



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC SUIT NO. 105 OF 2018

STELLA KOKI MUTUNGA (Suing as the Administrator and the legal

representative of the Estate of JOHN NZONGA KAMWATHI)...PLAINTIFF/APPLICANT

VERSUS

NDUNGE MUTUNGA..... 1ST DEFENDANT/RESPONDENT

TAABU NZOWE.....2ND DEFENDANT/RESPONDENT

DAVID KIVUNGI.....3RD DEFENDANT/RESPONDENT

ALFRED MUNENE4TH DEFENDANT/RESPONDENT

THE TRUSTEES OF JESUS RESTORATION

CENTRE -MATILIKU.....5TH DEFENDANT/RESPONDENT

RULING

1. What is before this court for ruling is the Plaintiff's/Applicant's Notice of Motion application expressed to be brought under Sections 1A, 1B & 3A of the Civil Procedure Act Cap 21, Orders 40 Rules 1(a), 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 make interim orders that the 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents by themselves, their agents and/or servants be restrained from entering onto and/or encroaching and remaining on and/or constructing, alienating, selling and/or doing any developments or works or in any other manner whatsoever interfering with a portion(s) of and/or the whole of land parcel NZAUI/KAWALA/961 pending hearing and determination of this application.

4. THAT this Honourable court be pleased to make interim orders that 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents by themselves and/or their agents, servants be restrained from entering into, and/or encroaching and/or remaining on and/or constructing on, alienating, selling and/or doing any developments, works or in any other manner whatsoever interfering with a portion(s) of and/or the whole of land parcel NZAUI/KAWALA/961 pending the hearing and determination of the main suit.

5. THAT the said orders be enforced by the OCS EMALI POLICE STATION.

6. Costs of this Application be provided for by the Defendants/Respondents.

2. The application is dated 30th October, 2018 and was filed in court on 01st November, 2018. It is predicated on the grounds that the Plaintiff/Applicant is an Administrator of the Estate of one John Nzonga Kamwathi (Deceased) the registered owner of land parcel

Nzau/Kawala/961, that sometimes last year and/or this year the 2nd, 3rd, 4th and 5th Defendants/Respondents purchased portions of the aforementioned parcel of land from the 1st Defendant/Respondent-a daughter in law of the Deceased without her obtaining letters of administration to the Estate of the Deceased, that the 1st Defendant/Respondent sold to the 2nd, 3rd, 4th and 5th Defendants portions of land parcel Nzau/Kawala/961 unlawfully, without justification and/or consent from the rest of the beneficiaries and the Defendants/Respondents have started developing and/or doing constructions on the suit parcel of land, that if the Defendants/Respondents are allowed to continue with their acts of wasting the deceased's Estate the other beneficiaries of the estate shall be denied their rightful shares thereof, that the beneficial interests of all the beneficiaries have not been ascertained and is supported by the affidavit of Stella Koki Mutunga sworn at Nairobi on the 30th October, 2018.

3. The Defendants/Respondents have opposed the application vide the replying affidavit of Jacinta Nduge Mutunga, the 1st Defendant/Respondent herein, sworn at Machakos on 22nd November, 2018.

4. Parties filed their submissions on 15th and 18th January, 2019 pursuant to the Court's directions on 21st November, 2018 that the application be disposed off by way of written submissions.

5. In support of the application, the Applicant has deposed in paragraphs 1, 2, 3, 4, 5, 6 and 13 of her affidavit that she is the granddaughter of John Nzonga Kamwathi who is now deceased and the registered owner of land parcel number Nzau/Kawala/961, that her late grandfather died intestate leaving behind beneficiaries of his estate as per the copy of chief's letter annexed as SKM-1, that the said land parcel Nzau/Kawala/961 forms part and parcel of the estate of the deceased, that letters of administration over the estate of the deceased have not yet been taken out since the beneficiaries of the estate are involved in citation proceedings before the High Court at Makueni being P&A 17 of 2018, that sometimes last year the 1st Respondent sold to his co-respondents portions of Nzau/Kawala/961 without authority from the rest of the beneficiaries of the estate of the deceased, that construction is ongoing on the portions that were sold and that unless the Respondents are restrained, she is unable to contain them.

6. On their part, the 1st Respondent has deposed in paragraphs 3, 5, 6, 7 and 12 that she has been advised by her advocates on record which she verily believes to be true that the Applicant's entire application dated 30th October, 2018 is misconstrued, an abuse of the court process and fatally defective and ought to be dismissed for lack of merit, that the Applicant lacks capacity to institute this suit as the limited grant of letters of administration the basis of which this suit is filed is limited to other purposes than filing this suit, that she has been advised by the same advocates on record which she verily believes to be true that the Applicant has not demonstrated her alleged relationship with the deceased, that in any case, there is succession cause which has been filed in the High Court of Kenya at Makueni vide succession cause No.31 of 2018 and that the Applicant herein is not a beneficiary of the estate of John Nzonga Kamwathi as evidenced by the letter from the chief which the Applicant annexed as MKM-1 to her supporting affidavit.

7. In his submissions, the Counsel for the Applicant submitted that the Applicant has locus standi to file this suit by virtue of her appointment as an administrator in Makueni SPMCC No.144 of 2018. That the Respondents ought to have filed a Notice of Preliminary Objection instead of doing so through a replying affidavit.

8. Regarding the principles set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** for the grant of injunctive orders, the Counsel submitted that land parcel Nzau/Kawala/961 is still registered in the name of one John Nzonga Kamwathi and that the 1st Respondent has not disputed sale of portions of the said land to his co-respondents. That construction is ongoing in the said parcel of land. The Counsel submitted that this would amount to intermeddling with the property of a deceased person contrary to the provisions of Section 45 of the Law of Succession Act.

9. Arising from the above, the Counsel was of the view that the Applicant has satisfied the principle of prima facie case with probability of success. On the issue of irreparable loss that the Applicant is likely to suffer, the Counsel submitted that the Applicant and other beneficiaries will lose their share of the estate if the sale is not stopped. On the issue of if the court is in doubt, it will decide the application on a balance of probabilities, the Counsel submitted that it is clear that the land parcel number Nzau/Kawala/961 is still in the name of a deceased person and nobody ought to sell it off without a certificate of confirmed grant.

10. On the other hand, the Counsel for the Respondents termed the application as a non-starter, spurious, grossly incompetent, incontestably bad in law, premature and an abuse of judicial process. The Counsel framed three issues for determination namely:-

1. Whether the court has jurisdiction to hear this application.
2. Whether the Applicant has locus standi to make this application.
3. Whether the 1st Respondent has intermeddled with the property of the deceased.

11. Regarding the first issue, the Counsel cited the case of **Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** where **Nyarangi J** held as follows:-

".....jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

12. The Counsel went on to submit that the application before this court is not with respect to environment, use and occupation of land and or title to land as contemplated by Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act which confer jurisdiction on this court. The Counsel added that the issue at hand is purely a succession dispute within the meaning of Sections 47 and 48

of the Law of Succession Act. The Counsel cited the case of **Beatrice Wambui Kiarie and 2 others vs. Tabitha Wanjiku and 9 others [2018] eKLR** where **M. C. Oundo J** stated thus:-

“I find that this court has no jurisdiction to try matters pertaining to succession disputes. Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there will be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

13. On the issue of whether or not the Applicant has locus standi to make this application, the Respondent’s Counsel submitted contrary to the Applicants assertions that she is the administrator of the estate of the deceased, she is infact a citor in a succession cause that is still pending at the High Court where parties were directed to file a cause for the grant of letters of administration intestate of the estate of John Nzonga Kamwathi namely Makueni P&A 17 of 2018. The Counsel termed the grant of letters of administration in Makueni SPMC Cause No.144 of 2018 as limited to instituting a suit in respect to the estate of the deceased.

14. On whether the 1st Respondent has intermeddled with the property of the deceased, the Respondent’s Counsel submitted that there was no evidence before this court of such intermeddling.

15. Arising from the above, the Counsel asked the court to dismiss the application with costs.

16. Having read the application, the replying affidavit as well as the submissions that were filed together with the authorities that were cited, it is clear to me that this being an application for the grant of injunctive orders, the principles set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** apply herein. Secondly, although a preliminary objection can be raised at any stage in the proceedings, the Respondents herein ought to have filed a proper notice of such objection instead of raising the same in their replying affidavit. It will serve no useful purpose if the court were to uphold the Respondents’ objection and strike out the application since the Applicant’s suit will still remain. That will amount to waste of precious judicial time. The Respondents ought to have filed a proper notice of preliminary objection to the entire suit as well as the application.

17. Regarding the principle of whether or not the Applicant has a prima facie case with probability of success, the Applicant has deposed in paragraph 4 of her supporting affidavit to her application that no letters of administration intestate over the estate of John Nzonga Kamwathi have been issued since the beneficiaries of the estate are involved in citation proceedings in Makueni P&A 17 of 2018. The letter from the Chief that the Applicant has annexed as SKM-1 to her supporting affidavit does not include her as one of the beneficiaries of the estate of John Nzonga Kamwathi. It is my finding, therefore, that the Applicant has not satisfied this court that she has a prima facie case with probability of success. Having failed to satisfy the first principle, I need not address the second principle. I am guided on this issue by the case of **Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001] EA 86** where the Court of Appeal held thus:-

“the sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first is satisfied.”

18. From the foregoing, my finding is that the application lacks merit and I proceed to dismiss it with costs to the Respondents.

Signed, dated and delivered at **Makueni** this **30th** day of **May, 2019**.

MBOGO C. G.,

JUDGE.

In the presence of:-

Mr. Muthiani for the Plaintiff/Applicant

Mr. Masaku for the Defendants/Respondents

Ms. C. Nzioka – Court Assistant

MBOGO C.G, JUDGE

30/05/2019.