



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 134 OF 2012

MARY NYANCHAMA OGWARE PLAINTIFF

VERSUS

ELKANA ONYANGO 1ST DEFENDANT

JAMES OMBEO 2ND DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on 13th April 2012 seeking:-

(a) A declaration that the plaintiff is the registered proprietor of land parcel known as South Mugirango/Botabori South/804 and a permanent injunction restraining the defendants by themselves or through their agents, servants and anyone claiming under the defendants from trespassing onto and/or interfering with the suit land namely, South Mugirango/Botabori South/804.

(b) An order of eviction to issue against the defendants.

(c) Costs of the suit to be borne by the defendants.

(d) Such further and/or other relief as the honourable court may deem fit and just to grant.

The defendants entered appearance and filed a joint statement of defence on 18th May 2012. In their statement of defence, the 1st defendant averred that LR No. South Mugirango/Botabori South/804 (hereinafter referred to as “the suit property”) was at all material times registered in the name of one, Nyamweya Mariba, deceased (hereinafter referred to as “the deceased”) who was the father of the 1st defendant and that the plaintiff fraudulently presented herself as the sole beneficiary of the estate of the deceased in Succession Cause No. 534 of 2009 and proceeded to transfer the suit property to her sole name upon obtaining a Grant of Letters of Administration thereby disinheriting the 1st defendant of his share in the property. The 1st defendant contended that the plaintiff is not a bonafide proprietor of the suit property. The 2nd defendant on the other contended that he is a bonafide purchaser of a portion of the suit property in respect of which he is in possession.

2. On 17th November, 2014, the defendants filed an application by way of Notice of Motion of the same date brought under section 1A, 3, 3A and 6 of the Civil Procedure Act and Order 51 of the Civil Procedure Rules seeking the following orders:-

(a) That there be an order for stay of proceedings in this matter pending hearing and determination of the application interpartes.

(b) That there be an order for stay of proceedings in this matter pending hearing and determination of objection proceedings in Kisii High Court Succession Cause No. 534 of 2009.

(c) That the costs of this application be in the cause.

The application was supported by the affidavit of the 1st defendant sworn on 17th November, 2014. The 1st defendant contended that the plaintiff who is his sister in-law had obtained a Grant of Letters of Administration in respect of the estate of the deceased fraudulently in Kisii High Court Succession Cause No. 534 of 2009 by misleading the court that she is the sole beneficiary of the estate of the deceased. Having obtained the said Grant of Letters of Administration, the plaintiff proceeded to transfer the suit property to her sole name thereby disinheriting other beneficiaries of the deceased the 1st defendant included. The 1st defendant contended that upon discovering these acts of fraud on the part of the plaintiff, he applied to the High Court (hereinafter referred to only as “the succession court” where the context so admits) for revocation of the Grant of Letters of Administration that was issued to the plaintiff and on the basis of which she acquired the suit property.

3. The 1st defendant contended that after the plaintiff acquired title to the suit property in the manner aforesaid, the plaintiff has been threatening them with eviction from the suit property and it would be fair and just in the circumstances if an order for stay of proceedings sought herein is granted pending the hearing and determination of the objection proceedings aforesaid which would impact on the issue of the legality of the plaintiff’s title to the suit property. The plaintiff filed a replying affidavit sworn on 20th November 2014 in reply to the defendants’ application. The plaintiff stated that the succession cause aforesaid was filed by her deceased husband Johnson Nyamweya Mariba and that she was only substituted as a petitioner after his demise. The plaintiff contended that she obtained a Grant of Letters of Administration in contention legally and the defendants are total strangers to the estate of Nyamweya Mariba (“deceased”).

4. The plaintiff contended that the defendants’ application is intended to delay the prosecution of this case without any reasonable cause. The plaintiff has contended that she is a widow and that the defendants aim is to defraud her of her deceased husband’s land which she acquired legally through a court process.

5. When the matter came up for hearing before me on 4th February 2015 it was agreed by the advocates for the parties that the application be argued by way of written submissions. The parties filed their respective submissions and the same are on record. I have considered the defendants’ application together with the affidavit filed in support thereof. I have also considered the affidavit that was filed by the plaintiff in opposition to the same. Finally, I have considered the submissions by the parties’ respective advocates and the authorities that were cited in support thereof. The defendants’ application is seeking an order for stay of proceedings herein pending the determination of the objection proceedings in a succession cause before the High Court in which the 1st defendant has sought the nullification of a confirmed Grant of Letters of Administration that was issued to the plaintiff and on the strength of which the plaintiff acquired the suit property.

6. In the case of, **Global Tours & Travel Limited Nairobi HC Winding up Cause No. 43 of 2000 (unreported)** Ringera J. stated as follows:-

“As I understand the law whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in

the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

7. In the case of **Kenya Power & Lighting Company Limited –vs- Esther Wanjiku Mokabi [2014] eKLR** Githua J. stated that:

‘To my mind the court’s discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by the following 3 main principles:-

(a) Whether the applicant has established that he/she has a prima facie case.

(b) Whether the application was filed expeditiously.

(c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”

8. Although the application before me is not seeking a stay of proceedings pending appeal, I am entirely in agreement with the general principles guiding the grant of stay of proceedings set out in the foregoing cases. It is not disputed that the suit property was registered in the name of the deceased and that the 1st defendant has contended that he is a son to the deceased. It is also not disputed that the plaintiff presented herself in the succession cause aforesaid as the sole beneficiary of the estate of the deceased and that a Grant of Letters of Administration in respect of the estate of the deceased was issued to her and was confirmed on that basis. According to the certificate of confirmation of the said Grant of Letters of Administration, the suit property was the deceased’s only asset.

9. After the plaintiff had caused the suit property to be registered in her name, she brought these proceedings to have the defendants evicted from the suit property. The defendants have challenged the plaintiff’s title to the suit property. They have contended that the plaintiff acquired the suit property through a Grant of Letters of Administration that she obtained fraudulently through non-disclosure of material facts to the succession court. The 1st defendant has moved the succession court to have the said Grant revoked on account of the alleged irregularity. The defendants’ have annexed to the present application a copy of the summons that he has lodged in the succession court for revocation or annulment of grant that was issued to the plaintiff in the High Court of Kisii Succession Cause No. 534 of 2009.

10. This court has no jurisdiction to determine the legality or otherwise of the Grant of Letters of Administration that was issued by the High Court to the plaintiff in the succession cause aforesaid. The High Court is best suited to determine that issue. It will also be in a position to determine the twin issue as to whether or not the 1st defendant was a beneficiary of the estate of the deceased and was entitled to a share of his estate including the suit property. The determination of these issues would assist this court in determining the issues that have been raised in this suit. If the 1st defendant succeeds in his application for revocation of the Grant of letters of Administration that was issued to the plaintiff, the plaintiff’s claim herein will have no leg to stand on. On the other hand, if the 1st defendant is unsuccessful in that application, the defendants’ defence herein shall be rendered otiose. I am of the view in the circumstances that it would serve the interest of justice if the 1st defendant is given an opportunity to prosecute his application pending in the High Court for revocation of the subject grant. I can see no prejudice that would be occasioned to the plaintiff if this cause of action is adopted since the determination of the said application as I have stated above would narrow down the issues in this case. However, in view of the constitutional imperative that requires suits to be determined expeditiously, the stay sought would be granted for a limited period within which the 1st plaintiff will have to take steps to prosecute the said application for revocation of grant pending before the High Court.

11. In conclusion, it is my finding that the defendants’ application dated 17th November, 2014 has merit. I hereby order that there shall a stay of all further proceedings in this suit for a period of six (6)months from the date hereof to enable the 1st defendant to prosecute his application for revocation of Grant of

Letters of Administration that was issued to the plaintiff in Kisii High Court Succession Cause No.534 of 2009. The costs of the application shall be in the cause.

Delivered, Dated and Signed at Kisii this 10th day of July 2015.

S.OKONG'O

JUDGE

In the presence of:

Mr. Ochwang'i h/b for Sagwe for the plaintiff

Mr. Nyariki h/b for Gichana for the defendant

Milcent Court assistant

S.OKONG'O

JUDGE