



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 18 OF 2018

ESTHER MAKUMBI MATUNDU..... PLAINTIFF/APPLICANT

VERSUS

MWANG'A KISYULADEFENDANT/RESPONDENT

RULING

1. There is before me an amended Notice of Motion Application expressed to be brought under Articles 20, 40, 47, Order 40 Rules (1) 1A, 8, 9 and 10 of the Civil Procedure Rules as well as Sections 1A and 3A of the Civil Procedure Act for orders:-

1. Spent.

2. THAT a temporary injunction do issue restraining the Defendant/Respondent by himself, his agents, servants, employees and or anybody or authority working under him from sub-dividing for sale, transferring and/or doing any other act on land parcel number Nzau/Nziu/855, Nzau/Nziu/373, Nzau/Nziu/712 pending the hearing interparties of this application and further pending the hearing and determination of this suit.

3. THAT the costs of this application be borne by the Defendant/Respondent.

2. The application is dated 22nd May, 2018 and was filed in court on the 23rd May, 2018. It is predicated on the grounds on its face and is supported by the affidavit of Esther Makumbi Matundu, the Plaintiff/Applicant herein, sworn at Machakos on the 22nd May, 2018. It is opposed by the Defendant/Respondent vide his replying and further replying affidavits sworn at Nairobi on 22nd February, 2018 and 02nd July, 2018 and filed in court on 23rd February, 2018 and 05th July, 2018 respectively.

3. Prior to the filing of the amended application, directions were issued on the 07th March, 2018 to dispose off the application dated 13th October by way of written submissions. Upon being allowed leave to amend his application, both parties were also granted leave to file supplementary submissions, if need be. It is only the Respondent who filed supplementary submissions.

4. In their submissions, the counsel on record for the Applicant and the Respondent respectively are in agreement that the principles set out in the case of **Giella Vs. Cassman Brown and Company Ltd (1973) EA 358** herein as this is an application for the grant of an order of injunction. I need not repeat the principles set out in Giella's case as they are well known.

The Applicant must show a prima facie case with probability of success.

5. The Applicant's counsel submitted that the parcels of land known as Nzau/Nziu/855, Nzau/Nziu/373 and Nzau/Nziu/712 are family land which were unprocedurally registered in the name of the Respondent herein presumably in trust for the three families of the Respondent's father who is also the father of the late husband of the Applicant. The counsel went on to submit that the Respondent has shown partiality by selecting the beneficiaries who would benefit from the land distribution. Given those circumstances, the counsel was of the view that it would be in the interest of justice to restrain the Respondent.

6. The counsel further submitted that the Respondent has in paragraph 10 of his replying affidavit admitted to intermeddling with the affairs of the estate of his late brother, one Michael Matundu, the husband of the Applicant, an act that runs contrary to the provisions of Section 45 of the Law of Succession Act Chapter 160 of the Laws of Kenya.

7. On the other hand, the counsel for the Respondent submitted that the Applicant has not shown a prima facie case with probability of success since the title to the three parcels of land are in the name of the Respondent.

An injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury.

8. The Applicant's counsel submitted that the Applicant and the estate of her late husband, Michael Matundu, are beneficiaries of all the parcels of land which are the subject matter of this application. The counsel pointed out the Applicant will suffer irreparably if the Respondent proceeds to sub-divide and dispose off the said properties.

9. The counsel relies on the case of **Mohamed Vs. Commissioner of Lands and Four others KLR (E&L)1 at page 217** where Waki, J (as he then was) held that:-

“It can be no answer to a prayer for injunction that the Applicant may be compensated in damages particularly where the transgression is against the law”.

10. The counsel added that the above position was held in the case of **Purity Wanjiku Nderitu and another {Suing as the personal representatives of Julius (Deceased)} Vs. Humphrey Wang'ombe Kahariri & Another (2013) eKLR at page 4 Paragraph 3 and 3.**

11. The counsel for the Respondent submitted that the Applicant has not challenged the title as is required in Section 26 of the Land Registration Act and as such, the Respondent owns the three parcels of lands. The counsel went on to submit that the Applicant cannot come to court to stop distribution of land to the beneficiaries who have already been given their shares. The counsel further submitted that the late Michael Matundu does not have titles registered in his name and hence it cannot be said that the Respondent has intermeddled with the property of a deceased person.

When the court is in doubt, it will decide the application on a balance of convenience.

12. The Applicant's counsel submitted that should the court be in doubt, then it should find that the balance of convenience tilts in favour of the Applicant. On the other hand, the Respondent's counsel was of the view that the court should find that the balance of convenience tilts in favour of the Respondent.

13. Having carefully read the amended application together with the affidavit in support as well as the replying and further affidavits, and having considered the submissions that were filed, my finding is as follows:-

14. On whether or not the Applicant has shown a prima facie case with probability of success, I do note that the Applicant has in paragraph 7 of her affidavit deposed that land parcel Nzai/Nzi/373 like the other two parcels namely Nzai/Nzi/855 and Nzai/Nzi/712, are family property and not the private property of the Respondent. She goes on to depose that Nzai/Nzi/373 is held in trust by the Respondent and should also be distributed.

15. The Respondent has in paragraph 4 of his replying affidavit and paragraph 7 of his further affidavit and parcel numbers Nzai/Nzi/855, 373 and 712 were surveyed and registered in his name in the 1970s. He further deposes in paragraphs 5 and 6 of his replying affidavit that he holds in trust for the three families of his late father land parcels numbers Nzai/Nzi/855 and 712 while Nzai/Nzi/373 is his private property.

16. The Applicant has in paragraph 7 of her supporting affidavit deposed that her father in-law is buried in land parcel number Nzai/Nzi/373 which goes against the Kamba customary law that no person was ever buried in a parcel of land that does not belong to him. This has not been controverted by the Respondent. In my view, the deposition by the Applicant goes a long way to show that she has shown a prima facie case with probability of success.

17. On whether or not she will suffer irreparable harm if the order of injunction is not granted, it is clear that the subdivision and distribution of parcels of land number Nzai/Nzi/855 and 712 to beneficiaries other than the Applicant will leave her with an irreparable injury that cannot be compensated in damages. Whereas I agree with the Respondent that he cannot be said to be intermeddling with the property of a deceased by virtue of the fact that he holds the land in trust of the family of his deceased father, the manner of subdivision and distribution has been put to question.

18. Regarding the third principle, this court is not in doubt and even if it was, given the reasons that I have highlighted in principles one and two, the balance of conveniences tilts in favour of granting the order of injunction.

19. I am satisfied that the amended application has merits and in the circumstances, I hereby proceed to grant prayers 2 and 3.

20. It is so ordered.

Signed, dated and delivered at **Makueni** this **13th** Day of **November, 2018**.

MBOGO C. G.

JUDGE

In the presence of:

Mr. Kitindio Musembi for the Applicant

Mr. Muthiani for the Respondent

Mr. Kwemboi – court clerk

MBOGO C. G.

JUDGE