



REPUBLIC OF KENYA

HIGH COURT AT BUNGOMA

ENVIRONMENTAL & LAND CASE 79 OF 2012

RUKIA NASIKANDA ASMAN.....PLAINTIFF

VERSUS

BENEDETTA NANJALA MATERE

MARK XAVIER WAMALWA.....APPELLANT

RULING

The applicant by his application dated 15th March 2012 brought under Sec. 3, 3A & 63E of the Civil Procedure Act and order 40 seeks for an injunction restraining the defendants whether by himself, his servants, agents or nominees from leasing, selling or transferring land parcel Bungoma township/371 measuring 0.0557Ha pending hearing and determination of the main suit.

The application is based on the ground that he applicant is the administrator of the estate of Valent WamalwaMatere who purchased the suit plot from the 2nd defendant. According to the applicant, the two defendants are colluding to dispose of the property and share the proceeds amongst themselves. She also swore an affidavit to support her prayers. She swore an affidavit on 15th March 2012 to which she annexed a sale agreement between the 2nd defendant and the deceased. She also annexed limited grant ad litem giving her capacity to file the suit and search showing the title is registered in the names of the 2nd defendant.

The defendants each filed a replying affidavit in opposition to the application. However on 21st January 2013, a consent was filed between the plaintiffs' counsel and the 1st defendants counsel in which the plaintiff has withdrawn her claim against the 1st defendant. The suit therefore remaining is against the 2nd defendant.

By his affidavit sworn on 23rd April 2012, the 2nd defendant admits selling the suit property to ValentWamalwaMatere – deceased but he did not transfer the sold portion to the deceased because the Bungoma municipal council declined to give consent to sub-divide. According to him, they agreed with the deceased that the deceased collects rents till the total sum of Kshs. 200,000/= he had been paid was fully recovered. This arrangement continued with 1st defendant still collecting rents while he pays

rates due to the municipality. To his knowledge, the plaintiff is not entitled to her claim as she is not a widow to the deceased. This court notes that the plaintiff obtained grant from court and therefore whether she is a widow or not, she is entitled to bring a claim on to preserve the assets/liabilities of the deceased.

He swore a supplementary affidavit filed on 10th September 2012 in response to the applicant's further affidavit dated 9th May 2012. The issue raised is introduction of a new name –Joseph Walumbe – deceased. According to the 2nd defendant, the applicant is widow of Joseph Walumbe-deceased but as earlier observed, this court will only rely on the grant in determining issues at the application stage but will not delve into whether applicant is widow of ValentMatere – deceased or Joseph Walumbe-deceased.

The grant of injunction takes into consideration whether the applicant has set out a prima facie case. The court finds this has been established in the present instance as the applicant has demonstrated that she is the legal administrator of the late ValentMatere. The 2nd defendant also admits having sold land to the said ValentMatere – deceased. The property needs to be preserved to determine whether there was an agreement for refund of purchase price by way of collecting rents and who between the plaintiff and her co-wife (formerly 1st defendant) is entitled to benefit from this plot.

Secondly there is the issue of balance of convenience in whose favour it tilts. From the pleadings, it is clear the 2nd defendant is not receiving rents from the portion he sold to the late ValentMatere – deceased. Therefore he will not suffer any prejudice if he is restrained from leasing or disposing the sold portion. The balance of convenience tilts in favour of the applicant. The applicant is required by law to establish only one or two of the principles for granting injunction.

I will thus not analyze the aspect of damages. I do therefore allow the application dated 15th march 2012 and hereby issue an order of temporary injunction restraining Mark Xavier Wamalwa, his servants or persons claiming through him from leasing, disposing or transferring portion of the suit property Bungoma township/371 measuring 25ft by 100ft pending the hearing and determination of this suit.

Costs be in the cause.

RULING DATED, SIGNED, DELIVERED AND READ in open court this 8th Day of April 2013.

**A. OMOLLO
JUDGE.**