



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KITALE**

**ELC CASE NO. 107 OF 2016**

**F M A.....PLAINTIFF**

**=VERSUS=**

**T T K.....1<sup>ST</sup> DEFENDANT**

**A K A.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The applicant **FMA** is the daughter of the late **AAM** (deceased) who was the registered owner of **LR No.[Particulars Withheld]** situate at Milimani within Kitale Municipality (suitland) . The 1<sup>st</sup> respondent is the one of the wives of the deceased. The 2<sup>nd</sup> Respondent is brother to the deceased.
2. The applicant's mother was divorced by the deceased in 2003 but the divorce took effect from 11<sup>th</sup> June 1994. The applicant brought a Notice of Motion dated 5<sup>th</sup> July 2016, in which she seeks an injunction against the Respondents restraining them from *selling, leasing or offering* the suit land as security until hearing and determination of the suit.
3. The applicant contends that the suit land was bought through the joint efforts of her mother and the deceased and that she and her sister have been residing in the suit land until the demise of the deceased. That the Respondents have leased out the suit land to third parties and that if they are not restrained, they might sell the same to her detriment and that of her sister.
4. The applicant further contends that the 1<sup>st</sup> Respondent was not lawfully married to the deceased as she was yet to divorce with her former husband even though she has been cohabiting with the deceased since the deceased separated with her mother. That there is rumour that the deceased left a will and that the respondents are named as executors but that they have declined to commence the process of succession.
5. The applicants' application is opposed by the respondents who contend that the applicants' application is premature. That the deceased left a will only that the same has not been opened due to dictates of Muslim law which require that such opening be delayed for some time. That what the applicant is complaining about can be ventilated in the succession cause where the deceased's properties can be distributed to all the beneficiaries.
6. The respondents further contend that the applicant has not come to court with clean hands. That she went and obtained a letter from the Chief of Kibomet who wrote in a letter that the applicant and her sister were the only beneficiaries of the deceased. That following this false information, the applicant obtained limited letters of administration to enable her file this suit. That the deceased lived all his life at Milimani and that if there was to be any letter written, it should have been written by the chief of

Milimani.

7. I have carefully gone through the applicant's application as well as the supporting documents. I have also gone through the response by the respondents. From the pleadings in this matter, it is clear that the deceased had other properties but the applicant has only picked on one of the properties for litigation. It is also clear from the pleadings that the deceased had other children from his other wives.

8. This is an application for injunction. Besides an applicant showing that he/she has a prima facie case with probability of success, the applicant has to approach the court with clean hands as this an equitable remedy. Contrary to the applicant's allegation that the respondents have leased out the suit land to third parties, documents filed in reply to her application show that the premises on the suit land were leased out by the deceased.

9. What has emerged from this application is that the applicant is out to control particularly the suit land. She does not appear to be interested in the other properties of the deceased. The applicant moved and obtained limited grant by falsely claiming that she and her sister were the only beneficiaries.

10. The principles for grant of temporary injunction are well settled. Firstly an applicant has to demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless otherwise the applicant will suffer loss which will not be compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

11. In the instant case, it has been confirmed by the respondents that the deceased left a will which has not been opened. Even the applicant deponed in her affidavit that there are rumours that the deceased left behind a will. If this is the case, the issue of the suit land can be better addressed in the succession cause. We are not dealing on the issue of who contributed to the purchase of the property or not. The applicant appears to have moved to court a bit prematurely.

12. No one can legally deal with a property belonging to a deceased unless there is proper succession carried out and a grant or probate is confirmed. The applicant's allegations that the property has been leased out by the respondents is not true. It is the deceased himself who leased out the property. The purpose for doing so was to enable him raise fees and other necessities for the minor children in school.

13. As it has been confirmed that there is a will left by the deceased, let the same be opened first so that it can be known how the deceased wished to share out his properties. If there are any issues, those issues can be raised in the succession cause. To this extent and given that the applicant has not come to court with clean hands I do find that she has not demonstrated that she has any prima facie case with probability of success. The applicant is only out to delay or scuttle the process of succession by filing suits on issues which can be addressed in a succession cause.

14. I therefore find that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Signed at *Nairobi* .

**E.O .OBAGA**

**JUDGE**

Dated, and delivered at *Kitale* on this *7<sup>th</sup>* day of *March 2017*.

**F.M.NJOROGE**

**JUDGE**

In the presence of :-

Mr Wanyama for Mr Kaosa for Plaintiff/Applicant

M/s Oketch for Defendant/Respondent

Court Assistant : Isabella

**F.M.NJORGE**

**JUDGE**