



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 59 OF 2016

JAMES MURIITHI NDAMBIRI.....1ST PLAINTIFF

VERONICA NYAWIRA NDAMBIRI.....2ND PLAINTIFF

VERSUS

EFUREITHI IRIMA MUGO.....1ST DEFENDANT

MINISTER OF LAND.....2ND DEFENDANT

LAND REGISTRAR MBEERE DISTRICT.....3RD DEFENDANT

RULING

A. INTRODUCTION

1. By a plaint dated 24th August 2016 the Plaintiffs who are the administrators of the estate of David Ndambiri Fedesio (the deceased) pleaded that the deceased was at all material times the registered proprietor of *Title No. Mbeere/Kirima/1100* (the *suit property*). They were, however, aggrieved because the 2nd Defendant had by an order made on 4th March 2016 directed that the *suit property* be registered in the 1st Defendant's name pursuant to proceedings they were never made aware of.

2. The Plaintiffs considered that the 2nd Defendant had violated the rules of natural justice by depriving the deceased of the *suit property* hence they sought the following reliefs in the plaint:

- a) *A declaration that the 2nd Defendant's decision is null and void as the same infringed on the Plaintiffs' right to property.*
- b) *A declaration that David Ndambiri Fedesio is absolute owner of Land Parcel No. Mbeere/Kirima/1100 and thus the Plaintiffs are entitled to a permanent injunction against the 1st Defendant, her agents and/or anyone acting on her behalf from evicting the Plaintiffs and their family members from Land Parcel No. Mbeere/Kirima/1100 or in anyway interfering with the said land.*
- c) *Costs of the suit.*

B. THE PLAINTIFFS' APPLICATION

3. By a notice of motion dated 25th June 2020 expressed to be brought under **Article 40(2) (a)** of the **Constitution of Kenya, Order 40 Rule 1 & Order 50 Rule 10** of the **Civil Procedure Rules, section 1A & 3A** of the **Civil Procedure Act, Section 68 (1)** of the **Land Registration Act and all other enabling provisions of the law** the Plaintiffs sought the following pertinent orders:

- a) ***That*** this honourable court be pleased to temporarily restrain the Defendants/Respondents, their agents and/or servants by way of a temporary injunction from evicting the Applicants, subdividing, alienating, disposing or in any manner whatsoever interfering with Land Parcel No. Mbeere/Kirima/1100 pending the hearing and determination of the suit herein.
- b) ***That*** an order of inhibition be issued by this honourable court against land parcel No. Mbeere/Kirima/1100 pending the hearing and determination of the main suit herein.
- c) ***That*** the OCS Kiritiri Police Station to ensure compliance with the orders herein.

d) That costs of this application be provided for.

4. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 2nd Plaintiff on 25th June 2020. It was contended that the 1st Defendant had embarked on sub-division of the suit property during the pendency of the suit with the risk that the Plaintiffs might be evicted and the suit rendered nugatory. The Plaintiffs also contended that the suit property may not be in a usable state upon conclusion of the suit unless the orders sought were granted.

C. THE DEFENDANTS' RESPONSE

5. The material on record shows that it is only the 1st Defendant who filed a response to the application. The 1st Defendant filed a replying affidavit sworn on 30th June 2020 in opposition to the application. She contended that she was the registered proprietor of the suit property having lawfully acquired the same upon determination of land adjudication appeals which were determined by the 2nd Defendant at which the deceased was represented by one Francis Muchira Mwanu.

6. The 1st Defendant stated that there were three appeals involving the suit property to wit *Minister's Land Appeal Case No. 25 of 2006, Case No. 56 of 1997 and Case No. 20 of 2011* which were heard and determined together. She stated that the 1st Plaintiff who is the 2nd Plaintiff's son (and son of the deceased) testified as a witness in two of the said appeals. It was also her case that Felidah Kairu Ngune who had purportedly sold the suit property to the deceased was also a party to the appeals but she lost.

7. The Defendant pointed out that at the time the Plaintiffs conducted succession proceedings in *Siakago PMC's Succession Cause No. 9 of 2011 In the Matter of the Estate of David Ndambiri* the suit property was encumbered with a restriction which indicated there should be no further dealings with the suit property until the appeals before the Minister were determined.

8. It was, therefore, the 1st Defendant's contention that the Plaintiffs had failed to demonstrate a *prima facie* case with a probability of success at the trial hence they were not entitled to the orders sought or any one of them.

D. DIRECTIONS ON SUBMISSIONS

9. When the said application was listed for hearing on 1st July 2020 it was directed that the application shall be canvassed through written submissions. The Plaintiffs were granted 21 days to file and serve their submissions whereas the Defendants were to file and serve theirs within 14 days upon the lapse of the Plaintiff's period. However, by the time of preparation of the ruling, none of the parties had filed submissions.

E. THE ISSUES FOR DETERMINATION

10. The court has considered the Plaintiffs' notice of motion dated 25th June 2020 together with the supporting affidavit and annexure thereto, the 1st Defendant's replying affidavit sworn on 30th June 2020 together with the annexures thereto and the material on record. The court is of the opinion that the following issues arise for determination herein:

- a) *Whether the Plaintiffs have made out a case for the grant of a temporary injunction.*
- b) *Whether the Plaintiffs have made out a case for the grant of an order of inhibition.*
- c) *Who shall bear the costs of the application.*

F. ANALYSIS AND DETERMINATIONS

a) Whether the Plaintiffs have made out a case for an interim injunction

11. The principles to be considered in an application for an interlocutory injunction were enunciated in the case of **Giella v Cassman Brown & Co. Ltd [1973] EA. 358**. First, the applicant must demonstrate a *prima facie* case with a probability of success at the trial. Second, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss or damage which cannot be adequately compensated by an award of damages. Third, if the court is in doubt, it shall decide the application on a balance of convenience.

12. The court has considered the material on record against the first principle. It is apparent from the material on record that although the deceased was registered as proprietor of the suit property on 23rd January 2004, a restriction was entered in the land register preventing further dealings with it until the pending appeals before the 2nd Defendant were finalized. It would appear further from the record that the relevant appeals were concluded in 2016 whereby the 1st Defendant was the successful party. That is the basis upon which she was registered as proprietor of the suit property on 13th June 2016 and that is also the date when the restriction in the Land Register was lifted.

13. It is evident from the plaint dated 24th August 2016 that the Plaintiffs are challenging the 2nd Defendant's decision in the appeals on the basis that they were not aware of the proceedings by which the 1st Defendant was declared the legitimate owner. They pleaded in paragraph 8 of the plaint thus:

'8. The 2nd Defendant in awarding the suit land violated the rules of natural justice as the Plaintiffs were never made aware

of the said proceedings. (emphasis added)

14. That is really the gravamen of the Plaintiffs' suit. Their contention is that they were deprived of the suit property without being accorded an opportunity of being heard. However, upon perusal of the proceedings of the appeals which were exhibited by the 1st Defendant it is clear that the 1st Plaintiff who is the son of the deceased and of the 2nd Plaintiff testified before the 2nd Respondent in a bid to retain the suit property which the deceased is said to have bought from Felidah Kairu Ngune. The said Felidah Kairu Ngure was party to the appeals and she also lost.

15. The court is of the opinion that where parliament has provided a mechanism or process for resolution of a dispute that process ought to be strictly followed. The **Land Adjudication Act (Cap. 284)** provides an elaborate process for resolution of disputes during the land demarcation and adjudication process. The process usually terminates with an appeal to the Minister whose decision is final subject, of course, to the supervisory jurisdiction of the superior courts. Although an aggrieved party can challenge such decision on account of violation of the rules of natural justice, the Plaintiffs in the instant suit have not made out a *prima facie* case on the alleged violation. All the material on record points to the contrary. It is also unlikely that the trial court would usurp the power of the 2nd Defendant and declare the deceased to be the legitimate owner of the suit property. As such, the court finds and holds that the Plaintiffs have failed to demonstrate a *prima facie* case with a probability of success at the trial.

16. Since the Plaintiffs have failed to surmount the first principle, it shall not be necessary for the court to consider the other two principles for the grant of an interlocutory injunction. The Plaintiff's application for an interim injunction consequently fails.

17. The court has noted from the material on record that during the pendency of the appeals before the 2nd Defendant and whilst the suit property was restricted, the Plaintiffs conducted succession proceedings whereby they purported to distribute the suit property amongst various beneficiaries of the estate of the deceased. The Plaintiffs were definitely acting in bad faith when they did so during the pendency of the appeals. They knew pretty well that the 2nd Defendant's decision on appeal could go either way. They were, therefore, trying to steal a march on the 1st Defendant by trying to render the outcome of the appeal nugatory. The court is thus of the opinion that the Plaintiffs did not come to court with clean hands hence they are disentitled to the equitable remedy of injunction.

b) Whether the Plaintiffs have made a case for the grant of an order of inhibition

18. Although the court has discretionary power to grant an order of inhibition to prevent any dealings with the suit property for a limited period of time or until the determination of the suit, the court is not inclined to grant such an order in the instant application. The court has already found that the Plaintiffs have not demonstrated a *prima facie* case with a probability of success at the trial. The court is thus not satisfied that this is a fit case for the grant of an order of inhibition.

19. The Plaintiffs appear to have come to the end of the road in the process of land adjudication following the decision of the 2nd Defendant in the appeals. However, it would appear that they would like to keep the matter alive for much longer by fabricating reasons for continued litigation. They are simply trying their luck by initiating a fresh suit before the Environment and Land Court in the hope that the matter would be kept alive through the judicial appellate system for some decades as they figure out on what else they could do to retain the suit property.

c) Who shall bear costs of the application

20. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the 1st Defendant who participated in the application shall be awarded costs of the application.

G. CONCLUSION AND DISPOSAL ORDER

21. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 25th June 2020. Accordingly, the same is hereby dismissed in its entirety with costs to the 1st Defendant only. For the avoidance of doubt, the interim orders of inhibition in place are hereby vacated. It is so ordered.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **15TH DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Mr. Andande for the Plaintiffs, Rose Njeru for the 1st Defendant and Ms. Njenga for the Attorney General for the 2nd & 3rd Defendants.

Y.M. ANGIMA

JUDGE

15.10.2020