



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 599 of 2012

**RENSON NZAU KIAMBA (Suing as the Administrator of
the**

Estate of the Late Onesmus Kiamba Nzau).....PLAINTIFF/APPLICANT

VERSUS

DAVID MUTHAMA MALONZA.....DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant filed a Notice of Motion application dated 12/9/2012 seeking orders that:

1. Spent.
2. Spent.
3. Pending the hearing and determination of this suit *inter-partes* a permanent injunction do issue, restraining the Defendant/Respondent by himself, his servants or agents, and or any other party claiming title under him or otherwise connected with him howsoever from entering into, alienating or in any other way interfering with Parcel L.R No. 12715/125.
4. The original file in Machakos Chief Magistrate Courts Civil Case No. 652 of 2011 be produced before this Court as an exhibit.
5. The Costs of the application be provided by the Defendant/Respondent.

The application is premised on the grounds that the Applicant is the administrator of the estate of the later Onesmus Kiamba Nzau and the custodian of the deceased's parcel of land known as Syokimau L.R No. 12715/125 (*hereinafter referred to as the suit property*). Further that the deceased is the registered proprietor of the suit property. That sometimes in August 2012 some unknown persons attempted to sell off the suit property using forged title and identification documents, which persons the Applicant contends were acting at the behest of the Defendant. Further that in the course of investigation by the Criminal Investigation Department (CID) officers, it emerged that the basis of the attempted sale of the property by the impostors is that there is a Court decree in Machakos CMCC No. 652/2011 vesting the title of the property on the Plaintiff therein. The Applicant maintains that said decree was obtained by the Defendant from an ex-parte judgment in the said suit through trickery, misrepresentation and outright fraud.

The Applicant claims that the said proceedings, judgment and decree were a nullity *ab initio* as the Defendant in the suit at Machakos has been deceased for over 10 years prior to the filing of the said suit, a

fact which was not disclosed to the trial court. That pursuant to the Judgment and Decree obtained in the said suit, the Defendant herein is now harassing and using unlawful means to forcefully take possession of the suit property. The Applicant is apprehensive that if the proceedings, judgment and decree in Machakos CMCC No. 652/2011 are not nullified, there is a danger of the suit property being wasted or alienated by the Defendant or his agents.

The application is supported by an affidavit sworn on 12/9/2012 by the Applicant. It is his disposition that the deceased prior to his demise was a member and shareholder of Syokimau Farm Limited which is the registered proprietor of a parcel of land known as L.R. No. 7149/11/R within Mavoko Township. The deceased was allocated Plot No. 81 during a balloting exercise for the parcels of land given to the shareholders, which plot was ultimately given the Official No. L.R No.12715/125 and a title deed issued in his favour. The Applicant deposed that an official search at the Lands Registry – Nairobi confirms that the suit property belongs to the deceased.

The Applicant deposed further that on 16/8/2012 he learnt that there was an impostor holding out himself as the deceased who was attempting to sell the suit property to Patrick Mbutia and Lamik Kipchirchir Rotich. It was the Applicant's disposition that he learnt that the impostor was one Samuel Kioko Ngui and that he was working with a Jackline Sang and Patrick Omani Nyamweya in the fraudulent exercise. He deposed that he made a report of the matter to the CID offices and the same is under investigation. In the same regard both the Applicant and the Advocates of the would-be buyers wrote letters to the Commissioner of Lands in relation to the fraud being perpetrated on the suit property.

The Applicant deposed that on 5/9/2012 unknown persons forcefully and violently trespassed upon the suit property, harassed the caretaker, broke the lock of the caretaker's house which is situate on the suit property and started to deliver building materials to the site. The Applicant stated that on reporting the matter to the Athi River Police he learnt that the Defendant herein had presented a Court Decree purportedly issued in Machackos CMCC No. 652/2011 vesting the suit property in him, and that the deceased and Syokimau Farm Limited had been listed as Defendants.

The Applicant deposed that he perused the Court file and confirms that the Decree was indeed issued in the said Court. It was his disposition that the entire proceedings, orders and decrees issued at the CMCC No. 652/2011 are a nullity *ab initio* as the suit was brought against a deceased and therefore the Defendant's conduct is not only malicious and in bad faith but meant to defeat the interest of the deceased's estate. Further that the resultant efforts to take control and possession of the property pursuant to a decree issued from fatally defective proceedings and which decree was issued by the highest level of fraud is most unfounded.

The Applicants were unable to effect personal service upon the Defendant and vide application dated 20/9/2012 the Applicants were granted leave to serve the Defendant by substituted means through a newspaper advertisement. The same was done in newspaper as there is a return of service. Despite this service, the Defendant has not entered appearance nor filed any pleading in response to the application herein. In view of the same this Court ordered that the application shall proceed to hearing *ex-parte*.

The Applicant seeks a permanent injunction against the Defendant pending the hearing and determination of the suit. It is noteworthy that a permanent injunction cannot be granted at the interlocutory stage, the same can only be granted after the suit has been heard. The nature of such an injunction is that it is not an interim order but a finality one. It has the effect of disposing off the suit at the interlocutory stage. In the circumstances, this Court declines to grant the Applicant a permanent injunction as prayed for. However, vide the inherent powers bestowed this Court pursuant to Section 3A of the Civil Procedure Rules, this court shall exercise its discretion to determine whether the application has met the principles of an interlocutory injunction as clearly articulated in **GIELLA v. CASSMAN BROWN & CO. LTD. [1973] EA 358** where it was held that an Applicant must demonstrate a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.

The Applicant has demonstrated that he is the administrator of the estate of the deceased and that the

deceased is the registered proprietor of the suit property, a copy of an Official Search marked “RNK5” confirms the same. It is evident from the Certificate of Death annexed to the affidavit and marked “RNK1 (b)” which clearly indicates that the deceased died on 20/8/2001. The Applicant alleges fraud on the part of the Defendant in the manner in which he obtained title documents through a Decree in Machakos CMCC No. 652/2011. It is evident from the case number and the pleadings that the same was filed in 2011 long after the deceased had died whereas he is named as Defendant. There is also a sale agreement dated 9/8/2012 in respect of the suit property marked “RNK 6(d)” wherein the vendor’s name is that of the deceased.

It is my finding that the Applicant has established a *prima facie* case with high chances of success. The estate is likely to suffer irreparable loss that may not be compensated by damages should the Defendant successfully alienate and/or in any way interferes with the suit property. In the circumstances, I hereby order that:

1. The Defendant by himself, his servants or agents, and or any other party claiming title under him or otherwise connected with him howsoever is hereby restrained from entering into, alienating or in any other way interfering with Parcel L.R No. 12715/125 pending the hearing and determination of the suit.
2. The original file in Machakos Chief Magistrate Courts Civil Case No. 652 of 2011 be availed to this Court as an exhibit in this case.
3. Costs of the application shall be in the cause.

Orders accordingly.

Dated, Signed and Delivered this **9th day of May 2013**

L.N. GACHERU

JUDGE

In the Presence of:-

Wasonga for the Plaintiff/Applicant

None attendance for the Defendant/Respondent

Anne: Court Clerk

Wasonga: I apply for copy of the Ruling upon payment of requisite fees.

L. N . GACHERU

JUDGE

Court:

Allowed upon payment of requisite fees.

L. N . GACHERU

JUDGE