



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 1114 OF 2015

OMEGA COMMERCIAL SERVICES LIMITED.....PLAINTIFF

VERSUS

FRANCIS KAIGUA KARITU (as Personal Representative of

PETER KARITU KAIGUA (deceased), GEORGE KAMWATI KARITU

(Deceased) and also in his personal capacity).....1ST DEFENDANT

SAMUEL MUNENE KARITU.....2ND DEFENDANT

RULING

What I have before me is the Plaintiff's application by way of Notice of Motion dated 2nd November 2015 in which the Plaintiff has sought a temporary injunction to restrain the Defendants from remaining on or entering parcels of land situated at Utawala Nairobi designated as Plot No. 4 and Plot No. 5 measuring $\frac{1}{4}$ acre each being portions of land parcel known as L.R No. 6845/148(I.R No. 153522) (hereinafter "the suit properties"), pending the hearing and determination of the suit, a temporary injunction restraining the Defendants from interfering howsoever with the Plaintiff's quiet enjoyment, possession and occupation of the suit property pending the hearing and determination of the suit and an order of inhibition inhibiting any and all transactions relating to the parcel of land known as L.R No. 6845/148(I.R No. 153522) pending the hearing and final determination of the suit.

The Plaintiff's case against the Defendants as set out in the body of the application and the supporting affidavits sworn by Joseph Karanja Wamugi on 2nd November 2015 and 6th May 2016 is that, the 1st Defendant is the legal representative of one, Peter Karitu Kaigua and one, George Kamwati Karitu, both deceased (hereinafter referred to as "the 1st deceased, and "the 2nd deceased" respectively) while the 2nd Defendant is a brother to the 1st Defendant. Sometimes in the year 2006, the 1st deceased who was the father of the 1st and 2nd Defendants and the 2nd deceased informed him that he had a beneficial interest in L.R No. 6845/148 ("Plot No. 6845/148) which by then was registered in the name of Githunguri Njiru Farm 1966 Ltd. and that he had prepared a sub-division scheme for the property under which the property had been sub-divided into several plots some of which he had given to his children, the 2nd Defendant and the 2nd deceased. The 1st deceased informed him that the 2nd Defendant and the 2nd deceased who were beneficial owners of Plot No. 5 and Plot No. 4 respectively in the sub-division scheme aforesaid were desirous of selling the said plots which were measuring $\frac{1}{4}$ acre each. The Plaintiff's director met the 2nd Defendant and the 2nd deceased in the presence of the 1st deceased and they agreed to sell the said parcels of land("the suit properties")to the Plaintiff. Formal agreements for sale were subsequently prepared and executed by the parties under which the 2nd Defendant and the 2nd deceased sold to the Plaintiff the suit

properties at Kshs.170,000/= each. After paying the purchase price, the Plaintiff took possession of the suit properties, fenced the same and planted trees along their boundaries. It was a term of the agreement between the Plaintiff, the 1st and 2nd deceased and the 2nd Defendant that the 1st deceased would take steps to acquire title for Plot No. 6845/148 after which they would transfer the suit properties to the Plaintiff. After waiting for the suit property to be transferred to it for several years without any success, it discovered in the year 2015 through inquiries that the 1st deceased had acquired a certificate of title for Plot No. 6845/148 in the year 2014 and that the property was registered in the name of the 1st deceased and the 1st Defendant. As at the time of his death on 14th September 2015 the 1st deceased had not transferred the suit properties to the Plaintiff. During the burial of the 1st deceased, the Plaintiff learnt that the 2nd deceased had died earlier. On 25th October, 2015 a gang of men invaded the suit properties, destroyed the fence the Plaintiff had put up around the property and cut down mature trees. When the Plaintiff's director visited the property to assess the damage, he found a heap of building stones which had been deposited on the suit property in readiness for construction of permanent structures.

The Plaintiff has contended that it has occupied the suit properties since the year 2006 and that unless the orders sought are granted; there is a risk of the suit properties being alienated or sub-divided by the Defendants to its detriment. The Plaintiff has contended that the registration of the 1st Defendant as a co-owner of Plot No. 6845/148 was fraudulent and that the same was subject to the rights of the Plaintiff in the property. The Plaintiff has contended that Plot No. 6845/148 is fully developed save for the suit properties.

The application was opposed by the Defendants through separate replying affidavits. In his affidavit sworn on 16th December 2015 the 1st Defendant denied that he is a legal representative of the 1st and 2nd deceased. The 1st Defendant averred that he has no obligations in respect of the liabilities of the 2nd deceased if any. The 1st Defendant contended that Plot No. 6845/148 was owned by the 1st deceased and him and as such the 2nd deceased and the 2nd Defendant could not dispose of the same. He contended that the 2nd deceased and the 2nd Defendant had no title which they could transfer to the Plaintiff. The 1st Defendant denied that the Plaintiff had taken possession of the suit property. On his part, the 2nd Defendant contended that the Plaintiff had tricked him into executing the agreement for sale which the Plaintiff has relied on in support of its case. The 2nd Defendant averred that he doesn't own Plot No. 6845/148 and as such cannot transfer any portion thereof to the Plaintiff.

The Plaintiff's application was heard by way of written submissions. I have considered the application and the Defendants Notice of Preliminary Objection and replying affidavit filed in opposition thereto. I have also considered the parties' respective submissions and the authorities cited in support thereof. The principles upon which this court exercises its jurisdiction in application of this nature are now well settled. An applicant for a temporary injunction must establish a prima facie case with a probability of success and must also demonstrate that he will suffer irreparable harm if the orders sought are not granted. See, Giella vs. Cassman Brown & Company Limited [1973] E.A 358.

1. I am not convinced that the Plaintiff has satisfied the conditions for grant of a temporary injunction. The 1st Defendant has been sued not in his personal capacity but in his capacity as the legal representative of the estate of the 1st and 2nd deceased who together with the 2nd Defendant are alleged to have sold the suit properties to the Plaintiff. The 1st Defendant has denied that he is a legal representative of the estate of the two deceased persons. The Plaintiff has not placed any evidence before the court showing that the 1st Defendant is an administrator of the estate of the 1st and 2nd deceased persons. If the 1st Defendant is not a legal representative of the estate of the said persons, no suit can be brought against him on their behalf. It would follow therefore that the suit against the 1st Defendant is a non starter. In the Court of Appeal case of **Virginia Edith Wambui Otieno –vs- Joash Ochieng Ougo & Another (1982-88) 1 KAR 1049**, it was held *per incuriam* that an administrator is not entitled to bring an action as administrator before he has taken out letters of administration and if he does so, the action is incompetent from the date it was instituted. In the text, Law of Succession by **W.M. Musyoka** published by Law Africa, he has stated as

follows at page 205 with regard to suits by administrators;

“Case law shows that no person has a right to enforce any cause of action, or defend any suit which survives the deceased or arises out of his death without a grant of letters of administration”.

With regard to the claim against the 2nd Defendant, it is not disputed that the 2nd Defendant does not own Plot No. 4865/148 or the suit properties and as such cannot transfer the same to the Plaintiff. The orders sought against the 2nd Defendant in the plaint cannot therefore issue. The Plaintiff’s claim against the two Defendants has no basis in the circumstances. On whether the Plaintiff would suffer irreparable harm, again, I am not satisfied that, that would be the case. The Plaintiff has sought damages as alternative prayer in the plaint which means that its possible loss if the orders sought are not granted can be quantified and compensated. For the foregoing reasons, it is my finding that the Plaintiff has not satisfied the conditions for granting the orders sought. Since the Plaintiff has failed to lay a proper basis for its claim against the Defendants, the order of inhibition sought can similarly not be issued in its favour. Such order is not issued as a matter of course. A proper basis must be laid to justify the issuance of the same. The Plaintiff has not brought the registered owners of Plot No. 4865/148 before the court having failed to sue the 1st Defendant in his personal capacity and the lawful administrator of the estate of the 1st deceased which is a co-owner of the suit property. The Plaintiff has stated in its supplementary affidavit that Plot No. 6845/148 is fully developed save for the suit properties. What this means is that, there are third parties on the ground who would be affected by the inhibition sought by the Plaintiff without having been heard. A court of law cannot give an order which will affect parties not before it without giving them a hearing.

In the final analysis and for the foregoing reasons, the Notice of Motion dated 2nd November 2015 fails. The same is accordingly dismissed with costs to the Defendants.

Delivered and Signed at Nairobi this 31st day of March, 2017

S. OKONG’O

JUDGE

In the presence of

Mr. Okatch h/b for Gichuru for the Plaintiff

N/A for the Defendant

Kajuju Court Assistant