



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT NAIROBI

ELC SUIT NO. 521 OF 2016

PAULINE ESTHER NJOKI THUKU..... PLAINTIFF

VERSUS

PHILSLER WANGECHI THUKU.....1ST DEFENDANT

HASSAN SHARIF ALWY.....2ND DEFENDANT

DELOS LIMITED.....3RD DEFENDANT

RULING

The plaintiff brought this suit through amended plaint dated 7th July, 2016 seeking the following relief against the defendants:

- (a) A permanent injunction restraining the defendants/respondents jointly or independently by themselves, their agents, servants, employees, proxies and contractor acting under their instructions jointly or independently, any other person claiming under them from encroaching, trespassing, evicting the plaintiff's children or any other occupant, demolishing any building therein, excavating, alienating, selling, conveying, transferring, arbitrarily registering, developing trading on and or interfering in any way howsoever with all that property described as I.R No. 22361, L.R No. 1870 Subdivision No. 160 (Original No. 81/1) section No. VI measuring approximately 0.5000 acres situated in Westlands, Nairobi County.
- (b) A declaration that the transfer or purported transfer and registration of the suit premises to the name of the 3rd defendant is fraudulent.
- (c) An order of re-transfer of the suit land L.R No. 1870/VI/160 (Original No. 81/VI/I) Nairobi.
- (d) General damages for loss of mesne profit.
- (e) An order for the Deputy Registrar to execute all transfer documents on behalf of the 3rd defendant and the 1st defendant if the two fail to do so independently.
- (f) In the alternative and without prejudice to the above, compensation to the Plaintiff for her share in the suit land at the prevailing/current value of the suit premises together with all development therein at the time of the determination of this suit.
- (g) Costs of this suit
- (h) Interest at court's rate.
- (i) Any other relief that this Honourable Court may deem fit and Just to grant.

In the amended plaint the plaintiff averred that the 1st defendant who was one of the executors of the estate of one, Tabitha Harry Thuku was appointed as a trustee to hold all that parcel of land known as L.R No. 1870, Subdivision No. 160 (Original Number 81/1, Section VI, Westlands, Nairobi CIR No. 22361) (hereinafter referred to as "the suit property") in trust for herself and other beneficiaries of the estate of the said Tabitha Harry Thuku (hereinafter referred to as "Tabitha").

The plaintiff averred that the suit property was bequeathed by Tabitha to the 1st defendant and the plaintiff and her siblings who are all biological children of the 1st defendant. The plaintiff averred that the plaintiff, Kenya Commercial Bank Ltd. and one, Irene Njambi Migwi were appointed as the executors of the will of Tabitha. The plaintiff averred that the 1st defendant and the said Irene Njambi Migwi

renounced probate and left Kenya Commercial Bank Ltd. (“KCB”) to apply for grant of probate in respect of the estate of Tabitha in Nairobi Succession Cause No. 1657/1992 (“the Succession Cause”). The plaintiff averred that in the said succession cause, most of the assets of the estate of Tabitha including the suit property were transferred to the 1st defendant to hold in trust for herself and her biological children, the plaintiff included. The plaintiff averred that the suit property that was developed with several residential houses was occupied by the plaintiff’s younger sister, one, Emily Nduta, the Plaintiff children and tenants.

The plaintiff averred that in breach of her duty as a trustee, the 1st defendant commenced the process of disposing of the suit property without the consent of the plaintiff and other beneficiaries of the same. The plaintiff averred that the 1st defendant had given notice to the occupants of the suit property to vacate the same so that she may demolish the buildings on premises and transfer part of the ownership of the suit property to the 2nd defendant under a Joint Venture Agreement (“JVA”) dated 7th August, 2015 between them. The plaintiff averred that in breach of and in abuse of her duty as a trustee, the 1st defendant fraudulently transferred or purported to transfer the suit property to the 3rd defendant under the said JVA and the 3rd defendant had commenced development thereon. The plaintiff averred that in addition to the tenants who were in occupation of the suit property, the 1st defendant also issued notices to the plaintiff’s younger sister and children to vacate the suit property and that the 2nd defendant had commenced the demolition of the buildings on the suit property with a view to starting construction thereon. The plaintiff averred that as a consequence of the foregoing, she is likely to be deprived of her share of the suit property thereby subjecting her to irreparable loss.

Together with the original plaint, the plaintiff had filed a Notice of Motion application dated 3rd February 2016 seeking a temporary injunction restraining the 1st and 2nd defendants from trespassing on the suit property or alienating the same pending the hearing of the suit. The 1st and 2nd defendants responded to the application through grounds of opposition dated 31st May, 2016 and replying affidavit sworn by the 1st defendant on 10th June, 2016. The plaintiff amended the plaint on 19th August, 2016 to add the 3rd defendant to the suit and at the same time amended the Notice of Motion application for injunction. The amended Notice of Motion dated 7th July, 2016 sought the following prayers;

1. A temporary injunction restraining the defendants/respondents by themselves, their agents, servants, employees, proxies any contractor acting under their instructions jointly or independently, any other person claiming under them from encroaching, trespassing, evicting plaintiff’s children or any other occupant, demolishing any building thereon, excavating, alienating, selling, conveying, transferring, carrying out any development thereon, arbitrarily registering, developing, trading on and or interfering in any way howsoever with the suit property pending the hearing and determination of this suit.
2. Any other relief the court may deem fit to grant.
3. The order be enforced by Officer in Charge of Parklands Police Station.
4. Costs of the application.

The amended Notice of Motion that was supported by the amended supporting affidavit sworn by the Plaintiff on 7th July, 2016 was brought on the same grounds set out in the amended plaint that I have highlighted above. The 1st and 2nd defendants did not file any new affidavit in response to the amended Notice of Motion. They relied on the affidavit of the 1st defendant sworn on 10th June, 2016 and the grounds of opposition dated 31st May, 2016 that were filed in opposition to the original application. In their grounds of opposition, the 1st and 2nd defendants contended that the plaintiff’s application is an abuse of the process of the court and discloses no prima facie case. The 1st and 2nd defendants averred further that the acts that the plaintiff had sought to restrain had already taken place and as such the application had been overtaken by events.

In her affidavit, the 1st defendant averred that the suit property was bequeathed to her by Tabitha in her will and that Kenya Commercial Bank Ltd (KCB), Irene Njambi Migwi and she were appointed as the executors of Tabitha’s Will. She stated that Irene Njambi Migwi and she renounced their rights to probate and grant of probate was issued to KCB in Nairobi High Court Succession Cause No. 1657/1992 (“the succession cause”) on 10th February, 1993. The 1st defendant stated that the said grant of probate was subsequently confirmed on 5th May, 1995 and the whole estate of Tabitha was vested upon KCB. The 1st defendant stated that Tabitha indicated expressly in her Will how certain properties were to be distributed while in others, she gave her executors the discretion to partition, allot or appropriate as deemed necessary.

The 1st defendant stated that KCB started distribution of the estate of Tabitha by allocating assets in accordance with the testamentary wishes of Tabitha after which it proceeded to do the allocation in accordance with the agreement of the beneficiaries of the estate. The 1st defendant stated that she was allocated the suit property following an agreement that was reached between the beneficiaries of the estate of Tabitha that was communicated to KCB through a letter dated 26th March, 1996. The 1st defendant stated that pursuant to the said agreement, the plaintiff and the other beneficiaries of the said estate were also allocated a number of assets.

The 1st defendant stated that following that allocation, KCB transferred the suit property to her on 14th November, 1996 and in the same manner KCB also transferred other properties to the other beneficiaries. The 1st defendant contended that the suit property was transferred to her as a beneficiary of the estate of Tabitha in her own right and not as a trustee. The 1st defendant contended that as the proprietor of the suit property, she was at liberty to deal with the same in whatever manner she deemed fit. The 1st defendant contended that she had no obligation to consult anyone including the plaintiff prior to dealing with the suit property.

The 1st defendant stated that in early 2015 she entered into discussions with the 2nd defendant on how to develop the suit property by constructing residential units thereon together with the associated infrastructure which discussion culminated in the signing of the Joint

Venture Agreement (JVA) dated 7th August, 2015 between her and the 2nd defendant. The 1st defendant averred that pursuant to the JVA, the 2nd defendant and she incorporated the 3rd defendant to be used as a special purpose vehicle for undertaking the development on the suit property. The 1st defendant averred that on 9th May, 2015 she transferred the suit property to the 3rd defendant. The 1st defendant stated that the 3rd defendant had taken possession of the suit property and commenced preparationsto start the construction of the housing units aforesaid. The 1st defendant contended that possession of the suit property was given to the 3rd defendant after the occupants of the suit property including the plaintiff's children had vacated the property upon being requested to do so.

The 2nd defendant stated that the reliefs sought by the plaintiff had been overtaken by events. The 1st defendant stated that in view of the massive development being undertaken on the suit property that would cost over a billion Kenya shillings, the plaintiff should be ordered to deposit a sum of Kshs.400,000,000/= as security before the court can consider granting the orders sought.

On 10th June, 2016, the 1st and 2nd defendants filed an application of the same date seeking security for costs in the sum of Kshs.9,000,000/= from the plaintiff in default of which the plaintiff's suit should be dismissed with costs. The application that was brought by way of Notice of Motion dated 10th June, 2016was premised on the grounds that the plaintiff though a Kenya Citizen is resident out of the jurisdiction of the court and as such the 1st and 2nd defendants may be subjected to difficulties in recovering their costs should the plaintiff's suit fail and she be condemned to pay costs.

On 3rd April, 2015, the court directed that the plaintiff's application for injunction and the 1st and 2nd defendant's application for security for costs be heard together by way of written submissions. The plaintiff filed submissions and further submissions on 7th April, 2017 and 24th April 2017 respectively. The 1st and 2nd defendants field their submissions and further submissions on 20th April, 2017 and 11th May, 2017 respectively.

I will deal with injunction application first the same having been filed first in time. I have considered the plaintiff's amended Notice of Motion application together with the affidavits filed in support thereof. I am not satisfied that the plaintiff has established a prima facie case against the defendants with a probability of success. The plaintiff's entire claim is premised only on one ground namely that the 1st defendant held the suit property in trust for her and her siblings and as such the 1st defendant could not deal with the suit property in a manner adverse to her interest without her consent. It is common ground that the suit property belonged to Tabitha and that Tabitha bequeathed the suit property by Will to her beneficiaries. It is also common ground that the plaintiff and the 1st defendant were among the beneficiaries of the estate of Tabitha who were supposed to benefit from her estate during the distribution thereof. The 1st defendant and one, Irene Njambi Migwi renounced probate leaving only one executor KCB. KCB took out grant of probate and distributed the assets of the estate in accordance with the Will of the deceased. There is no allegation in these proceedings that KCB did not discharge its mandate in accordance with the law. I have perused the Will of Tabitha, the grant of probate that was issued to KCB and the certificate of confirmation of the said grant. I have also perused the correspondence said to have been exchanged between the beneficiaries of the estate of Tabitha and KCB on how they wished to have the properties of the deceased distributed. The plaintiff has not convinced me that the 1st defendant had an obligation under Tabitha's Will or confirmed grant of probate of Tabitha's will or the instrument under which the suit property was transferred to the 1st defendant to hold the property in trust for the plaintiff. In my view, the plaintiff has not established any basis for her trust claim. There is no indication in the title of the suit property that the 1st defendant was to hold the property as a trustee.

In view of the foregoing conclusion, it is not necessary for me to consider whether the plaintiff would suffer irreparable harm unless the orders sought are granted. The plaintiff's injunction application cannot succeed in the circumstances.

With regard to the 1st and 2nd defendant's application for security for costs, my view is that the same cannot succeed in the circumstances of this case. As was held in the case of Shah v Shah [1982] KLR 95 that was cited by the 1st and 2nd defendants, the general rule is that security for costs is normally required from plaintiffs resident outside the jurisdiction but the court has a discretion whether or not to order security. It has not been disputed that the plaintiff is a Kenyan residing and working in the state of California in the U.S.A. The evidence before the court shows that the plaintiff's children live in Kenya and that the plaintiff visits Kenya from time to time. I have noted that the plaintiff acquired a number of properties from the estate of Tabitha which properties are not the subject of the dispute herein. There is no evidence that the plaintiff has disposed of the properties that she acquired from the estate of Tabitha. It follows that although the plaintiff is resident outside the jurisdiction of the court, the plaintiff has sufficient interest and property within the jurisdiction of the court. I am also of the view that the nature of the dispute and the relationship between the plaintiff and the 1st defendant who are the prime protagonists in the suit is such that the plaintiff should not be hindered from pursuing her claim. For the foregoing reasons, I would exercise my discretion against ordering the security sought.

The upshot of the foregoing is that the plaintiff's amended Notice of Motion application dated 7th July, 2016 and the 1st and 2nd defendant's Notice of Motion dated 10th June, 2016 have both failed. The same are dismissed with costs to be in the cause.

Dated and Delivered at Nairobi this 21st day of June, 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of

Ms. Gichuhi

for the Plaintiff

Ms. Akal holding brief for Mr. Kuyo for the 1st Defendant

Ms. Akal holding brief for Mr. Kuyo for the 2nd Defendant

Catherine Court Assistant