



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NO.1084 OF 2016

MARGARET MUKAMI MACHARIA

(Suing as the Administrator of the estate)

ESTHER WANGUI MACHARIA.....PLAINTIFF

=VERSUS=

JESSE MAINA GITAU.....DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 7th September 2016 in which she sought an injunction restraining the defendant from interfering with **plot No.L 35 Kahawa West also known as Kware 35** (suit property). The applicant is the administratrix of the estate of her late, mother Esther Wangui Macharia (Deceased) who was the beneficial owner of the suit property.

2. The applicant contends that shortly after the demise of the deceased, ownership documents in respect of the suit property were stolen from the deceased's house. On 31st August 2016, the defendant/respondent trespassed on to the suit property and started constructing pillars on the suit property. The applicant asked the respondent to stop the trespass but the respondent was adamant. This is what forced the applicant to file the present application.

3. The respondent opposed the applicant's application based on a replying affidavit which he swore on 23rd April 2018 and two other affidavits sworn by Susan Njeri and Francis Njuru Ngugi sworn on the same date. The respondent contends that he purchased the suit property from Susan Njeri on 5th August 2015. He took possession for one year after which the applicant came to the suit property in company of hired goons who destroyed the foundation of a building he had started putting up.

4. Susan Njeri, the deponent of an affidavit in support of the respondent deposed that in early 2002 she was residing in one of the properties which were being managed by the applicant's late brother. She developed interest in one of the vacant properties which were under his care was then sold to her by the applicant's brother on 25th November 2002. She remained in possession of the undeveloped property until 2015 when she sold it to the respondent.

5. The respondent's position was supported by Francis Njuru Ngugi who was a partner of the deceased. He deposed on how he and the deceased purchased land which was then subdivided. The deceased took her share of the plots and he took his share. He stated that he is aware that the applicant's late brother sold one of the plots which the deceased had bequeathed to him to Susan Njeri who in turn sold the same to the respondent. He denied the applicant's allegation that the deceased's documents were stolen from her from her house.

6. I have considered the written submissions filed by the parties as well as the documents in support of the applicant's application as well as those in support of the of the respondent's case. The only issues for determination are firstly whether this court has jurisdiction to hear this suit and secondly whether the applicant has met the threshold for grant of an injunction.

7. The defendant/respondent had filed a notice of preliminary objection that this court has no jurisdiction to entertain this suit as there is a pending succession cause in respect of the deceased's estate and that that is the court seized with jurisdiction to handle succession matters. On this point the defendant/respondent relied on three decisions that is **Beatrice Mbwese Mutiso Vs Martha Wangene Mutiso (2014) eKLR** , **Jane Muthoni Njuguna Vs Joseph Njuguna Murema (2014) eKLR** and **Catherine Wambilyanga Vs Justina Syombua Musyoka & 3 Others (2015)eKLR**.

8. The plaintiff/applicant opposed the preliminary objection arguing that this suit was filed against the defendant as a trespasser; that the defendant is not a beneficiary of the estate of the deceased and is not claiming anything in the succession cause. The plaintiff's advocate

submitted that the three cases are distinguishable from the present case in that in the three cases relied on by the defendant, the parties involved were relatives.

9. I have read the decisions relied on by the defendant. The defendant is not claiming any part of the estate of the deceased. He purchased the suit property from Susan Njeri who had purchased it from the applicant's deceased brother to whom it had been bequeathed. The defendant has been sued a trespasser and the issue of succession does not arise. I therefore overrule the preliminary objection.

10. On whether the applicant has demonstrated that she has a prima facie case, I find that she has not demonstrated that she has a prima facie case with probability of success. The suit property had been bequeathed to the applicants' deceased brother who sold it to Susan Njeri who in turn sold it to the respondent. The property was sold way back in 2002. The applicant is coming to claim it in 2016. From the materials placed before me, I do find that the applicant has not demonstrated that she has a prima facie case with probability of success. Even if she were to succeed, she can always be compensated in damages. I therefore find no merit in the applicant's application which is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Nairobi on this 11th day of October, 2018

E.OBAGA

JUDGE

In the absence of parties who were aware of date and time of delivery of

Ruling.

Hilda : Court Assistant

E.OBAGA

JUDGE