



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 372 OF 2017

COSMAS MUTUA KITILA.....1ST PLAINTIFF

BRIGITA MBEKE MUTUA.....2ND PLAINTIFF

VERSUS

ISABELA NDINDA KITILA.....1ST DEFENDANT

STELLAMARIS MUMBUA.....2ND DEFENDANT

CAROLINE MBINYA.....3RD DEFENDANT

DIANA NDANU.....4TH DEFENDANT

RULING

1. There is before me a notice of motion application expressed to be brought under Order 40 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 and all enabling laws for orders;

1) Spent

2) Spent

3) That this honourable court be pleased to issue an order of injunction restraining the defendant/respondents by themselves, agents servants or any other person claiming under their authority and/or instructions from entering, trespassing, interfering, constructing, demolishing, fencing, leasing out, carry on any activity thereon or committing any act whatsoever of all that property known as Makueni/Kako/1371 registered under CosmasMutuaKitila measuring 7.06 Hectares situated within Makueni County pending the hearing and determination of this suit.

4) That the costs for this application be provided for.

2. The application is dated 6th December, 2017 and was filed in court on even date. It is predicated on the grounds on its face and is supported by the affidavit of CosmasMutuaKitila, the first plaintiff/applicant herein sworn at Nairobi on unnamed date in the month of December, 2017.

3. The defendants/respondents have opposed the application through their replying affidavit sworn by the 3rd defendant/respondent on the 16th February, 2018 and filed in Court on the 19th February, 2018.

4. On the 19th February, 2018 the court directed that the application be disposed off by way of written submissions. By the time of writing this ruling, only the Respondents had complied with the direction.

5. The Respondents rely on the famous case of *Giella Vs. Cassman (1973) EA 358* which provides the principles upon which the grant of injunctive orders are issued. I need not repeat those principles herein save to say that on the principle of whether or not the applicants have shown a prima facie case with a probability of success, the respondents counsel submitted that the applicants have failed to do so.

6. The counsel went on to submit that the land known as Makueni /Kako/1120 came into existence after the subdivision of land known as Makueni/Kako/85 which belonged to one Clement Kitila Muinde. He went on to submit that Makueni/Kako/1120 was later subdivided into parcels numbers Makueni/Kako/1371, 1372 and 1373 and added that the subdivision of Makueni/Kako/85 was unlawful and fraudulent since

nobody including the applicants hereinafter petitioned the court for a grant of legal representation of the estate of Clement Kitila Muinde. The counsel termed the act of subdivision as intermeddling with the estate of a deceased person since it offends section 45 of the Law of Succession Act.

7. The counsel termed the failure by the applicants to procure a grant of representation so as to be able to subdivide and share the estate of Clement Kitila Muinde as an illegality. He added that since the orders sought are equitable remedies, the maxim of equity which holds that, "**he who comes to equity must do so with clean hands**" come into play.

8. The counsel cited the case of **Caliph Properties Ltd Vs Barbed Sharma & Another [2015] eKLR** where the Njagi, J held;

"I further agree with the 1st defendant's submission that an injunction being an equitable remedy, anyone whose seeks the same must come with clean hands"

9. The counsel submitted that the applicants having failed to prove the first ground set out in Giella's Case, the application by the applicants must fail.

10. The counsel referred to the Court Appeal decision in **Kenya Commercial Finance Co. Ltd Vs Afraha Education Society [2001] EA 86** where the court held that,

"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"

11. I have looked at paragraph 2 of the affidavit in support of the application. The paragraph does not disclose when the late Clement Kitila bequeathed land parcel Makueni/Kako/1371 to the applicants even though in paragraph 12 of the affidavit, they have deposed that they have been in possession of the suit property since 1996. They have further deposed that they were issued with title deed dated 6th March, 2016.

12. The respondents have in paragraph 8 of their replying affidavit deposed that before Clement Kitila Muinde died in 1996, he divided his land between the 1st applicant and the 1st respondent. They further depose in paragraph 9 that upon the demise of Clement Kitila Muinde, no succession cause was ever filed by the family members to get an administrator to subdivide the land as per the wish of the deceased.

13. The applicants have not countered this fact. This would, therefore, call into question the process of issuance of the title deed dated 6th March, 2016 to the applicants. Given those circumstances, I am in agreement with the respondents that the applicants have failed to show that they have a prima facie case with a probability of success. Having failed to satisfy this principle, on the authority of **Kenya Commercial Finance Co Ltd Vs Afraha Education Society (2001) I EA 86**, I see no need to address the second principle.

14. From the foregoing, my finding is that the application has no merit and same is dismissed with costs to the respondents. It is so held.

Signed, dated delivered at Makueni this 8th day of October, 2018

Mbogo C.G,

Judge

In the presence of:

Mr. Mulei holding brief for Mr. Munyasia for the plaintiff

No appearance for the respondents

Mr. Kwemboi- Court Assistant

MBOGO C.G, JUDGE

8/10/2018