



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO. 17 OF 2018

RAPHEAL KIRUTHI KINUTHIA.....PLAINTIFF

=VERSUS=

IBRAHIM ABDI.....1ST DEFENDANT

DANIEL NDUNG'U.....2ND DEFENDANT

LANDS REGISTRAR, NAIROBI.....3RD DEFENDANT

THE HON.ATTORNEY GENERAL.....4TH DEFENDANT

BEATRICE HANNAH NJERI MATIMU.....INTENDED 5TH DEFENDANT

RULING

1. The Plaintiff in this case Raphael Kiruthi Kinuthia (deceased) was the registered owner of LR No. Nairobi Block 110/991 (suit property). The deceased had sued four Defendants in this case that is Ibrahim Abdi , Daniel Ndungu, Land Registrar Nairobi and the Attorney General as 1st, 2nd 3rd and 4th Defendants respectively. The deceased had alleged that the suit property had been transferred from his name into that of the 1st Defendant who in turn transferred it to the 2nd Defendant.

2. During the pendency of this suit, the 2nd Defendant transferred the suit property to Beatrice Hannah Njeri Matimu who is now the current registered owner. The deceased died on 26th April 2019. His wife Mary Wanjiru Kiruthi who has taken out limited grant of letters of administration ad litem filed a notice of motion dated 8th July 2019 in which she seeks the following orders.

1) That the Plaintiff herein be substituted with one Mary Wanjiru Kiruthi.

2) That this Honourable Court be pleased to enjoin Beatrice Hannah Njeri Matimu to these proceedings as the 5th Defendant.

3) Spent

4) That pending hearing and determination of this suit, a temporary injunction be issued restraining Beatrice Hannah Njeri Matimu and/or her servants/agents from in any way transferring ,alienating, subdividing or otherwise interfering with the suit property being title number Nairobi/Block 110/991.

5) Spent

6) That pending hearing and determination of this suit, a temporary injunction be issued restraining Beatrice Hannah Njeri Matimu and/or her servants/agents from interfering with the Plaintiff's quiet possession of the suit property being title number Nairobi/Block 110/991.

7) That the cost of this application be provided for.

3. The Applicant contends that the 2nd Respondent transferred the suit property while this suit was pending and that there were orders restraining the 2nd Respondent from interfering with the suit property let alone transferring the same. The Applicant further argues that it is

necessary to bring the 5th intended Defendant as a Defendant in this suit so that all issues can be effectually and completely be adjudicated upon.

4. The Applicant further argues that there is need to issue an injunction against the 5th intended Defendant so as to preserve the suit property pending hearing and determination of this suit.

5. The 5th intended Defendant/Respondent opposed the Applicant's application based on a replying affidavit sworn on 9th December 2019 and filed in court on 10th December 2019. She contends that she purchased the suit property from the 2nd Respondent through an agreement dated 3rd August 2018 and enjoyed quiet possession of the same until 2019 when some people came claiming ownership. When she went to carry out a search, she was surprised to notice that a restriction had been registered against the title pending hearing and determination of this suit. She contends that before she purchased the suit property, she conducted due diligence and confirmed that the suit property belonged to the 2nd Respondent before going on with the purchase.

6. The 5th Respondent filed another replying affidavit sworn on 25th March 2020 in which she contends that no orders can be granted as prayed by the Applicant before pleadings are amended. She further states that the deceased was aware that she was in occupation of the suit property even before he died and that any injunctive orders will greatly affect her.

7. The 2nd Respondent opposed the Applicant's application based on grounds of opposition filed in court on 4th December 2019 in which he contends that the application is res judicata as the Applicant had previously filed an application whose order lapsed after twelve months and that the prayers sought in prayer 3 to 6 cannot be granted without the pleadings first being amended.

8. I have considered the Applicant's application as well as the opposition thereto by the 2nd Respondent and the 5th intended Defendant/Respondent. The prayer for substitution is not opposed. The application for substitution was made before the suit abated. The prayer for joinder was also not opposed as such. It is not contested that the 5th intended Defendant/Respondent is the current registered owner of the suit property. This being the case, it is necessary that she be enjoined in this suit so that the court can determine all issues at once.

9. The only issue for determination is whether an injunction should issue restraining the 5th intended Defendant/Respondent in the manner prayed for. From the submissions by the Applicant, it is clear that the Applicant is not in possession of the suit property. This being the case, there is no injunction which can issue in the manner prayed for in prayer 6 of the application.

10. The Applicant is alleging that the suit property was fraudulently transferred from the deceased to the 1st Respondent who in turn transferred the same to the 2nd Defendant who also transferred the same to the 5th intended Defendant/Respondent. The Applicant did not place any documents before the court to show how the alleged transfer was done. In fact, what shows that the deceased once owned the suit property is a copy of a cancelled certificate of lease which was annexed to the bundle of documents of the 3rd and 4th Respondents.

11. The deceased had filed a judicial review application in which he was granted leave to bring proceedings for an order of mandamus compelling the Registrar to produce documents evidencing transfer. This application appears not to have been pursued any further. In the absence of any documents to confirm that the transfer may have been fraudulent, I do find that there is no prima facie case disclosed which warrant this court to issue injunctive orders against the 5th intended Defendant/Respondent.

12. It is admitted by the Applicant that there is a multi-storey building which is being put up in the suit property by the 5th intended Defendant/Respondent. In the circumstances, if the Applicant succeeds in her claim, she will be compensated by whoever will be found to have been culpable for the alleged fraudulent transfer. It therefore follows that no injunction can be granted and in any case, there is a restriction which has been registered against the title. There cannot be any dealings which can be made in terms of transfer, leasing or charging until this case is heard and determined.

13. I therefore find that the Applicant's application only succeeds to the extent that the Applicant is hereby allowed to substitute the deceased. The 5th intended Defendant/Respondent is hereby allowed into these proceedings as the 5th Defendant. Pleadings shall be amended within 14 days to reflect her as the 5th Defendant and summons to enter appearance and plaint shall be served on the 5th Defendant only. Costs of this application shall be cost in the cause.

It is so ordered.

Dated, Signed and Delivered at Nairobi on this 5th day of November 2020.

E.O.OBAGA

JUDGE

In the virtual presence of:-

Mr Oduor for 5th Defendants

Mr Kinyanjui for Applicant

Court Assistant: Hilda

E.O.OBAGA

JUDGE