled to transfer forthwith Account No.105, at Ngere Tea*

Factory Company Ltd to the Plaintiff/Applicant and in default , the Deputy Registrar of the High Court be authorized to execute and/or give consent in place of the 1st Respondent.

vii. **Cost of the application be provided for.**

The application is premised on the grounds stated on the face of the application and on the Supporting Affidavit of **Joseph Kabugi Karanja**. These grounds are;-

- i. **The Plaintiff/Applicant entered into a sale agreement over a parcel of land known as Location 16/Kimandi–Wanyaga/775, a six acre tea farm and the Plaintiff/Applicant performed all his obligations under the contract and the Defendants handed over all the completion documents to the applicant.**
- ii. **The Plaintiff/Applicant lodged the document for registration at the Thika Land Registry, but the process of registration had been put on hold pending compliance with the Succession Act.**
- iii. **Further that the Defendants relinquished and the Plaintiff/Applicant took exclusive possession of the property and expended a substantial amount of money on improving the tea plantation.**
- iv. **That the 1st Respondent has since barred the Plaintiff/Applicant from accessing the suit property to the Plaintiff/Applicant and therefore the 1st Respondent has no color of right to deny the applicant access, use and occupation of the property.**
- v. **Further that the 1st Respondent has failed, refused, and or neglected to transfer Account No.105 at Ngere Tea Factory, to enable the Plaintiff/ Applicant deliver tea.**
- vi. **Therefore the Plaintiff/Applicant is incurring irreparable loss and damage after investing heavily in purchasing the tea farm with the hope of recouping his investment from the sale of tea.**

In his supporting Affidavit, **Joseph Kabugi Karanja** averred that he was introduced to the 1st Defendant /Respondent by one **Daniel Mwangi Gichuki** who informed him that 1st Respondent was selling a 6 acres tea farm at Ndakaini area. He further averred that he met 1st Defendant who informed him that the land was initially owned by their father who later bequeathed it to their sister **Shiphira Wanjiru** and the Defendants were nominated as trustees. Further that the said **Shiphira Wanjiru** died in the year 2013 and that now the 1st Defendant was the sole beneficiary and thus inherited the said property as per their father's Will. It was his contention that he was given a copy of the Title for the property known as **Loc.16/Kimandi-Wanyanga /775** as per annexure **JKK1**. He also deposed that the 1st Respondent showed him the tea pay slip to prove that he is the one who delivers and is paid for the tea from the said farm . The slip is **JKK2**. It was his further contention that they agreed on a purchase price of **Kshs.8,340,000/=** which he has now fully paid through instalments. He thereafter executed a sale agreement which was witnessed by **Daniel Mwangi Gichuki** and **Joseph Karanja Mwangi**. The other Respondents were to sign later. He further deposed that there was caution placed by the Directorate of Criminal Investigations (CID) on the parcel of Land and the said caution was lifted on **30th May,2014**. Thereafter the 1st Defendant applied and obtained consent to transfer the parcel of land from **Gatanga Land Control Board** as evidenced by annexures **10a** and **10b**. He further contended that on **27th May 2014**, the 1st Defendant gave him all the completion documents as per annexure **JKK 11**. Thereafter the deponent applied for valuation and paid stamp duty to KRA as per annexure **JKK12**. He further deposed that he lodged the Transfer Documents for registration at **Thika Lands Office** on **6th June 2014**, as per annexure **JKK13**. He contended that he took possession of the parcel of land with the express authority, knowledge, and permission of the 1st Defendant as he had fulfilled all his obligations under the agreement.

It was his contention that the Registrar of Lands declined to effect the transfer to his name as he

alleged that there was no **Succession Cause** appointing the administrator of the Estate of **Shiphira Wanjiru Mukunya**. He also contended that the 1st Respondent needs to give his consent for transfer of the **Account No.105** at **Ngere Tea Factory** which he has refused to give. The applicant has also deponed that the 1st Respondent has continued to pick Tea and prune tea bushes and therefore the applicant is unable to pick the tea even after investing huge amounts in purchasing the land and improving the tea bushes. He contended that the 1st Respondent is scouting for other buyers and the applicant fears that he might lose the property in which he had invested colossal amount of money.

It was his contention that since he had possession, the property had already passed to him. He therefore contended that the interest of justice and fairness will only be served if the court restores possession of the property to the applicant and compelling the 1st Respondent to transfer the account at **Ngere Tea Factory** to him to enable him pick and deliver tea pending the finalization of the succession process.

The application is opposed by each of the Defendant/Respondent herein. The 1st Respondent averred that the Defendants are siblings registered as proprietors of all that parcel for land known as **Loc 16-Kimandi-Wanyaga /775**. He further averred that they are registered as trustees of the suit land on behalf of their sister **Shiphira Wanjiru Mukunya**, who is now deceased. It was his contention that the land was bequeathed to the late **Shiphira Wanjiru Mukunya** by their late father **Livingstone Mukunya Muriu**. Therefore the Respondent's held the Land in trust for their sister and since there are other siblings the **Estate** of **Shiphira Wanjiru Mukunya** must devolve to the Respondents and their siblings, in equal shares as the deceased died intestate. He further contended that though the applicant alleged to have purchased the suit property from the Respondents, the Respondents lacked legal capacity to do so as the Estate had not yet devolved to them. Further that the agreement entered if any was null and void **abinitio** as the Respondents lacked capacity to sell and subsequently transfer any interest in the suit land to any person. Further that the applicant had never taken possession of the suit land and the issue of retaking does not apply. It was his contention that he is the one who manages the tea bushes and sells the tea at **Ngere Tea factory** and applicant has not adduced any evidence of possession of the suit property.

On her part, second Defendant/Respondent averred that the Respondents are registered as properties of the suit land as trustees of their late sister **Shiphira Wanjiru Mukunya** who died on **30th November 2013**. She contended that she has never met or spoken to the Plaintiff/Applicant and she therefore does not know him. It was her further contention that she was a complete stranger to the alleged sale of the land **Loc 16/ Kimandi- Wanyaga/ 775**. She further denied ever signing the application for consent of the **Land Control Board** and has never attended the **Land Control Board** for the sale of the suit property and the alleged signature by the second Defendant is a forgery. She further denied executing the transfer of the land and the signature therein in annexure **JKK II** is a forgery. She also denied ever giving her passport photographs or copy of her ID card or her PIN to the Plaintiff/Applicant. It was her contention that no one has a right to transfer either the tea bushes or the land or give possession of the land to the Plaintiff/Applicant or any party until the rightful heirs to the deceased estate are determined by the court.

The third Defendant on her part admitted that she is one of the registered proprietors of **Loc16.Kimandi-Wanyaga/775** but the said registration is as trustees of one **Shiphine Wanjiru Mukunya** . She contended that the said **Shiphira Wanjiru Mukunya** is now deceased and the suit land cannot be disposed off and action taken over it without there being succession proceedings to her estate so that her heirs can be properly identified and her estate disposed off as provided in law. She also denied that she was aware of any steps taken to dispose of the land to the plaintiff. She also denied ever participating in any negotiations nor did she attend any **Land Control Board** meeting to obtain **consent to transfer** the **Land**. She also contended that she did not sign any sale agreement or transfer document and she deposed that the transfer document annexed to the application has not been signed by the 3rd Defendant.

That applicant filed a Supplementary Affidavit and reiterated the contents of his Supporting Affidavit. He further contended that the Affidavit of the 1st Defendant is a lie and fabrications intended to

deliberately and dishonestly mislead the Court. He reiterated that he indeed entered into a sale agreement that was prepared by the 1st Defendant and which he signed in his presence. The said sale agreement was witnessed by people who are available to confirm the same. It was his contention that he paid the 1st Respondent from the Accounts of **Capacity Outsourcing Kenya Ltd and Hillside School** as they are entities associated with him but they were not purchasing the property. He further contended that the consent to transfer was signed by 1st Defendant in his presence and 1st Respondent obtained the said consent with the applicant's involvement. He denied that the said transfer was a forgery and denied that he fraudulently orchestrated the forgery of the Defendants signatures in a scheme to transfer the property to himself.

The Notice of Motion was canvassed by way of Written Submissions. The Court has carefully read the filed submissions and considered them. The Court also considered the pleadings generally, the annexures thereto, the relevant laws and the cited authorities and the Court makes the following findings:-

There is no doubt that the suit land herein **Loc.16/Kimandi-Wanyanga/775** is registered in the names of the three Defendants. The three Defendants were to hold the said parcel of land as trustees for one **Shiphira Wanjiru Mukunya** . There is no doubt that the three Defendants are siblings and are brother and sisters to the said **Shiphira Wanjiru Mukunya** . It was alleged that the said **Shiphira Wanjiru Mukunya** is now deceased. There is also no doubt that the said parcel of land was bequeathed to **Shiphira Wanjiru Mukunya** by her father as per the Will attached to the applicants Affidavit marked as **EMM4**.

From the available documents; there is no doubt that the plaintiff herein entered into a sale agreement for sale and purchase of **LR No. 16/Kimandi-Wanyaga /775**, the suit land. The said parcel of land is the suit land and it was allegedly been sold by the Defendants herein who are trustees of **Shiphira Wanjiru Mukunya** (now deceased) From the attached sale agreement , **JKK 6**, the suit land was being sold for **Ksh.8,340,000/=** . It was allegedly sold by the Defendants herein who are trustees of **Shiphira Wanjiru Mukunya** (now deceased).It was the applicant's contention that he has completed payment of the purchase price. He attached three copies of Equity Bank Cheques to pay **Benson Mugo Mukunya**, the 1st Defendant. There is therefore no doubt that the applicant paid the full purchase price to the 1st Defendant. However, the 2nd and 3rd Defendants have denied being involved in the sale and purchase of the suit land though they are trustees for the deceased **Shiphira Wanjiru Mukunya** and registered as proprietors of the suit land to hold it in trust for **Shiphira Wanjiru Mukunya**. The Applicant has alleged that the 2nd & 3rd Defendants were involved in the sale and purchase of the suit land. That allegation has been denied by the 2nd and 3rd Defendants. The sale of the suit being the gist of the matter herein, then this is an issue that will have to be decided in the main trial by calling of evidence. The Court at this juncture will be cautious not to delve into matters that will need to be canvassed at the main trial. See the case of **Narendra Chaganlal Solanki Vs Neepu Auto Spaces Ltd , Kisumu High Court Civil Case No. 90 of 2003.**, where the Court held that:-

“In an interlocutory application for injunction, the Court must warn itself of the gravity of danger of making conclusive findings that may prejudice the interest of the parties at the hearing of the suit and should as far as possible exercise some cautionary steps”.

Taking into account the above holding of the Court, I find that at this juncture the Court cannot conclusively find whether or not the 2nd and 3rd Defendants had participated in the signing of the sale agreement. However, it is not in doubt that the 1st Defendant did actively participate in the preparation and signing of the sale agreement. The 1st Defendant/Respondent has not denied that he received the purchase price as alluded by the applicant.

There is no doubt that the 1st Defendant and applicant even proceeded to apply for consent from the **Gatanga Land Control Board**. The said consent was given on **28th April 2014**, as evidenced by **JKK 10(b)**. There is also a transfer that was allegedly signed by the three Defendants herein and the applicant

lodged it at the Thika Lands office. However, the said transfer was not effected as the applicant alleged that the Land Registrar declined to register or effect the said transfer until a succession cause has been filed and an Administrator of the Estate of **Shiphira Wanjiru Mukunya** appointed. There is therefore no doubt that the said anticipated transfer aborted because the estate of **Shiphira Wanjiru Mukunya** had no administrator. The 1st Respondent on his part averred that the consent to transfer that had been given by the Land Control Board was later revoked.

The issue now for determination is whether the Defendants had capacity to deal with the suit land and whether the applicant is entitled to the Orders sought.

There is no doubt that the Defendants are registered as proprietors of the suit land but to hold it as trustees for **Shiphira Wanjiru Mukunya**. There is no doubt that **Shiphira Wanjiru Mukunya** is now deceased. An Administrator for the Estate of the said **Shiphira Wanjiru Mukunya** needed to be appointed. The role of the Administrator of the deceased estates is spelt out in **Sections 82 and 83 of the Successions Act**.

In the instant case, the alleged sale of the suit land to the applicant was in essence distribution of the deceased estate. As was held in the case of **Okayana Vs Musi and another (1987) KLR 103**.

“ There could be no distribution of the estate of the deceased whilst it was uncertain who the administrator or administrators actually were”.

The Defendants herein and especially the 1st Defendant had not taken out letters of Administration and the same confirmed by the Court. They did not have capacity to sell the suit land. As has been severally held by our courts, a person dealing with the estate of the deceased should first have been appointed as an administrator. Failure to do so, then his/her action will be deemed to be meddling in the deceased Estate. See **Section 45 of the Succession Act** which provides that;-

“Except in so far as expressly authorized by this Act, or by any other written law or by a grant of representation under this Act, no person for any purpose, take possession or dispose of or otherwise intermeddle with any free property of a deceased person”.

Therefore for a person to have capacity to deal with the estate of the deceased, he/she needs to take letters of Administration. See the case of **Troustick Union International and ano Vs Mrs. Jane Mbeya & another Civil Appeal No. 145 of 1990**, where the court held that:

“Personal representatives are people who have obtained grant and not blood relatives; If an administrator brings an action before obtaining a grant the same is incompetent from its inception”

Further the case of **Elly Odhiambo Onyuka Vs Ayub Odhiambo Migwalla Civil Appeal No.81 of 2002**, the Court held that ;-

“A person who has not taken out letters of administration has no capacity to enter into a sale agreement in respect of the property still registered in the name of his late father as the property is protected by Section 45(1) of the Law of Succession Act”.

Having found that there is no evidence that the Defendants have taken letters of Administration to the Estate of **Shiphira Wanjiru Mukunya**, the court finds **prima facie** that the Defendants had no capacity to enter into a sale agreement.

Having now found that the Defendants lacked capacity to enter into the sale agreement over a deceased property, is the applicant entitled to the prayers sought?.

The applicant had sought for injunctive orders. The first prayer is for compelling the Respondents

to allow the applicant to retake exclusive possession of all that parcel of land known as **Loc 16/Kimandi-Wanyaga/ 775**. The applicant alleged that he had been given possession of the suit land after paying the purchase price. However, the Defendants have denied that allegation. The Order sought is mandatory in nature. The Courts have been reluctant to grant mandatory injunction at interlocutory stage except if the case is clear and one which the Court thinks it ought to be decided at once. See the case of **Kenya Breweries Ltd and another Vs Washington O Okeyo , Civil appeal No. 332 of 2000 (2000) LR 4984, (IEA 109)** where the Court held that;

“A mandatory injunction can be granted on an interlocutory application as well as the hearing but in the absence of special circumstances, it will not normally be granted, However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done which can be easily remedied or of the Defendant attempted to steal a march on the Plaintiff...a mandatory injunction will be granted on an interlocutory application”. See also **Volume 24 Halsbury Laws of England 4th edition paragraph 948.**

In the instant case, though the applicant alleged that he bought the suit property from the Defendants, the 2nd and 3rd Defendants have denied ever participating in the said transaction. The case is therefore not a clear one which can be decided at once. The parties need to call evidence and the same be tested in cross –examination.

On the second prayer of seeking to restrain the Defendants from interfering with the Plaintiff’s occupation, use and quiet enjoyment of the suit land, the issue of whether the Plaintiff is in occupation of the suit land is a disputed one which will have to await the determination of the main suit. The court finds that the applicant has not established that he has a prima facie case with probability of success as was held in the case of **Giella Vs Cassman Brown and Co .Ltd (1973) EA 358,** to warrant the Court issue the Order of injunction as prayed in prayer No.3 of the Notice of Motion .Having found that prayer No.3 is not merited, the Court cannot therefore issue prayer No.4 herein.

On prayer No.5, the applicant has sought for conservatory Orders for **inhibition** and **prohibition**, restricting and barring any further dealing by the Defendants on its servants and agents by either sale, charging or transfer against the suit land, pending the hearing and determination of the suit.

It is evident that the applicant did pay **Kshs.8,340,000/=** as purchase price for the suit land . The applicant has not gotten possession of the suit land and further the purchase price has not been refunded to him. Though the Court found that the Defendants had no capacity to enter into a sale agreement without Letters of Administration, that finding alone would not prevent the Defendants from attempting to sell the suit property to other unsuspecting would be buyers like the applicant herein.

Section 68(1) of the **Land Registration Act** gives the Court power to issue inhibition over any parcel of land.

“ the court may make an order (herein referred to as an inhibition) inhibiting for a particular time or until the occurrence of a particular events or generally until a further order, the registration of any dealing with any land lease or charge.”

The applicant has demonstrated that he paid **Kshs.8,340,000/=** to the 1st Defendant in an attempt of purchasing the suit land. The same did not succeed and he has not been refunded his purchase price. The applicant has therefore shown good reasons why the Court should exercise its discretion herein and issue the order of inhibition and prohibition. Consequently, the Court finds that the applicant deserves the order sought in **prayers No.5** and the Court grants the same pending the hearing and determination of this suit.

On prayer **No.6** the Court has found and held that there is no evidence that applicant is in possession of the suit land. The issue of whether the applicant is deserving of the said order will have to await the determination of the main suit. The Court would therefore decline to issue the said **prayer No.6.**

Having now considered the Notice of Motion dated **2nd October 2014**, the Court finds that the same is only merited in terms of **prayer No.5** and the Court allows the same. The Court however disallows prayers **No.2, 3, 4 & 6**. The applicant is also entitled to costs of this application.

It is so ordered.

Dated, Signed Delivered this **17th** day of **July, 2015**

L. GACHERU

JUDGE

In the presence of

Mr Macharia for the Plaintiff/Applicant

None attendance for the 1st Defendant/Respondent

None attendance for 2nd & 3rd Defendant/Respondent

Hilda: Court Clerk

Court:

Ruling read in open Court in the presence of Mr Macharia for the Plaintiff /Applicant and in the absence of the Defendants / Respondents.

L. GACHERU

JUDGE