



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 532 of 2012

JOHN MUCHIRI MBUTHIA..... PLAINTIFF

VERSUS

REBECCA WERE MUTANDA.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING

There are two applications before the court for determination. The first is a Notice of Motion dated 22nd August 2012 brought under section 63(c) and (e) of the Civil Procedure Act and Order 40 Rule 1, 2, 4 and 10 of the Civil Procedure Rules brought by the Plaintiff. The Plaintiff is seeking an order that the 1st Defendant be restrained from invading, evicting, occupying, developing, leasing, letting, selling or completing by conveyance any transfer of any sale or otherwise howsoever interfering with the Plaintiff's ownership of, title to and/or interest in stall number 647 Kariobangi North Market. The application is supported by an affidavit sworn by the Plaintiff on 22nd August 2012, and opposed by the 1st Defendant in an affidavit she swore on 3rd October 2012.

The second application is a Notice of Motion dated 25th September 2012 brought by the 1st Defendant under sections 3A and 63 of the Civil Procedure Act as well as Order 40 and 51 of the Civil Procedure Code. The 1st Defendant is seeking a mandatory injunction to restrain the Plaintiff from interfering, with, forcefully occupying and illegally possessing or using the 1st Defendant's stall number 647 Kariobangi North Market. The application is supported by an affidavit sworn by the 1st Defendant on 3rd October 2012 and is opposed by the Plaintiff in grounds of opposition dated 3rd December 2012.

The Plaintiff's case is that he is the owner of Stall Number 647 Kariobangi North Market (hereinafter referred to as the suit property), and that the 1st Defendant has unlawfully obtained a transfer of the said stall to her name and is now threatening to evict the Plaintiff. The Plaintiff has stated that he purchased the suit property for value from Julius Mwangi Maina in the year 2011, and has attached a copy of the sale agreement as evidence. According to the Plaintiff, Julius Mwangi Maina had bought the property from Jairos Otanga Okonyo and Festus Okonyo Litunya. A copy of the sale agreement between the said parties has been exhibited, as well as the letter of allotment to Jairos Otanga Okonyo with respect to the suit property.

The Plaintiff alleges that in order to facilitate registration of the stall in his name, he was issued with a

letter of allotment of the stall, death certificate of the registered owner as well as affidavits whose copies have been annexed as evidence. The Plaintiff has averred that since the purchase of the suit property, he has had uninterrupted occupation until the 1st Defendant wrote to him demanding that he vacates from the property. Further, the Plaintiff has stated that since he purchased the stall, he has continuously paid rates to the 2nd Defendant and has attached copies of receipts for rates paid.

The 1st Defendant's case is that she is the widow of Mr. Festus Okonyo (deceased), the original owner of the suit property, and was entitled to own the said property as a result of a transfer effected by the 2nd Defendant who is the head lessor and holder of title of the suit property. The 1st Defendant has annexed copies of the minutes of the meeting where the said transfer was approved, a grant of letters of administration in respect of the estate of the late Jairo Otanga by the 2nd Defendant, and receipts from and correspondence with the 2nd Defendant with respect to the suit property.

The 1st Defendant has alleged that she secured the suit premises from City Council in the 1990's and had it officially registered and allocated in the name of her late husband Jairo Otanga Festo as a matrimonial property. According to the 1st Defendant, Festus Litunya who is a grandchild to her late husband forcefully and surreptitiously took possession of the suit premises together with original documents, and rented the same to third parties alleging he was the first born son to the 1st Defendant's late husband. The 1st Defendant maintains that it was upon follow up with the City Council that her rights were recognized and transfer effected in her name.

Further, the 1st Defendant stated that it was after she was sued that she realized that the said grandson had illegally sold the plot to Julius Mwangi Maina while purporting to be the personal representative of the estate of her late husband. According to the 1st Defendant, the sale agreements in respect of the suit premises are illegal and of no evidentiary value. This is for the reason that there was no evidence to prove that Festus Litunya was a personal representative of the estate of Jairo Otanga Festo, and therefore lacked legal capacity to enter into any sale agreement over the suit property.

The two applications were heard on 19th February 2013, and the Plaintiff and 1st Defendant relied on written submission they had filed in court. The 2nd Defendant's counsel indicated that he was not responding to either of the applications.

The Plaintiff's Counsel in submissions dated 3rd December 2012 argued that his case squarely falls within the circumstances laid down in the case of **Giella -vs- Cassman Brown (1973) EA 348**. Further, counsel argued that annexures attached to the Plaintiff's affidavit showed that the land belonged to the Plaintiff and that the 1st Defendant colluded with the 2nd Defendant who effected transfer without the Plaintiff's knowledge. It was submitted that the Plaintiff had therefore established a *prima facie* case.

It was further submitted that the Plaintiff will suffer irreparable loss if the injunction is not granted as the 1st Defendant is intent on evicting him from the suit property. The Plaintiff's counsel also argued that the balance of convenience tilted in favour of the Plaintiff who was in occupation of the suit property. Lastly, counsel for the Plaintiff stated that the test as to grant a mandatory injunction is stated in Volume 24 of **Halsbury's Laws of England** 4th edition at paragraph 948, and that the 1st Defendant had not made out a special case for the grant of a mandatory injunction.

The 1st Defendant's Counsel in submissions dated 14th February 2013 relied on the case of **Katende -vs- Haridas (2008) 2EA 173** where it was held that a purchaser who without investigating whether his predecessor had any title or power of attorney to sell the land could not be held as a *bona fide* purchaser. Further, it was argued that an injunction ought to be granted to the 1st Defendant's as the damage that will be suffered by the Plaintiff can be compensated. The Counsel contended that the balance of convenience tilted in favour of the 1st Defendant, a widow and legal representative of the estate of Jairo Otanga, and whom the 2nd Defendant had recognized and transferred the suit property to as the sole beneficiary of the

deceased's estate.

Counsel for the 1st Defendant further submitted that Festus Litunya had no legal capacity and could not transfer title of a property without letters of administration. While relying on section 35 of the Law of Succession Act, counsel argued that the 1st Defendant's grandson could not be ranked on priority over the widow of the estate of the deceased, and placed reliance in the authority of **Re Estate of Wamira (2000) KLR 12** where it was held that a surviving widow had preference over other persons.

Lastly, the counsel argued that the 1st Defendant had established a *prima facie* case against the Plaintiff for among other reasons that she and her late husband were strangers to the purported sale agreements with respect to the suit property which were effected by persons who were not administrators or beneficiaries of the estate of the late Jairo Otanga. Finally, it was submitted that the 2nd Defendant had already transferred the suit property to the 1st Defendant.

I have read and carefully considered the pleadings, evidence and submissions made by the parties herein. The issues to be determined is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction and whether the 1st Defendant has met the requirements for a mandatory injunction as laid out in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**.

The requirements for a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience. For a mandatory injunction to issue in favour of the 1st Defendant there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

The first question to be answered therefore is whether the Plaintiff and 1st Defendant have established a *prima facie* case. The Plaintiff in his plaint dated 22nd August 2012 is seeking a declaration that he is owner of the suit property and cancellation of any title issued by the 2nd Defendant to the 1st Defendant, as well as a permanent injunction. He has brought evidence of a sale agreement with respect to the suit property dated 29th June 2011 entered into with Julius Mwangi Maina, , and of the sale agreement dated 26th June 2009 between the said Julius Mwangi Maina and Festus Okonyo Litunya who is described as the personal representative of the estate of Jairo Otanga Festo Okonyo. He has also brought evidence of the letter of allotment dated 8.1.1996 with respect to the suit property issued to Jairos Otanga and payment receipts issued by the 2nd Defendant with respect to the said property.

The Plaintiff's claim to the suit property is contested by the 1st Defendant who argued that the sale of the property was executed by persons who lacked capacity. The grant of letters of administration attached to the 1st Defendant's application dated 25.09.12 and a copy of the death certificate produced by the Plaintiff indicate that Jairo Otanga Festo Okonyo died on 7th October 2007. The sale agreement between Festus Okonyo Litunya and Julius Mwangi Maina shows that the sale of the suit property took place on 26th June 2009, after the demise of the original allottee Jairo Otanga Festo Okonyo. There was no evidence brought to show that Festus Okonyo Litunya was the legal representative of the deceased at the time of the said sale. On the other hand, the 1st Defendant has brought evidence to show that she is the legal representative of the estate of Jairo Otanga Festo Okonyo as per the grant of letters of administration issued to her on 3rd March 2011.

It was held by the Court of Appeal in the case of **Troustik Union International & Another -vs- Mrs Alice Mbeyu & Another, Nairobi Civil Appeal Number 145 of 1990**, that nobody has capacity to act with regard to a deceased's estate without first applying for letters of administration. I therefore find that the Plaintiff has not established a *prima facie* case with probability of success in the absence of evidence that Festus Okonyo Litunya was the legal representative of the deceased Jairo Otanga at the time of the

alleged sale of the suit property to Julius Mwangi Maina on 26th June 2009. The Plaintiff's application dated 22nd August 2012 therefore fails.

The 1st Defendant on her part has brought evidence of the grant of letters of administration issued to her with respect of the estate of Jairo Otanga, and of minutes showing a transfer of the suit property in her favour by the 2nd Defendant. I have perused the said minutes and note that they refer to the 1st Defendant's application for transfer, but that there is no resolution recorded in the said minutes on the said application and/or transfer. However, I find that the 1st Defendant has shown her entitlement to the suit property based on her grant of letters of administration, and has therefore shown a *prima facie* case.

I however do not find this to be a clear case for a mandatory injunction to issue as there are outstanding issues to be clarified by way of further evidence on the circumstances surrounding the sale of the suit property to the Plaintiff. For this reason I also decline to grant the 1st Defendant the orders sought in her application. Pursuant to the provisions of sections 3A and 63(e) of the Civil Procedure Act I instead order that the *status quo* be maintained as follows with regard to the suit property:

1. The Plaintiff and Defendants shall not sell, transfer or in any way dispose of the property known as stall number 647 Kariobangi North Market pending the hearing and determination of the suit filed herein, or until further orders.
2. The Defendants shall not interfere with the Plaintiff's possession of the said stall number 647 Kariobangi North Market pending the hearing and determination of the suit filed herein, or until further orders.

It is further ordered that the pre-trial conference on the suit herein be held on 17th May 2013.

The costs of the Plaintiff's and 1st Defendant's applications shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___10th___ day of

___April___, 2013.

P. NYAMWEYA
JUDGE