



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 93 OF 2014 (OS)

IN THE MATTER OF SECTIONS 28 (a) & (b) OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF ORDER 37 RULE 8 OF THE CIVIL PROCEDURE RULES, 2010

AND

SECTIONS 1A, 1B, 3A & 63 (e) OF THE CIVIL PROCEDURE ACT

AND

ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

SARAH MORAA MORACHA1ST
APPLICANT

SMART NGARE MORACHA2ND
APPLICANT

VERSUS

JULIUS MORACHA MATUNDURA 1ST
RESPONDENT

ANNE ONDIEKI 2ND
RESPONDENT

RULING

1. The applicants brought this suit by way of Originating Summons dated 10th March 2014 seeking;
 - i. **A declaration that the applicants' rights over a portion of land known as LR No. Kisii Municipality/Block II/66 (hereinafter the "suit property") is conferred by section 28 (a) and (b) of the Land Registration Act, 2012 as an overriding interest and as such the applicants are entitled to a share of the said property.**
 - ii. **A declaration that the 1st respondent was registered as the proprietor of a share of the suit property so as to hold the same in trust for his sons and grandsons by virtue of the provisions**

of sections 28 (a) and (b) of the Land Registration Act aforesaid and as such any disposition of the suit property without the consent of the 1st respondent's sons and other family members is illegal and void.

iii. A declaration that the disposition and transfer of a share of the suit property by the 1st respondent to the 2nd respondent was illegal, null and void.

2. Together with the Originating Summons, the applicants filed an application by way of Notice of Motion also dated 10th March 2014 seeking a temporary injunction to restrain the 2nd respondent from evicting tenants, disposing off, alienating, wasting or charging the suit property. The applicants' application was supported by the affidavit of the 2nd applicant sworn on 10th March 2014. The application was brought on the following grounds. The 1st respondent is the 1st applicant's husband and the 2nd applicant's father. The 1st respondent was registered as the proprietor of a portion of the suit property to hold in trust for his sons and grandsons. This was in accordance with the order that was issued by the court in Kisii High Court Succession Cause No. 62 of 2009.
3. In breach of the terms of the said court order, the 1st respondent has proceeded to transfer the portion of the suit property that was registered in his name to hold in trust as aforesaid to the 2nd respondent without the consent or authority of the 1st respondent's sons and other family members. The 2nd respondent has since proceeded to terminate the leases for the tenants who were occupying the portion of the suit property that was sold and transferred to her by the 1st respondent thereby denying the applicants the income that they used to derive there from that they require for paying school fees and other needs. It is the applicants' contention that the transfer of the portion of the suit property that was held by the 1st respondent in trust to the 2nd respondent was null and void to the extent that the same was in breach of the 1st respondent's duty as a trustee.
4. The applicant's application was opposed by the respondents who filed separate replying affidavits both sworn on 14th March, 2014 in response thereto. In his response to the application the 1st respondent contended that on 2nd November 2012, the High Court issued to the 1st respondent and one, William Onkoba Matundura a grant of letters of administration in respect of the estate of one, Teresa Nyanhero Matundura ("**deceased**") in High Court Succession Cause No. 62 of 2009 (hereinafter referred to as "**the Succession Cause**") and that the said grant was confirmed on 17th December 2012. Among the assets of the estate of the deceased was LR No. Kisii Town/Block II/66 ("the suit property"). In the course of the distribution of the estate of the deceased, the 1st respondent was registered as the proprietor of 1/3 portion of the suit property. On 31st January 2013, the 1st respondent entered into an agreement for sale of the said portion of the suit property to the 2nd respondent to whom he subsequently transferred the same.
5. The 1st respondent has contended that the agreement for sale between the 1st respondent and the 2nd respondent was lawful and that the 2nd respondent is now the lawful and bonafide proprietor of 1/3 portion of the suit property that was transferred to her by the 1st respondent. The 1st respondent contended that the 2nd applicant had consented to the sale of the said portion of the suit property to the 2nd respondent and that the filing of this suit has been actuated by ulterior motives. The 1st respondent has contended further that the issues raised herein are *res judicata* the same having been raised by the applicants in the succession cause in which the same were heard and determined. The 1st respondent contended that the applicants have no rights or interests in the portion of the suit property in dispute and as such they have no *locus standi* to institute this suit.
6. In her response to the application, the 2nd respondent contended that she purchased the suit property from the 1st respondent at a consideration of kshs. 2,000,000/=. The 2nd respondent contended that upon the sale and transfer of the said portion of the suit property to her name, she became the lawful and bona fide proprietor thereof with absolute and exclusive rights over the same. The 2nd respondent contended that the said portion of the suit property having been transferred to her by a duly appointed legal administrator of a deceased person, her title to the

same is indefeasible. The 2nd respondent contended that the 1st applicant's claim has no basis as the suit property has never been and was not a matrimonial property. With regard to the applicants' claim that the sale of the suit property to her by the 1st respondent was done in breach of trust, the 2nd respondent contended that before the suit property was sold and transferred to her, the 1st respondent obtained the requisite consents from his sons. Like the 1st respondent, the 2nd respondent contended that the suit herein is *res judicata* because the issues raised herein had been raised by the applicants in the Succession Cause, were head and determined. The 2nd respondent also challenged the applicants' locus standi to bring this suit.

7. On 20th March 2014 the parties agreed to argue the applicants application by way of written submissions. The applicants filed their submission on 15th April 2014 while the respondents did so on 24th April 2014. I have considered the applicants' application and the affidavits filed by the respondents in opposition thereto. I have also considered the written submissions by the advocates for both parties and the authorities cited in support thereof. What I need to determine at this stage is whether the applicants have met the conditions for granting interlocutory injunction. As was held in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358** an applicant for an interlocutory injunction must establish that he has a prima facie case with a probability of success against the respondent and that if the order is not granted, he is likely to suffer irreparable injury. In the event that the court is in doubt, the application would be determined on a balance of convenience. It is not in dispute that the 1st respondent and one, William Onkoba Matundura were appointed as personal representatives of the estate of Teresa Nyanhero Matundura (“deceased”) and that among the assets of the deceased was the suit property. It is also not in dispute that the 1st respondent was one of the beneficiaries of the estate of the deceased.
8. It is also not disputed that an order was made in the Succession Cause that the 1st respondent was entitled to 1/3 share of the suit property and that, once he received the said 1/3 share, he would hold the same in trust for his sons and grandsons. I have noted that, on 5th April 2013, the suit property was transferred to the 1st respondent and one, Sospeter Moindi Mokaya by the administrators of the estate of the deceased by transmission. On the same date, 1/3 portion of the suit property was transferred to the 1st respondent. It is expressly stated in entry number 9 in the register of the suit property that the 1st respondent was to hold the said 1/3 portion of the suit property in trust for his sons and grandsons. This fact is also clear in the certificate of official search dated 11th April 2013 that is annexed to the affidavit of the 2nd respondent as exhibit “AO2”. It is therefore beyond doubt that the 1st respondent was to hold the 1/3 portion of the suit property that was registered in his name in trust for his sons and grandsons.
9. The applicants' case is that, the 1/3 portion of the suit property that was registered in the name of the 1st respondent to hold in trust as aforesaid was transferred to the 2nd respondent in breach of the said trust in that the 1st respondent did not obtain the consent of the persons on whose behalf he held the said property in trust before he sold and transferred the said property to the 2nd respondent. The 1st respondent has evaded and failed to respond to this serious accusation in his affidavit in reply to the present application. The 1st respondent had no rights or interest in the 1/3 portion of the suit property that was registered in his name. He held the property as a mere trustee. He had no personal interest in the property that he could pass to the 2nd respondent. The 1st respondent could only sell and transfer the said 1/3 portion of the suit property as a trustee and this he could only do lawfully upon obtaining the consents from the beneficiaries under the trust namely, his sons and grandsons.
10. I have no evidence before me that the 1st respondent obtained the consent of his sons and grandsons before he sold and transferred 1/3 portion of the suit property to the 2nd respondent. The 1st respondent has annexed to his affidavit as exhibit “JMM6” what he has referred to as a consent that was given to him by his three (3) sons to transfer the property in dispute to the 2nd respondent. The 2nd applicant has denied ever having consented to the sale of the disputed portion of the suit property to the 2nd respondent. In fact he has annexed a copy of a birth certificate for one of the 1st respondent's sons who is said to have given his consent to the transaction, one,

- Bonface Onsongo to show that he was only 12 years old when he is alleged to have given his consent aforesaid. The said Bonface Onsongo could not therefore have given a lawfully binding consent. Even if it is assumed that all the sons of the 1st respondent had given consent to the transaction, I am doubtful if such consent would have relieved the 1st respondent of his trusteeship. As stated above, the 1st respondent held the 1/3 portion of the suit property in trust not only for his sons but also his grandsons. There has been no suggestion that the 1st respondent's grandsons authorized him to sell the disputed portion of the suit property. The respondents have in their notice of preliminary objection and replying affidavit put forward several grounds to show that the applicants have not established a prima facie case against them.
11. I have considered each of the said grounds. The first ground that has been raised by the respondents is that the issues raised herein should have been brought to court by way of a normal suit and not by way of Originating Summons under order 37 of the Civil Procedure Rules, 2010. The applicants' Originating Summons has been brought under order 37 rule 8 of the Civil Procedure Rules. That provision allows all applications under the Registered Land Act, Cap 300 (now repealed) with few exceptions to be brought by way of Originating Summons. The applicants' application herein is premised on sections 28 (a) and (b) of the Land Registration Act, 2012. Section 28 (a) and (b) of the Land Registration Act, 2012 does not provide that any application there under can be brought by way of Originating Summons. Order 37 rule 8 does not also refer to sections 28 (a) and (b) of the Land Registration Act, 2012. It follows therefore that, even if section 28 (a) and (b) had provided that an application can be brought there under, such application could not have been brought by way of Originating Summons under Order 37 rule 8 because that Order refers as I have stated above to Registered Land Act Cap 300 Laws of Kenya ("RLA") (now repealed) only.
 12. It cannot be assumed that any reference to the RLA in the Civil Procedure Act and rules would after the repeal of the RLA apply to the statutes that replace it. I am therefore in agreement with the respondents that the issues and declaratory reliefs sought by the applicants herein should have been raised and pursued in a normal civil suit. The other issue that was raised by the respondents was that this Originating Summons is *res judicata* in that the issues raised had been raised and determined in the Succession Cause. I am not in agreement with this contention. First, the applicants had moved the court in the Succession Cause by way of an application and not by a substantive suit like in this case and the main reliefs that were sought in the said application have not been sought herein. Secondly, the court held that the 2nd respondent's title could not be challenged in the Succession Cause. Furthermore, the court stated in relation to the 1st applicant herein who was the 2nd applicant in the succession cause that **"The 2nd applicant should mount that fight in another forum"**. Thirdly, the 2nd applicant herein was not a party to the Succession Cause application. The decision made therein cannot therefore bar him from bringing this suit. The other ground put forward by the respondents is that the court in the Succession Cause had held that the 2nd respondent's title to the 1/3 portion of the suit property is indefeasible under section 93 of the Succession Act, Cap 160 Laws of Kenya and as such to call upon this court to determine the issue again would be tantamount to inviting the court to sit on appeal against the decision of a court of concurrent jurisdiction.
 13. I am once again not in agreement with this submission. As I have stated above, the judge in the Succession Cause had stated that the title of the 2nd respondent could not be challenged in the said cause and advised the 1st applicant herein to do so in another forum. The court did not give the 2nd respondent's title total immunity from challenge as claimed by the respondents. I am even doubtful if the 2nd respondent's title can enjoy protection under section 93 of the Succession Act, Cap 160 Laws of Kenya. As I have stated above, the 1/3 portion of the suit property was transferred to the 1st respondent herein by transmission as a beneficiary of the estate of the deceased. Thereafter the 1st respondent transferred the same to the 2nd respondent in his capacity as the proprietor of the property.
 14. It is seriously misleading to suggest and I believe that the respondents herein misled the Succession Court to believe that the 1/3 portion of the suit property was transferred to the 2nd respondent by the 1st respondent in his capacity as the administrator of the estate of the deceased.

- That is totally untrue. The argument was ingeniously put forward to enable the 2nd respondent to hide behind section 93 of the Succession Act, Cap 160 aforesaid. The respondents' argument that the 2nd respondent's title is protected as aforesaid has no basis. The 2nd respondent has also contended that she has a valid and lawful right over the suit property having purchased the same from the 1st respondent and as such to issue the injunction sought would be tantamount to divesting her and/or dispossessing her of the suit property. I am in agreement that the 2nd respondent is the registered owner of the suit property and that she has an interest in the same.
15. The legality of that interest has however been challenged. On the material before me, I am doubtful whether the 1st respondent had the capacity to sell and transfer the 1/3 portion of the suit property to the 2nd respondent. The 1st respondent as I have stated above was a trustee and had no personal interest in the suit property that he could transfer and confer upon the 2nd respondent. The 1st respondent could not transfer upon the 2nd respondent an interest that he did not have. If it is proved at the trial that the 1st respondent sold and transferred to the 2nd respondent the disputed property without authority of the beneficiaries of the trust, the beneficiaries like the 2nd respondent herein would be entitled to trace and recover the property sold in breach of trust.
16. From the foregoing, I am satisfied that the 2nd respondent has established a prima facie case against the respondents. I am however doubtful of the success of that case in view of the reservations that I have expressed above regarding the suitability of instituting the suit herein by way of origination summons. On whether the applicants stand to suffer irreparable harm, I am satisfied that the 2nd respondent who is a beneficiary of the trust that was bestowed upon the 1st respondent would suffer irreparable injury if the injunction sought is not granted. The disputed property being a trust property, may be put beyond the reach of the beneficiaries the 2nd respondent inclusive if an order is not made to stop such move. On the other hand, I am in agreement with the respondent's contention that the 1st applicant has no locus standi to bring this suit. The 1st applicant has no known legal or equitable interest in the suit property in respect of which she can seek protection from this court.
17. Having expressed doubt on the chances of success of the applicants' case, their application falls for consideration on a balance of convenience. The 2nd respondent purchased the disputed property from the 1st respondent for valuable consideration and she is in possession thereof. Whether she acquired the property illegally or not can only be determined at the trial. I am of the view that the balance of convenience would lean against granting of the injunction sought. It would however served the interest of justice if an order is made that would ensure that the suit property is preserved pending the hearing and determination of this suit.
18. In conclusion, the applicant's application dated 10th March 2014 is disallowed. In exercise of the powers conferred upon this court under section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and section 13 (7) of the Environment and Land Court Act, 2011, I hereby order that pending the hearing and determination of this suit there shall be an inhibition against the title of the suit property inhibiting the registration of any further dealing with the 1/3 portion thereof which is registered in the name of the 2nd respondent. The cost of the application shall be in the cause.

Delivered, signed and dated at KISII this 14th of November, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Begi h/b for Nyambati

for the 1st and 2nd applicants

Mr. Ochwang'i

for the 1st and 2nd respondents

Mr. Mobisa

Court Clerk

S. OKONG'O

JUDGE