



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 291 OF 2014

FLORENCE WAIRIMU MBUGUA.....PLAINTIFF/APPLICANT

-VERSUS-

IBRAHIM A. BAKARI

THE COUNTY GOVERNMENT OF MOMBASA

PETER KINYUA MUCHENDU T/A KINYUA & CO. AUCTIONEERS

HEMEDI HAMADI ABDALLA

THE REGISTRAR OF TITLES.....DEFENDANTS/RESPONDENTS

RULING

1. The plaintiff brought this suit as the personal representative of the estate of Joseph Kiarie Mbugua deceased against the four defendants. Together with the plaint, she filed a notice of motion application dated 17th November 2014. This application is premised on the provisions of section 1A & B of the Civil Procedure Act and Order 40 Rule 2 & 4 (1) & (2) of the Civil Procedure Rules. The applicant sought the following orders;

1) Spent

2) Spent

3) A Court bailiff be directed to seek and obtain the assistance of the OCPD (Airport Police Station) in effecting service of the order and ensuring compliance therewith.

4) Pending the hearing of the suit:-

a. The 4th defendant by himself or by his agents, servants or otherwise howsoever be restrained from trespassing upon, entering, remaining on and/or otherwise interfering with the plaintiff's access to, use of and quiet possession of property CR/13893/1 subdivision 2464 (Original Number 1113/1) Section VI Mainland North measuring 0.554 acres.

b. The 1st, 2nd, 3rd 4th Defendants by themselves or by their agents, servants or

otherwise howsoever be restrained from advertising, offering for sale, selling, leasing mortgaging, charging, transferring, or assigning and/or otherwise dealing with property CR/13893/1 subdivision 2464 (Original Number 1113/1) Section VI Mainland North measuring 0.554 acres.

c. The 5th Defendant be restrained from registering any instrument with the effect of leasing mortgaging, charging transferring, or assigning and/or otherwise dealing with property CR/13893/1 subdivision VI Mainland North measuring 0.554 acres

5) The costs of the application be provided for.

2. The application is supported by the 11 grounds listed on its face inter alia; the 4th defendant claimed to have purchased the suit property subdivision No. 2464 through public auction. The public auction was to recover rates owed to the 2nd defendant by the 1st defendant. Yet the plaintiff claims to have enjoyed quiet possession of the suit property since 1979 and that the 1st defendant is a complete stranger. That the copy of the title deed maintained by the 5th defendant allegedly with the 1st defendant as owner of the suit property between 25th November 1983 & 3rd October 2014 measuring 0.530 acres is prima facie fraudulent or a result of an error, mistake or misdescription and is null and void.

3. The application is also supported by the affidavit sworn by Florence Wairimu Mbugua – the applicant. Ms Mbugua began by adopting the list and bundle of documents filed as evidence in support of her claim. She deposed that her late husband Joseph Kiarie Mbugua was the registered owner of property CR/13893/1 subdivision 2464 (suit property). Ms Mbugua deposed that by a consent order issued on 2nd July 2010 the grant of the deceased estate was confirmed and his assets distributed. Further that the suit property was to be transferred to her and her children as per copy of the consent at page 4 – 7 of the bundle.

4. Ms Mbugua also deposed in paragraph 8 of her affidavit how the title to the suit property changed from Peter P. Oduma in 1977 to Harry Karobia Mbui and subsequently to her husband in 1979. She continued that pursuant to a vesting order issued on 22nd September 2014 in CMC Mombasa the 5th Respondent registered a transfer in favour of the 4th Respondent in respect of the suit property on the basis that the 1st Respondent was the rate payer.

5. The applicant deposed that she believes the certificate of title previously owned by the 1st Defendant and now the 4th defendant does not relate to her husband's property. Alternatively that if it relates to the same property then the title was acquired through fraud, misrepresentation error or misdescription and she gave reasons why. She continued that the 4th defendant is interfering with the plaintiff's quiet possession of the suit property by bringing strangers/3rd parties misrepresenting to them that he can sell them the land. She urged the Court to grant the orders sought.

6. The application is opposed by the 2nd & 4th defendants/Respondents. Mr Ngare state counsel appearing for the 5th defendant informed Court he was not opposing the application while the 1st defendant did not file any pleadings in opposition to the application. On behalf of the 2nd defendant, Mr Robinson O. Malombo swore a replying affidavit in which he deposed that plot No 2464 was the subject of proceedings in MSA SRMCC 285 of 2014. He deposed that this plot was registered in the name of 1st defendant and was sold by public auction to the 4th defendant. That the rates were in respect of plot No 2464 and the sale was not a forgery at all. That the instructions to sell the property were issued verbally. He urged the Court to dismiss this application.

7. The 4th defendant on his part deposed that the applicant does not have locus to bring this suit as she is among the four administrators of the estate of Joseph K. Mbugua – deceased. That she cannot file a suit as a sole administrator. Secondly that the suit property does not comprise the estate of the deceased. She denied the chronology of the title as given by the applicant in paragraphs 8 (a) – (g) of the supporting

affidavit.

8. Mr Hemedi continued that he purchased the property in a public auction after doing due diligence by confirming that the rates were in arrears. Further that after the auction he got a vesting order and the property was transferred to him. He deposes that the allegation of fraud or misrepresentation is incompetent and bad in law. That the suit property was legally sold to him and he is an innocent purchaser for value without notice. He urged the Court to dismiss the application. He annexed an insert HMA, showing the registration of the property to himself, the newspaper cutting advertising the property for sale by public auction as well as a certificate of postal search that he is the owner.

9. The applicant in response to the 2nd & 4th defendants' averments filed a supplementary affidavit. She deposed that she is an administrator of the deceased estate as per the grant issued on 6.8.2007. She also confirmed that in the grant, the property is erroneously described as LR 5464 instead of 2464. In response to the rates arrears, she deposed that on the face of the rates statement, the property is described 2462 and that the suit property did not owe any rate arrears.

10. The applicant continued that she has learnt that the 2nd defendant never issued any instructions for the sale of the suit property. That the legal officer of the 2nd defendant has denied swearing the affidavit used in SRMCC 285 of 2014. She also deposed that the 4th defendant did not exercise due diligence as he never visited the suit property as that would have helped him ascertain ownership from the plaintiff's servants. She said her case is merited and the application be allowed.

11. The applicant and the 2nd & 4th defendants filed written submissions which I have considered and need not reproduce their contents here. It is now established in law that before the Court grants an order of injunction, a party must prove either of these three principles i.e

a) That she has a prima facie case with a probability of succeeding

b) If the injunction is not granted she will suffer irreparable loss

Or

c) If the Court is in doubt in whose favour the balance of convenience tilts.

12. The applicant through her pleadings and submissions contend that she has established a prima facie case with a probability of succeeding. She has shown to this Court a certificate of confirmation of grant in respect of Joseph Kiarie Mbugua – deceased whom she says is her late husband. She also annexed copy of certificate of title No 13893, & L. R No 2464 which at page 2 has entries numbers 2, 3, 4 & 5 with entry No 5 being a transfer in favour of the deceased registered on 3.8.79. She deposed that this plot was allocated to her and her children during the distribution of the deceased properties.

13. The 2nd and 4th defendants dispute these facts. They both allege that L. R 2464 did not comprise part of the estate of Joseph K. Mbugua – deceased. That this suit property was in the name of the 1st defendant and the same was subsequently sold in a public auction therefore the applicant's claim is without basis. It is not in dispute that a sale was advertised by the 3rd defendant as shown by the newspaper cutting annexed by both the 2nd & 4th defendant. Pursuant to the auction, the 4th defendant applied for and obtained vesting orders and became the registered owner of the suit property.

14. The 4th defendant did not however annex a full entry in regard to the title of the suit property. He only annexed a page with two entries showing the 1st defendant as the registered owner and a second entry in his favour registered on 3.10.2014. The statement from the 2nd defendant dated 22.10.2014 which he annexed also refers to two plots on the face of it i.e. Block No VIMN/2462 & plot No VIMN/2464. The 2nd defendant did not annex a certificate of postal search other than the insert to show that the suit land was indeed in the name of the 1st defendant.

15. The applicant also deposed that they are in possession as they have their servants living on the suit parcel. She admitted there was an error in the grant that referred to the property as 5464 instead of 2464. She has through her documents demonstrated that the deceased Joseph Kiarie Mbugua was once registered as the owner of the suit title. The 2nd defendant sued Ibrahim Abdalla Bakari (1st defendant) in SRMCC 284 of 2015 for rate arrears. The deceased therefore did not participate in the proceedings that resulted into his property being auctioned.

16. The question then arises as to who was the registered owner of the suit property between the deceased and the 1st defendant at the time of sale? For this question to be answered, evidence will have to be adduced. The applicant having demonstrated their interest in the suit property and is questioning the registration of the 1st defendant in my view meets the first principle of prima facie case. On this account only I would grant the prayers sought.

17. I will skip the issue of irreparable loss and deal with the principle of balance of convenience. None of the defendants have denied the averment by the applicant that they have been in possession since 1979. Further, the 4th defendant has not denied that he has been taking 3rd parties to the suit property with intention to sell. Until the dispute herein is resolved, it is imperative that orders do issue stopping the land from changing hands. The balance of convenience tilts in favour of the applicant who is in possession and the 4th Respondent being restrained from transferring the suit property to any new/3rd parties pending determination of this suit.

18. In conclusion, I am satisfied that the applicant has made out a good case for the grant of the orders sought. Consequently I do allow the application dated 17.11.2014 in terms of prayer 3 & 4 of the motion. Costs to abide the outcome of the main suit.

Dated and delivered in Mombasa this 10th day of February 2017

A. OMOLLO

JUDGE