



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.154 OF 2018

MERCY WANJIRU MBURU.....PLAINTIFF

VERSUS

ELIZABETH WANJIRA EVANS & 8 OTHERS.....DEFENDANTS

RULING

(Application for injunction; principles to be applied; plaintiff having been a beneficiary of property distributed in a succession matter jointly with her siblings; the suit properties being among those distributed; two of the suit properties transferred without her consent; applicant seeking in her suit to order cancellation of title; prima facie case established; application for injunction allowed)

1. The application before me is that dated 19 April 2018 which is an application for injunction that was filed contemporaneously with the plaint. The applicant wants the defendants/respondents restrained from the land parcels Nakuru Municipality Block 7/542, 545 and 546 (hereinafter referred to as “the suit properties”) pending the hearing and determination of this suit. The principles upon which such an application is determined are now well settled. The applicant needs to demonstrate a prima facie case with a probability of success and also show that she stands to suffer irreparable loss if the application is not allowed. Where the court is in doubt, it will decide the application on a balance of convenience.

2. In her plaint, the applicant has averred that the 1st, 2nd and 3rd respondents acted as administrators of the estate of the late Rahab Wanjiru Evans (Ms. Evans). She has mentioned that she is the daughter of one John Mburu (also deceased) who was son to Ms. Evans. She stated that the 4th, 5th, 6th and 7th respondents are her sisters and co-owners of the suit properties. She pleaded that there had been litigation over the estate of the late Ms. Evans which matter was finally decided by the Court of Appeal on 18 December 2014 vide which the suit properties were distributed to the children of John Mburu, that is herself, and the 4th – 7th respondents. She has however contended that the respondents have now fraudulently transferred the plot No. 542 to the 8th respondent and are on the verge of transferring the plots No. 545 and 546 to the 9th respondent who has already taken possession and is in the process of developing them. In the suit, she wants orders for a declaration that she is the co-owner of the suit properties; an order cancelling the title of the 8th respondent; an order compelling the respondents to deliver vacant possession of the suit properties; costs and any other order deemed fit and just to grant.

3. The application has support from the 2nd respondent who has filed an affidavit through which she has deposed that she together with the other administrators of the estate of Ms. Evans, executed instruments of transfer of the suit properties to the applicant and the 4th – 7th respondents. She has averred that if there is any transfer to third parties, the same is illegal.

4. The 4th – 7th respondents appointed a joint advocate, M/s Githui & Company Advocates, and responded to the motion through the replying affidavit sworn by the 7th respondent. She has inter alia deposed that the applicant seeks to enforce property rights accruing to the estate of their father, John Mburu, and this ought to be enforced by the administrator of the estate of the deceased or executor, and she has argued that the applicant is neither. She has thus deposed that the applicant has no locus standi to present this suit. She has also disputed that the applicant is daughter of the late John Mburu and has contended that it is she and her other sisters who are the beneficiaries of the estate of the late John Mburu. She has deposed further that it is true that the suit properties were bequeathed to them and that they agreed that all matters relating to the same would be handled by their mother, Jane Wanjiku. She has stated that through their mother, the family of John Mburu, agreed to donate one property as a gift to church and sell one to enable their mother build her residence. Consequently, they gifted the plot No. 546 to the 9th respondent (Deliverance Church) and sold the plot No. 542 to the 8th respondent (Menengai Oil Refineries) and that all these decisions were taken as part of the administration of the estate of the late John Mburu. She mentioned that because of the dispute over whether the applicant is daughter of the late John Mburu, one property, the plot No. 545 was retained as contingency, pending the determination of the status of the applicant. She further contended that the dispute in the case is one of succession of the estate of the late John Mburu and thus this court has no jurisdiction. A preliminary objection on jurisdiction was indeed raised. I heard the same and dismissed it through my ruling of 11 October 2018 and the issue of jurisdiction is now water under the bridge.

5. The 8th respondent replied to the application through the affidavit of Onkar Singh Rai, its managing director. He has deposed that the 8th respondent purchased the plot No. 542 through a sale agreement dated 12 April 2016, entered into by the 4th, 5th, 6th, 7th represented by M/s Githui & Company Advocates and themselves, represented by M/s Mukite Musangi & Company Advocates. They paid the purchase price of KShs. 7,000,000/=. The property was then transferred to the 8th respondent and Mr. Rai believes that due process was followed. He has deposed that the applicant instructed M/s J.A Simiyu & Company Advocates, who wrote to their counsel on 1 August 2016, that instead of causing unnecessary complications, she would pursue her share of the purchase price. A further letter dated 3 August 2016 was written stating that they had sorted out issues concerning the sale of the property with the firm of M/s Githui & Company Advocates. On the same day, M/s Githui & Company Advocates wrote a letter confirming that the share of the proceeds of the sale which is due to the plaintiff will be forwarded to M/s J.A Simiyu & Company Advocates. He has deposed that the applicant is at liberty to settle any outstanding issues between her and the other beneficiaries, without involving the 8th respondent, as this is a family issue which should be settled by family members.

6. A further affidavit was sworn by Mr. John Githui, the proprietor of M/s Githui & Company Advocates. He has inter alia deposed that the 4th -7th respondents, as children of the deceased, (John Mburu) informed him that they wished to distribute the property amongst themselves and he was further informed that they have agreed to gift the 9th respondent. The widow of the late John Mburu and the 4th - 7th respondents then informed him that they wished to dispose of the plot No. 542 to the 8th respondent and he did a transfer to the 8th respondent. He deposed that the law firm of M/s Simiyu & Company Advocates who were on record for the applicant, protested to the sale and he held a meeting with Mr. Simiyu where it was agreed that the applicant could have KShs. 1,000,000/= as her share of the sale. Mr. Githui also informed Mr. Simiyu that his firm could dispose of the plot No. 545 and the proceeds distributed to the children of the late John Mburu. At the demand of Mr. Simiyu, the sum of KShs. 1,000,000/= was transferred to him for onward transmission to the applicant. He (Mr. Githui) then retained the title to the plot No. 545, on the understanding that when sold, the proceeds would be shared to the children of John Mburu. Having been in consensus, Mr. Simiyu then withdrew the objection to the sale of the plot No. 542 and the same was transferred to the 8th respondent. He has deposed that any further claim that the applicant may have is protected by the retention of the title to the plot No. 545 and thus her position is secured. He has no problem depositing the original of this title in court. He was further of the view that damages would be adequate compensation to the applicant.

7. The plaintiff filed a supplementary affidavit where she deposed that she is daughter of one Elizabeth Mukuhi Ndungu and that Jane Wanjiku Mburu is the biological mother of the 4th - 7th respondents. She has averred that the suit properties were distributed jointly to her and the 4th - 7th respondents by the Court of Appeal and no further distribution can be carried out by the said Jane Wanjiku Mburu. She has deposed that she has never attended any meeting or signed any instrument to vest the 9th respondent any property. She has denied ever instructing the law firm of Ms/ J.A Simiyu & Company Advocates. She has averred that she has never consented to the sale of the plot No. 542 to the 8th respondent. She believes that the retention of the title to the plot No. 545 is wrongful since no decision has ever been made to sell it. She has lamented that she is being left out in receiving her share of the distribution of the estate of the late Ms. Evans and has cited failure to be given her monetary share of some proceeds received by M/s Githui & Company Advocates. She has complained that Mr. Githui should therefore not act in the matter as his role is that of witness.

8. Nothing was filed by the 9th respondent who is yet to enter appearance. The 1st-3rd respondent have entered appearance but did not file anything on this motion.

9. I invited counsel to file submissions and I have considered the submissions so filed. I take the following view of the matter.

10. The issues herein flow from the decision of the Court of Appeal which distributed the estate of the late Ms. Evans in Nakuru Civil Appeal No. 221 of 2007. In the judgment, the properties Nakuru Municipality Block 7/542, 545, 546, 548 and 549, were distributed to the children of the late John Mburu. Further in the said judgment, the children of the late John Mburu (also described as Mburu Gachigi), were identified as Salome Njoki Mburu, Margaret Wanjiru Mburu, Mary Nyambura Mburu and Mercy (Mary) Wanjiru Mburu (the applicant). It was argued by the 4th -7th respondent that the applicant is not a child of the late John Mburu, but the Court of Appeal recognized her as a child of the deceased, and it is not for me to question that position for I have no jurisdiction to do so. The Court of Appeal also pointed out what is to be distributed, and how the same should be distributed, and again it is not for me to interrogate that distribution.

11. I have already pointed out that the properties Nakuru Municipality Block 7/542, 545, 546, 548 and 549 were distributed to the children of the late John Mburu. That being the case, *prima facie*, I do not see how the suit properties could be sold without the applicant being a signatory to any sale agreement and/or without her consent. It has not been shown to me that the applicant executed any sale agreement or issued any written consent to the sale. I have been informed of some discussion between Mr. Githui and Mr. Simiyu, who was said to be acting for the applicant. The applicant has categorically denied instructing Mr. Simiyu to act for her in the sale transaction, but most importantly as I have mentioned, at this stage of the proceedings, I am persuaded that the applicant has made out a case that she needed to give approval to any sale or transfer of the suit properties.

12. I thus hold the view that the applicant has made out a prima facie case with a probability of success. There is a risk that the properties may be dealt with or developed unless an injunction is issued, and if this happens, the applicant stands to suffer irreparable loss.

13. For the above reasons, I allow the application for injunction. I make the following orders :-

(i) That there is hereby issued an order of inhibition, inhibiting the registration of any disposition in the registers of the land parcels Nakuru Municipality Block 7/542, Nakuru Municipality Block 7/545, and Nakuru Municipality Block 7/546 and the order of inhibition to remain in place until this case is finalized.

(ii) That there is hereby issued an order of injunction stopping the respondents from selling, charging, leasing, or in any other way dealing with the properties Nakuru Municipality Block 7/542, Nakuru Municipality Block 7/545, and Nakuru Municipality Block 7/546 until this case is heard and determined.

(iii) That there is hereby issued an order of injunction barring the respondents from undertaking any development of any structure in the land parcels Nakuru Municipality Block 7/542, Nakuru Municipality Block 7/545, and Nakuru Municipality Block 7/546, until this case is heard and determined.

(iv) That the applicants shall have the costs of this application against the 1st, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents.

14. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 3rd day of April 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Ms. Ogange for the plaintiff/applicant.

Mr. R.K Langat holding brief for Mr. Githui for the 4th-7th defendants/respondents.

No appearance on the part of M/s A.N. Geke & Company for the 1st defendant /respondent.

No appearance on the part of M/s Ochweri Ngamate & Company for the 2nd and 3rd defendants.

Court Assistant – Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU