



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 48 OF 2019

(Formerly Machakos ELC suit No. 24 of 2019)

ABEDNEGO KITHOME MWANZUIPLAINTIFF/APPLICANT

VERSUS

JOSEPH KIMEU KINGOO.....1ST DEFENDANT/RESPONDENT

PETER MUSYOKA KINGOO2ND DEFENDANT/RESPONDENT

SCHOLASTICA KINGOO 3RD DEFENDANT/RESPONDENT

FRANCIS MUSAU KINGOO4TH DEFENDANT/RESPONDENT

RULING

1. The application for ruling is the one dated 07th March, 2019 and filed in court on 08th March, 2019 by the Plaintiff's/Applicant's Counsel under certificate of urgency.

2. The application is expressed to be brought under Article 40(1)(a)(b) (3)(a) (4) (5) (6) and 159(2) of the Constitution of Kenya, section 7 and 38(1)(a)(b) of the Land Registration Act, sections 3, 13 and 19 of the Environment and Land Court Act, sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1 and 2 and Order 51 rule 1 of the Civil Procedure Rules, 2010, and all enabling provisions of the law for orders;

1) Spent.

2) Spent.

3) **THAT** this Honourable Court be pleased to restrain by way of a temporary injunction order the 1st, 2nd, 3rd and 4th Defendants/Respondent, by themselves, their agents, servants, employees, proxies and/or any other persons claiming ownership under them from trespassing, alienating, selling, transferring, wasting, developing, damaging, constructing buildings, interfering and/or dealing in any manner with parcel land NO.MAKUENI/UNOA/20 situated in Makueni containing by measurement Forty Seven (47.0) Acres, pending the hearing and determination of this Application.

4) **THAT** an order be issued to the administrators to include and/or invite the Applicant in any meetings held for purposes of discussing the mode of distribution estate as order by the Honourable Judge D.K. Kimei on 5th February, 2019.

5) **THAT** this Honourable Court declares the Plaintiff/Applicant as an innocent buyer, a bona fide Purchaser for value without notice and the valid Proprietor of part of the above named parcel MAKUENI/UNOA/20.

6) **THAT** this Honourable Court confirms that there was no fraud and/or illegal falsification during the sale of part of parcel MAKUENI/UNOA/20 to the Plaintiff/Applicant.

7) **THAT** the Officer Commanding Stations (OCS) Wote Police Station do supervise and enforce the order.

8) **THAT** the costs of this application be provided for.

3. The application is predicated on the grounds on its face and is supported by the affidavit of Abednego Kithome Mwanzui, the

Plaintiff/Applicant herein, sworn at Nairobi on 07th March, 2019.

4. Joseph Kimeu King'oo who is the 1st Defendant/Respondent herein does not oppose the application.

5. Peter Musyoka King'oo, the 2nd Defendant/Respondent has opposed the application vide his replying affidavit sworn at Machakos on 09th December, 2019 and filed in court on even date.

6. Scholastica King'oo and Francis Musau King'oo (the 3rd and 4th Defendants/Respondents) have also opposed the application vide their replying affidavit sworn on 15th April, 2019 at Nairobi and filed in court on 16th April, 2019.

7. The application was canvassed by way of written submissions.

8. The Plaintiff/Applicant has deposed in paragraphs 4, 5, 6, 7, 8, 12, 14, 19, 20, 23 and 24 of his supporting affidavit that on or about the year 2017 he approached the 1st Respondent who sold him 1 acre of land parcel MAKUENI/UNOA/20 being part of his share of the Estate through a sale agreement dated 09th day of May, 2017 which was also witnessed and attested to by Peter Musyoka Kingoo the 2nd Defendant/Respondent herein who is one of the administrators, that by the time he purchased the said property, the 1st and 2nd Defendants/Respondents did not disclose to him any problem or issues with the grant confirmed on 25th April, 2001 thus assuring him that the portion the 1st Defendant/Respondent was infact subdivided awaiting issuance of title deed and later sub dividing it into two where a title number for his one acre would be registered, that he paid the full purchase price and started developing the said property by building his house where he resides today, making various developments to the property and planting various cash crops hence increasing the value of the property, that he enjoyed quiet possession in the property ever since he purchased it and has never been summoned by any authority with regard to intermeddling or wasting the estate as the beneficiaries are well aware of their parts of the estate as all of them have made various developments as well as subdividing their portions to their children, that the 3rd Defendant/Respondent filed an Application for revocation of the Grant stating that the Administrators then had intermeddled with the estate allowing the sale of 10 acres of land parcel MAKUENI/UNOA/20 by the 1st Defendant/Respondent and 2nd Defendant/Respondent to the Applicant and Munyao Maingi who was the 3rd Respondent in the 3rd Defendant's/Respondents application dated 10th August, 2018, that Hon. Justice D.K Kemei presiding over succession cause 37 of 2001 Machakos on 5th February 2019 made an order that any part of the Estate in occupation and contested shall be preserved to await the cause to be lodged over same claim in the next two (2) months in the Environment and Land Court, that if the said property is distributed in the absence of the Plaintiff/Applicant this suit shall be rendered nugatory and the Plaintiff/Applicant shall be denied his right to be heard and he will suffer great loss and damage, that he has made multiple improvements and developments to the said 1 acre of the said property MAKUENI/UNOA/20 he purchased from the 1st Defendant/Respondent which is currently valued at Kshs. 18,600,000/= that he has resided with his family with no interference whatsoever in the said property until when he received a letter from the 3rd Defendant's/Respondent's advocates claiming that he should vacate the property as he is an intermeddler, that the developments he made in the property were done in full glare of all the beneficiaries as they all live in the said land, that he will be greatly prejudiced if this court fails to declare him as the proprietor of the 1 acre parcel of land he purchased from the 1st Defendant as part of the inheritance of his share in the estate of the Deceased.

9. The 2nd Defendant/Respondent has deposed in paragraphs 3, 5, 6, 7 and 9 of his replying affidavit that the application herein is fatally defective, bad in law, an abuse of the court process and does not disclose a reasonable cause of action against himself, that he is a co-administrator to the estate of Pius King'oo Muthwa together with the 1st Defendant/Respondent herein, that the Applicant approached the 1st Respondent herein and who sold him a portion of land measuring 1 acre to be hived from his share of the estate of Pius King'oo Muthwa through a sale agreement dated 09th May, 2017, that grant of letters of administration was later revoked in March 2018 after the sale agreement had been executed, that he was not the vendor in the sale agreement and thus cannot make any representation as to how the Applicant's portion of land parcel No. MAKUENI/UNOA/20 was to be transferred to the Applicant herein, that the proper recourse for the Applicant is to pursue his claim against the vendor (1st Defendant/Respondent) after confirmation of the grant in respect of the estate of Pius King'oo Muthwa alias Wiliam Kingoo.

10. On their part, the 3rd and 4th Defendants/Respondents have deposed in paragraphs 4, 5, 6, 7, 8, 9, 10, 15, 20, 23 and 26 of their replying affidavit that the Applicant has consistently and with caution from them continued to interfere with their deceased father's estate and in cahoots with the 1st and 2nd Defendant had a piece of the property sold to him without the consent of the rest of the beneficiaries, that in the year 2017 when the Applicant allegedly had the property sold to him there was an existing court order which she (3rd Defendant) extracted on the 22nd March, 2018 and was served on all persons who are parties to this suit including the Applicant, that the 1st and 2nd Respondent were present before court when the orders were issued and were aware that they did not have the mandate to dispose of the property, that the order under paragraph 3 of the same expressly stated; "THAT an order of injunction is hereby issued preventing the Administrators and any other persons from intermeddling and or wasting or in any manner from dealing with the estate of PIUS KINGOO MUTHWA (deceased) pending the filing of fresh summons for confirmation of Grant or until further orders of this court", that the Applicant had a duty to exercise due diligence which included ascertaining before this court whether indeed the 1st Defendant had authority to sell the suit property or not, in doing so the Applicant would have discovered that there was an existing dispute that resulted in the revocation of grant issued to the 1st and 2nd Defendants and ceased from proceeding with the alleged purchase, that the Applicant in complete disregard to the beneficiaries who initially cautioned him went ahead to commence construction on the property, that the Applicant is not and has never been an innocent purchaser, he has always been aware of the dispute between them to which several of the beneficiaries including herself cautioned him from purchasing the property but he refused, neglected and failed to heed to her warning, that she is advised by her advocates which advice she verily believes to be true that he who comes to equity must come with clean hands, the orders the Applicant is seeking are orders under the doctrine of equity, the Applicant has not come with clean hands as per her averments stated hereinabove and as such an order for injunction cannot be issued in his favour, that in response to paragraph 14 and 15 the Applicant had the duty to exercise due diligence as previously stated, mere information by an administrator that the succession cause had been finalized is not enough to proceed, the Applicant ought to have insisted on the letters for confirmation of Grant and the distribution of the estate, if this was not provided by the administrators, he then ought to have proceeded to the succession registry and confirmed indeed the 1st and 2nd Defendants had the mandate to transfer the property,

that the improvements allegedly made on the premises commenced in the year 2018 after service of the orders from the succession court, the same should be demolished at the Applicant's cost, that the estate stands to suffer loss and substantial damages if the orders herein are allowed.

11. By the time of writing this ruling, it is only the Plaintiff/Applicant and the 2nd Defendant/Respondents who had filed their submissions. Their Counsel on record are in agreement that the conditions for the grant of an interlocutory injunction are as enunciated in the case of **Giella vs. Cassman Brown & Co. Ltd. [1973] EA 358**. I need not repeat those conditions herein. I do agree with the Counsel for the 2nd Defendant/Respondent that save for prayer 3 in the notice of motion application, the rest of the prayers are not relevant in an application for an order of injunction as such I will only consider the grounds upon which the grant of interlocutory injunction can be granted.

12. Regarding the condition that an Applicant must demonstrate a prima facie case with probability of success, the Plaintiff's/Applicant's Counsel submitted that the Plaintiff/Applicant entered into a sale agreement (AKM1) with the 1st Defendant/Respondent in respect of one (1) acre of land of the suit property, the Counsel went on to submit that the Plaintiff/Applicant performed his obligations under the said sale agreement by paying the purchase price of Kshs. 600,000/=. It was also the Counsel's submissions that the Plaintiff/Applicant alludes that he was never aware of any objection raised during the sale agreement dated 09th May, 2017 which was witnessed by the 2nd Defendant/Respondent who was one of the administrators. The Counsel pointed out that the sale was within the knowledge of the 3rd Defendant/Respondent and all the other beneficiaries who never raised any concern. The Counsel further submitted that the Plaintiff/Applicant has been in real occupation of the disputed parcel of land and has put up a permanent structure for his family, planted various cash crops with direct and/or indirect concurrence of the beneficiaries of the estate of the deceased.

13. The Counsel relied on the case of **Mrao Ltd. vs. First American Bank of Kenya Ltd & 2 others [2003] KLR 125** where the Court of Appeal held that: -

"A prima facie case in a civil application includes but is not confined to a 'genuine and arguable case.' It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for explanation or rebuttal from the latter."

14. Arising from the above, the Counsel submitted that this case raises triable issues which can only be proved during the main hearing.

15. On the other hand, the Counsel for the 2nd Respondent also cited **Mrao's case** (supra) and submitted that the Plaintiff/Applicant has not proved a prima facie case. The Counsel went on to submit that the Plaintiff/Applicant has not proved any threat or violation of his rights. The Counsel added and I quote him, *"He has occupied and taken possession of the land from the year 2017 and developed it without any interference from the Respondents and therefore, we submit that he has not proved a prima facie case."* In my view this line of submissions goes a long way to support the Plaintiff's/Applicant's contention that he has been in occupation of the suit property.

16. Regarding the principle that 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, his counsel submitted that having made multiple improvements and development on the disputed land and the fact that the Applicant resides on it with his family, the loss that is likely to arise is psychological, physical, economical and constitutional and cannot be remedied in monetary terms. The Counsel relied on the case of **Hosea Kiplagat and 6 others vs. National Environment Management Authority (Nema) & 2 others [2015] eKLR**.

17. On the other hand, the Counsel for the 2nd Respondent submitted that the moving party must demonstrate that the irreparable harm is harm that cannot be quantified in monetary terms or which cannot be cured. The Counsel went on to submit that the Applicant herein has not proved before this Court that he is likely to suffer harm which is irreparable (sic) or which cannot be compensated by an award of damages.

18. As for the principle of if the Court is in doubt, it will decide the application on the balance of convenience, the Counsel for the Plaintiff/Applicant submitted that the same lies in favour of the Plaintiff/Applicant. The Counsel pointed out that whereas the Plaintiff/Applicant would be deprived of his legal rights and privileges, the Respondents would suffer no prejudice if the orders sought are not issued. On the other hand, the Counsel for the 2nd Defendant submitted that the balance of convenience rests with the Plaintiff who has been in occupation of the suitland. The Counsel pointed out that the Plaintiff/Applicant has not proved threats or violation of his rights while in occupation of the property thus the court should grant an order of status quo.

19. Having read the application together with the replying affidavits and the rival submissions by the Counsel on record for the parties herein, my finding is as follows: -

20. It is not in dispute that the Plaintiff/Applicant is in occupation of part of MAKUENI/UNOA/20. It is also not in dispute that he has built a house on the same as can be seen from the valuation report marked as AKM-1. In the Machakos High Court of Kenya succession cause No.2001 – Scholastica King'oo vs. Joseph Kimeu King'oo and 3 others, an order was issued in the following terms: -

"Any part of the estate in occupation and contested herein shall be preserved to await the cause to be lodged over some claim in the next two (2) months in the Environment and Land Court. Failure to lodge the same as ordered within the next two (2) months from the date hereof, the same disputed acreage will be subject to distribution hereof."

21. The above would therefore defeat the deposition by the 3rd Defendant/Respondent in paragraphs 5 and 6 of her replying affidavit that in the year 2017 when the Applicant allegedly had the property sold to him there was an existing court order which she extracted on the 22nd March, 2018 and served upon all persons who were parties to this suit including the Applicant. In any case, the 3rd Defendant/Respondent has not annexed a copy of the order in question despite marking it as SK-1.

22. Arising from the above, I am satisfied that the Applicant has demonstrated that he has a prima facie with probability of success.

23. As for irreparable loss that cannot be compensated by an award of damages, it is clear that the valuation of the suit property that the Applicant has produced shows that the loss can be tabulated and compensated and hence the Applicants disposition in paragraph 19 of his supporting affidavit that the suit property is currently valued at Kshs. 18,600,000/=. However, paragraph 20 of the supporting affidavit alludes to sentimental value that the Applicant attaches to the suit property as he states that he has continued to reside on the suit property without interference from the Respondents. In my view the sentimental value cannot adequately be compensated by an award of damages, and if I understood the submissions by the Applicant's Counsel that the Applicant is likely to suffer psychologically and physically among others, this is what the Counsel meant. Eviction from the portion of land that the Plaintiff/Applicant and his family have called home since 2017 would cause untold psychological torture to them.

24. As for balance of convenience, I wish to point out that for the reasons that I have given in the above two principles, this court is not in doubt and even if it were, the balance of convenience would tilt in favour of the Plaintiff/Applicant under the circumstances.

25. The upshot of the foregoing is that the application has merits and I hereby proceed to allow it in terms of prayers 3 and 8 as hereunder: -

3) A temporary order of injunction is hereby issued against the 1st, 2nd, 3rd and 4th Defendants/Respondent, by themselves, their agents, servants, employees, proxies and/or any other persons claiming ownership under them from trespassing, alienating, selling, transferring, wasting, developing, damaging, constructing buildings, interfering and/or dealing in any manner with parcel land NO.MAKUENI/UNOA/20 situated in Makueni containing by measurement Forty Seven (47.0) Acres, pending the hearing and determination of this Application.

8) Costs of this application be provided for.

26. As earlier on indicated elsewhere in my ruling, the other prayers by the Plaintiff/Applicant cannot be considered in an application such as this.

Signed, dated and delivered at Makueni via email this **10th** day of **November, 2020**.

MBOGO C.G.,

JUDGE.

Court Assistant: G. Kwemboi