



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 556 OF 2010(OS)

- 1. ROSEMARY WANJIKU MUNYUA**
- 2. MARY MENDI MUNYUA**

(Suing as Administrators of the

Estate of Francis Munyua Maina).....APPLICANTS

VERSUS

JOSEPH MAINA MUNYUA.....RESPONDENT

RULING

The application for determination is an Amended Chamber Summons dated 14th January 2011 brought by the Applicants under Order 40 Rules 1, 2, 3 and 4 and Order 5 Rule 17 of the Civil Procedure Rules seeking the following orders:-

1. That the Respondent, his servants, independent contractors and/or agents be restrained from disposing, alienating, dealing, entering, allocating or transferring the suit premises known as DAGORRETTI/RIRUTA/5747 (hereinafter referred to as the suit property) and occupied by the Applicants until the determination of the suit.
2. That the Respondent be ordered by this Honourable court to return the removed roof iron sheets.

The application is supported by the affidavit of the 1st Applicant sworn on 14th January 2011. The Applicants and the Respondent are sisters and brother, and the Applicants claim that the Respondent has fraudulently transferred the suit property which they occupy and which belonged to their deceased father in his name, had made holes on the iron roofs of the houses located on the land and was threatening to evict them. They attached copies of their deceased father's death certificate, a certificate of official search of the suit property and a grant of limited grant of letters of administration ad litem issued to them with respect to the estate of Francis Munyua Maina, their deceased father.

The Respondent opposed the application in a replying affidavit and additional affidavit both sworn on 9th February 2011. He stated that his deceased father owned part of the property known as Dagoretti/Riruta /5147 and had prior to his death on 17th October 2009 sub-divided the suit property into seven portions namely Dagoretti/Riruta /5744-5752, and gifted to him one of the sub-divisions being Dagoretti/Riruta /5747. However, that the process of registration delayed and was concluded on 11th February 2010. He attached a copy of the title to Dagoretti/Riruta /5147 issued to Francis Munyua Maina on 11th August 2003, a mutation form of Dagoretti/Riruta /5147, and a letter of consent of the land control board dated 11th November 2008 given to Francis Munyua Maina to transfer the suit property to Respondent.

The Respondent also stated that the dispute by the Applicants was about distribution of a deceased person's estate which can only be through a succession cause, and filed a Notice of Preliminary Objection dated 9th February 2011 on the following grounds:

1. The application and the suit are incompetent and fatally defective for having been brought under the provisions of the Civil Procedure Act and Rules yet the claim is based on succession and/or allegations of distribution of the Estate of Francis Munyua Maina (Deceased).
2. The applicants lack a reasonable cause of action against the Respondent for the following reasons:
 - a. Failing to particularize the alleged fraud.
 - b. Basing their claim for trusteeship upon the Respondent's interest, which they claim had been acquired fraudulently.
 - c. Their claim would depend on ascertainment first, of whether the suit property was part of the Estate of Francis Munyua Maina (Deceased) and second, whether they were entitled to it specifically, which can only be determined in a succession cause, on evidence, upon distribution and confirmation of all available assets.
3. The entire suit is vexatious, having been instituted on the face of the existence of one filed by them, NBI HSCS NO. 1770 of 2010 and another, NBI HCSC No. 3065 of 2001, wherein the same land and or a portion thereof, had been a subject of dispute.

The Respondent sought to have the Applicants' Originating Summons and Chamber Summons both dated 14th December 2010 struck out or dismissed with costs.

The parties filed written submissions in which they reiterated the above arguments, and on the basis of which a ruling was reserved on both the Applicants' Amended Chamber Summons and the Respondent's preliminary objection. The Applicants' counsel in submissions dated 5th July 2011 argued that they has shown a *prima facie* case as they had produced as evidence a certificate of official search that showed that the suit property was registered in the Deceased father's name until a few months after his death. Further, that the transfer of the land to the Respondent's name was fraudulent as it did not involve the Applicants, and that the normal process of administration of the Deceased's estate should have followed.

The Respondent's counsel filed written submissions dated 10th December 2012, and argued that the Applicants have no cause of action, and had not met the applicable principles for the grant of an injunction. Further, that they have not sought any prayer for an injunction in their originating summons filed herein dated 14th January 2011. The counsel also submitted that the best forum to adjudicate this matter is the Family Court as the Applicants' cause of action of trust is premised on succession of their Deceased father's estate.

The counsel for the Respondent further argued that the alleged fraud on his client's part had not been particularized as required under Order 2 Rule 4(1) of the Civil Procedure Rules, and neither had it been proved. He submitted that the Respondent had disproved the allegations by showing that his father gifted him the suit property. Lastly, that the Applicants had not brought any proof of the destruction or removal of the iron roofing, and that the mandatory injunction was unmerited.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. There are three main issues before the court for determination. The first is whether the objections raised by the Respondent are on points of law, and if so whether they have merit and should be upheld. The second and third issues will only arise if the Respondent's preliminary objection is not upheld, and are whether the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary prohibitory injunction, and in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** as to the grant of a mandatory injunction have been met by the Applicants.

On the first issue, it was held in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696** that a preliminary objection must be on a pure point of law and cannot be raised if any fact has to be ascertained. However the first and second objections raised by the Respondent as to whether this matter ought to be in this Court or in the Family Court, and whether the Applicants have a reasonable cause of action require the facts of the Applicants' case to be established and are not therefore pure points of law.

The objection by the Respondent on previous cases filed by the Plaintiff on the same subject matter raises the issue of whether this court has jurisdiction on the basis of this suit being *res-judicata* or *sub-judice*, and is therefore on a pure points of law. However, the Respondent did not bring any evidence to show whether the previous suits have been heard and determined, and/or whether the causes of action and parties in the said suits are similar to those in the present suit. This court is therefore unable to make a finding that the suit herein is *res judicata* or *sub judice*. The upshot of the foregoing is that the Respondent's preliminary objection is found not to be merited and is dismissed.

On the second issue, the requirement for the grant of a temporary prohibitory 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.

The first question I must therefore answer is whether the Applicants have established a *prima facie* case. I am of the view that they have shown that they have a *prima facie* case, as they have brought evidence in the form of two certificates of official search to show that on 8th January 2009 the suit property belonged to their deceased father, and was transferred to the Respondent on 11 February 2010 after the death of their father in the absence of administration processes.

The Respondent has also admitted the said transfer of the suit property after his father's death, and explained it on the delay in the registration processes after the deceased gifted him the suit property. The fact of the gifting of the suit property by the Deceased to the Respondent is one to be proved at full hearing, and it is therefore necessary to preserve the suit property pending the hearing and determination of the suit herein pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules. However, bearing in mind that the Respondent is the registered proprietor of the suit property, it is also necessary that the suit herein should be heard and determined expeditiously.

On the final issue before the court, it is a requirement that for the court to grant a mandatory injunction 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. I am in agreement with the Respondent's submissions that the Applicants have not brought any proof of the removed iron roof sheets, and only brought evidence of holes in the roofing. The prayer that the Respondent be ordered to return the removed roof iron sheets cannot therefore be granted.

I accordingly order as follows:-

1. The Respondent, his servants, independent contractors and/or agents be and are hereby restrained from selling, transferring, disposing of, alienating, dealing with, entering, or allocating the suit premises known as DAGORRETTI/RIRUTA/5747 occupied by the Applicants until the determination of the suit herein or until further orders.
2. The Applicants shall take the necessary steps to have this suit set for pretrial conference within six months of the date of this ruling, and in default the order of injunction given herein above shall lapse.
3. The Applicants' prayer for the return of the roof iron sheets is denied.
4. The costs of the Applicants' Amended Chamber Summons dated 14th January 2011 and Respondent's Preliminary Objection dated 9th February 2011 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____2nd____ day of ____October____, 2013.

P. NYAMWEYA

JUDGE