



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO.981OF 2014

JOSEPH KAMAU KARIUKI.....PLAINTIFF

VERSUS

ERNEST NJENGA KARIUKI.....1STDEFENDANT

JOSEPH NJUNGE KARIUKI.....2NDDEFENDANT

PETER MATHIA KARIUKI.....3RD DEFENDANT

RULING

When the plaintiff brought this suit against the defendants on 25th July, 2014, he contended that all that parcel of land known as Karai/Karai/823(hereinafter referred to as “the suit property”) belonged to the estate of his late mother, Hannah Wambui Kariuki(hereinafter referred to as “the deceased”. The plaintiff averred that the defendants are his brothers. The plaintiff averred that they are six(6) in the family; four(4) boys and two(2) girls. He averred that one of his sisters is deceased but left children while the other sister is alive. The plaintiff averred that before the death of the deceased, she informally subdivided the suit property into five (5) portions. The sons, that is, the plaintiff and the defendants were entitled to four (4) portions while the deceased’s two daughters were entitled to the remaining one (1) portion. The plaintiff averred that with a view to deprive their two sisters of their share of the suit property, the defendants had planned to sell the portion of the suit property that was set a part for them by the deceased. The plaintiff averred that the children of thier deceased sister were cultivating the portion of the suit property that the deceased had allocated to their mother and were not aware of the plan that the defendants had hatched to dispossess them of the land. The plaintiff sought judgment against the defendants for an injunction to restrain them from cultivating, selling or disposing of the land that was set aside by the deceased for their two sisters.

Together with the plaint, the plaintiff filed an application by way of Chamber Summons dated 24th July, 2014 in which he sought a temporary injunction to restrain the defendants from transferring, charging or in any other way dealing with the said portion of land that was set aside by the deceased for their two sisters, Joyce Njoki(deceased) and Mary Ngendo Kariuki pending the hearing of the suit. When the application came up for hearing ex parte before Mutungi J. on 7thAugust, 2014, he formed the view that the dispute revolved around the distribution of the estate of the deceased, Hannah Wambui Kariuki. For that reason and with a view to preserve the subject matter of the dispute, Mutungi J. granted an order of a temporary injunction restraining the defendants from transferring, subdividing, charging or in any way dealing with the portion of the suit property that was allocated by the deceased to their sisters aforesaid pending the filing of a petition for letters of administration in respect of the estate of deceased.

On 15th September, 2014, the plaintiff brought another application by way of Chamber Summons dated

3rd September, 2014 seeking an order for the committal of the defendants to civil jail for contempt of the said order of Mutungi J. When the contempt application came up for hearing before Mutungi J. on 28th October, 2014, the court stated as follows:

“The court issued the interim order in this matter as a stop gap measure to enable the plaintiff to pursue any rights that he claims the sister had to inherit from his late mother from the succession court. The court was not supposed to continue hearing the matter without the succession court making a determination as to whether the sister was entitled to any inheritance from the mother. I direct that the plaintiff pursues that course.”

The said orders made by Mutungi J. on 7th August, 2014 and 28th October, 2014 have neither been reviewed nor set aside. The defendants entered appearance and filed a joint statement of defence on 22nd September, 2014. The defendants denied the plaintiff's claim in its entirety. The defendants denied that they had any intention of denying their sisters' children the share of the suit property that was allocated to their mothers by the deceased as claimed by the plaintiff. The defendants averred that the deceased allocated to each of her sons a half acre each of the suit property and that the suit property was transferred to them before the death of the deceased. The defendants denied that the suit property was subdivided into five (5) portions for allocation to all the children of the deceased. The defendants denied that they had any intention of selling the portion of the suit property that belonged to their sisters and contended that if they were to sell any portion of the suit property, the sale would be limited to their individual portions of the said property.

What is now before me is the defendants' Notice of Motion application dated 21st January, 2015 in which they have sought an order that the District Land Registrar be ordered to sign the necessary documents to enable the subdivision of the suit property so that the same may be shared between the defendants and the plaintiff equally in the ratio of half (1/2) acre each. The application which is supported by the affidavit of the 1st defendant has been brought on the grounds that the plaintiff has infringed on the defendants' rights over the suit property by refusing to consent to the subdivision of the suit property and transfer to the defendants of their respective shares in the property. The defendants have contended that the refusal by the defendant to consent to the subdivision and transfer to the defendants of their shares in the suit property has impeded their rights to deal with their shares in the property. The defendants have contended that the suit property was transferred to the plaintiff and the defendants by the deceased before her death and that the plaintiff has withheld his consent to have the property partitioned so that they may each have a title for their respective shares in the property. The defendants have contended that since they are all registered as owners of the suit property, they are entitled to share the property equally. The defendants have contended that the plaintiff has no justification for refusing to have the suit property partitioned.

The application is opposed by the plaintiff through a replying affidavit sworn on 16th May, 2016. The plaintiff has reiterated that before her death, their mother (the deceased) had indicated that the suit property which she held in trust for her children should be shared between her sons and daughters with the sons each getting half (1/2) acre and the two daughters sharing the remaining half (1/2) acre. The plaintiff has contended that after the death of the deceased, the defendants hatched a scheme to disinherit their two sisters of their share in the suit property. The plaintiff has contended that the defendants came up with an instrument of transfer purportedly executed by the deceased transferring the suit property to her sons only to the exclusion of the two daughters. The plaintiff has contended that the share of the suit property which is supposed to go to their two sisters would now be taken by the 1st defendant under the new scheme mooted by the defendants. The plaintiff has contended that the children of one of his sisters, Joyce Njoki Kariuki who is deceased have been cultivating her portion of the suit property and that the court had issued an injunction restraining the defendants from interfering with the portion of the suit property that was allocated to their two sisters pending the filing of succession proceedings in respect of the estate of the deceased. The plaintiff has contended that the defendants have admitted having frustrated the filing of a petition for grant of letters of administration in respect of the estate of the deceased.

When the defendants' application came up for hearing on 28th March, 2017, the court was informed by the parties that the 1st defendant had died and his advocates wished to substitute him with his legal

representative. The application was adjourned to 29th June, 2017 to give time to the defendants' advocates to substitute the deceased 1st defendant. When the application came up on 29th June, 2017, the 1st defendant had not been substituted with his legal representative but the advocates for the parties informed the court that they wished to argue the application. In his submission, Mr. Harris who appeared for the defendants relied entirely on the affidavit of the 1st defendant that was filed in support of the application and urged the court to allow the application. In his submission in reply, Mr. Mwango who appeared for the plaintiff reiterated the contents of the plaintiff's replying affidavit. Mr. Mwango submitted that it was not disputed that the deceased had four sons and two daughters. He submitted that the purported transfer of the suit property to the deceased's sons to the exclusion of the daughters was contrary to the Law of Succession Act, the Constitution and the intention of the deceased. Mr. Mwango submitted that Mutungi J. had made an order that the status quo be maintained pending the filing of a petition for grant of letters of administration in respect of the estate of the deceased. He submitted that the defendants had refused to sign the petition for grant of letters of administration. Mr. Mwango submitted that the suit property should not be interfered with until succession in respect of the estate of the deceased had been undertaken. He submitted that the orders ought by the defendants are contrary to the orders issued herein earlier by the court. In a rejoinder, Mr. Harris submitted that the suit property did not form part of the estate of the deceased.

I have considered the defendants' application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the plaintiff in opposition thereto and the submission by the parties' advocates. I am of the view that the defendants' application is misconceived and must fail for a number of reasons. First, the application is not properly before the court. The jurisdiction to hear and determine applications for partition of land held by tenants in common is conferred in the first instance upon the Land Registrar by section 94 of the Land Registration Act, 2012. This court's jurisdiction on disputes over partition of land is conferred by section 94(5) of the Land Registration Act, 2012. The jurisdiction is appellate in nature. That provision of the Land Registration Act, 2012 gives a co-tenant who is aggrieved with the decision of the Land Registrar on an application for partition, a right to apply to court for the review of the same.

In the case of, Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR, Court of Appeal stated that:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

It is not disputed that this court has original and appellate jurisdiction over all disputes relating to environment and land. The court must however exercise restraint in dealing in the first instance with disputes in respect of which a statute has given original jurisdiction to an administrative body and conferred upon it appellate or supervisory jurisdiction. The defendants have not given satisfactory or any reason why they did not follow the procedure provided in the Land Act for partitioning land held by tenants in common.

Even if it is assumed that the application was made to this court because there was already an existing dispute, I am not satisfied that a proper basis has been laid for the application. For the court to make an order for partition there must be a suit for partition. There is no such suit before me. The suit before me is by the plaintiff seeking injunction against the defendants. The defendants have not filed a counter-claim. The other factor that militates against the granting of the orders sought by the defendants is the existence of the orders that were made herein by Mutungi J. on 7th August, 2014 and 28th October, 2014. As I have stated earlier, the said orders that enjoined the defendants to maintain status quo in relation to the suit property pending succession proceedings in respect of the estate of the deceased have not been reviewed or set aside. The defendants had submitted that the suit property did not form part of the estate of the deceased. The issue is contentious. Even if that is the case, the orders aforesaid have to be set aside before the defendants can partition the suit property. As things stand now, I am in agreement with the plaintiff

that the orders sought by the defendants if granted would be in conflict with the earlier orders issued herein by Mutungi J.

For the foregoing reasons, I find no merit in the defendants' Notice of Motion application dated 21st January, 2015. The application is dismissed with costs to the plaintiff.

Delivered and Signed at Nairobi this 19th day of January, 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Ochieng h/b for Kenyatta for the Plaintiff

Mr. Harn's h/b for Kirangu for the Defendants

Catherine Court Assistant