



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Environmental & Land Case 74 of 2012

ISAAC NJUGUNA KIBOIPLAINTIFF

- VERSUS -

PAUL KINUTHIA MUNGAI..... DEFENDANT

RULING

1. By a notice of motion dated 17th January 2012, the plaintiff prays for a mandatory injunction to compel the defendant to vacate title number Kiganjo/Gachika/2288. The application is expressed to be brought under order 40 rules 2 and 4 of the Civil Procedure Rules 2010. The plaintiff avers that he bought the property from George Kimani and Charles Wainaina. The latter were the administrators of the estate of Hannah Wairimu Mungai, deceased, who owned the property. There is an affidavit sworn by George Kimani on 17th January 2012 confirming the sale to the plaintiff. The plaintiff has also sworn a deposition of even date confirming that the entire purchase price was paid. A title in favour of the plaintiff was issued on 29th April 2011.
2. The plaintiff's case is that the defendant, a brother of the administrators to the estate, has refused to vacate the property. Hence the present suit and motion to compel him to vacate the property.
3. The motion is contested. The respondent has filed a notice of preliminary objection as well as a replying affidavit all dated 5th March 2012. He has also entered appearance in the suit and filed a statement of defence dated 5th March 2012. The respondent did not appear at the hearing of the motion despite service with a hearing notice. I have however considered the replying affidavit and defence as well as the rebuttals contained in a supplementary affidavit of the plaintiff sworn on 9th May 2012.
4. The preliminary objection is two pronged: that the suit is *res judicata*; and, that the suit land is the subject of Nairobi High Court succession cause number 1313 of 2011 Re estate of Hannah Wairimu Mungai. The respondent avers in the replying affidavit that there was no valid sale; that the land has sentimental value to him; that proceedings in the succession cause are aimed at revoking the grant upon which the sale was undertaken; and, that an order of inhibition has been issued against the title in the succession cause. The respondent's case is that the present application is incurably defective and should be dismissed.

5. I take the following view of the matter. The plaintiff bought the suit land for KShs 4,500,000 paid to George Kimani and Charles Wainaina. The amount has been paid in full as per the exhibited cheque. The vendors were not the owners of the land. They were the administrators of the estate of the late Hannah Wairimu Mungai. The defendant and the vendors are sons of the deceased. A grant of letters of administration was issued and confirmed by the Senior Resident Magistrate Thika in succession cause 413 of 2003. I have perused that grant. The suit land was for the benefit of George Kimani, Charles Wainaina, Henry Kimani, Edward Mweya, Paul Kinuthia Mungai (the defendant) and three others and was to be sold and the proceeds shared equally. There were other immovable and moveable properties belonging to the deceased. From the value of the estate, or even the suit property alone, I entertain serious doubts that the Senior Resident Magistrate at Thika had jurisdiction under the Law of succession Act. I am thus not too surprised that there are other proceedings in Nairobi High Court succession cause 1313 of 2011 in *Re estate of Hannah Wairimu Mungai*. On 1st July 2011, the High Court issued an order directed to the Thika District Land Registrar to register an inhibition on Kiganjo/Gachika/2288. That is the suit land. It is not clear whether the order of inhibition was entered on the register. But I do note that a title in favour of the plaintiff had already been issued on 29th April 2011.

6. I cannot however shut my eyes to the fact that the grant issued by the subordinate court at Thika is the subject of the succession cause 1313 of 2011 at the High court. The plaintiff concedes in the supplementary affidavit sworn on 9th May 2012 at paragraph 13, that the latter suit seeks to revoke or annul the grant of representation of the estate of the deceased issued to the vendors. I have already observed that I have serious doubts that the subordinate court had jurisdiction to issue the grant in view of the value of the estate and the provisions of the Law of Succession Act. Those however are matters within the province of the trial court upon tested evidence. But they are germane to the present prayers by the plaintiff. The plaintiff prays for a mandatory injunction to evict the defendant. Granted the questions I have raised on the grant upon which the plaintiff's title originates, I am hesitant to grant such a drastic order at this interlocutory stage. The authorities point me in the opposite direction. In granting such an order, the court must be completely clear in its mind that the plaintiff is nearly guaranteed the same prayers at the trial. Authorities in this area abound and they hold, primarily, that a mandatory interlocutory injunction ought not to be granted save only in special circumstances and in the clearest of cases. It cannot be better said than in the decision of *Locabail International Finance Limited Vs Agro Export et al* [1986] 1 ALL E.R. 901 where their lordships held;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being on a different and higher standard than was required for a prohibitory injunction”.

See also the decisions in *Technomatic Limited T/A Promopack Company Vs Kenya Wine Agencies Limited* Nairobi HCCC 398 of 2005 (unreported) and *Mucuha Vs Ripples Limited* [1990 – 1994] E.A. 388. That position has been stated clearly in *Halsbury's Laws of England* 4th Edition Volume 24 paragraph 848.

7. This court is now enjoined to do substantial justice to the parties. That is the tenor and spirit of articles 50 and 159 of the constitution as read together with sections 1A and 1B of the Civil Procedure Act. To order the eviction of the defendant from the suit land in the face of unresolved succession matters or validity of the grant upon which the plaintiff has obtained title may occasion a serious injustice at this stage. There has to be a delicate balance between the rights of the plaintiff, as the registered owner, and those of the respondent claiming a beneficial interest in succession. Granted the evidence and the law, I thus find that the plaintiff's notice of motion dated 17th January 2012 lacks merit. I order that the same be and is hereby dismissed with costs to the defendant.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 3rd day of July 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Maina for Mr. Goa for the Plaintiff.

No appearance for the Defendant.
Mr. Collins Odhiambo Court Clerk.