



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 194 OF 2016

SAMUEL MAWEU VUVAPLAINTIFF/APPLICANT

VERSUS

ESTHER NZISA KATHUMBI.....1ST DEFENDANT/RESPONDENT

MORRIS DAVID KATHUMBI.....2ND DEFENDANT/RESPONDENT

DANIEL MUTINDA3RD DEFENDANT/RESPONDENT

RULING

1. What is before me is the Application by the Plaintiff dated 18th November, 2016. In the Application, the Plaintiff is seeking for the following orders:

a. That the 1st, 2nd and 3rd Defendants/Respondents be restrained by an order of injunction either by themselves, their servants, agents, employees, assigns, or any other person authorized to act for them and/or on their behalf from trespassing onto, selling, disposing off, evicting the Plaintiff/Applicant therefrom and or otherwise dealing with all that piece of land known as Title Number Kalama/Muumandu/547 pending the hearing and final determination of the suit herein.

b. That the costs of this Application be provided.

2. The Application is premised on the grounds that the Plaintiff purchased the suit property from the 1st and 2nd Defendants on 7th December, 1987; that he has been in exclusive, continuous and uninterrupted use and occupation of the land since then and that despite having paid the purchase price as agreed, the Defendants have refused to transfer the land to him.

3. The Plaintiff deponed that the Defendants were supposed to pursue and obtain letters of administration of the estate of Kathumbi Itisya Kithoi; that the Title Deed was subsequently issued in the name of the deceased and that the Defendants have refused to effect the transfer in his favour.

5. According to the Plaintiffs, the Defendants have entered into negotiations with a Third Party in respect of the suit property.

5. In response, the 1st Defendant deponed that the alleged Sale Agreement between the Plaintiff and himself is null and void because no letters of administration had been obtained as at the time of the alleged sale; that he all along thought that he was leasing out the suit property to the Plaintiff and that he

only realised that the Plaintiff had drafted a Sale Agreement instead of a Lease Agreement.

6. According to the 1st Defendant, the rest of the family members have refused to consent to the alleged sale of the suit property and that by the year 1995, he had agreed with the Plaintiff that the money he had paid so far should be considered as the payment for a lease for five (5) years.

7. It is the 1st Defendant's case that there has been a dispute between him and the Plaintiff over the suit property since 1987 and as such, the Plaintiff cannot claim to have been in occupation since then.

8. On his part, the 2nd Defendant deponed that they had leased the suit property to the Plaintiff; that the subsequent agreements were drafted by the Plaintiff himself and that when they were signing for the money, they thought the money so received was for the lease.

9. The parties' advocates filed written submissions which I have considered.

10. It is not in dispute that the suit property is registered in the name of the 1st Defendant's and the 2nd Defendant's husband and son.

11. It is also not in dispute that by the time the Plaintiff purported to purchase the suit property from the Defendants, the registered owner was dead.

12. It is trite that sometimes, the beneficiaries of the Estate of a deceased person usually deal with the Estate of the deceased person before obtaining the letters of administration, which, in itself, is intermeddling in the Estate.

13. Although the sell of part of the Estate of a deceased person before confirmation of a Grant is in itself unlawful, I have always held the view that such a sale can always be validated after the certification of confirmation has been issued with the result that the beneficiary(s) of such a sale should be held liable by ceding their share on a pro-rata basis to the purchaser.

14. The Respondents have not denied that they collected money from the Plaintiff. The issue of whether they believed that the money they collected from the Plaintiff was in respect to sell of the suit property or not can only be dealt with at trial.

15. However, having admitted that they received money from the Plaintiff in respect of the suit property, and having put the Plaintiff in possession of the land, it is only proper that the suit property is preserved pending the hearing and determination of the suit.

16. For those reasons, I find that the Plaintiff has established a *prima facie* case with chances of success and he is likely to suffer irreparable damage if the injunctive order is not granted.

17. In the circumstances, the Application dated 18th November, 2016 is allowed as prayed.

DATED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE