



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 51 OF 2017**

**DAVID MUDAMBO** (*suing as*

*Administrator of the Estate of ANDREW*

**SAMANYA MUDAMBO (deceased).....PLAINTIFF**

**VERSUS**

**VIOLET MUSIMBI.....DEFENDANT**

**RULING**

1. In the application dated **14/3/2017** the plaintiff seeks an order of temporary injunction restraining the defendant and her agents from ploughing, leasing, selling, wasting, damaging, alienating, charging and/or in whatever other way interfering with Land Parcel No. **Bungoma/Kiminini/835** pending the hearing and determination of this suit.
2. The application also seeks a mandatory injunction to compel the defendant to remove herself from the suitland.
3. The plaintiff sets out grounds on which the application is brought at its foot. He states that the Estate of **Andrew Samanya Mudambo – deceased** would suffer substantial loss and irreparable injury should an injunction be refused.
4. In the supporting affidavit the plaintiff avers that he is the legal representative of the Estate of **Andrew Samanya Mudambo** who died on **19/10/2016** and that the suitland is part of the deceased's estate. It measures **7.24 acres**. The plaintiff states that the deceased was survived by **four children**, each with its own mother and that the deceased was not married to any of their mothers.
5. The plaintiff further avers that the defendant is mother to **Margret Shukrani Mudambo**, one of the deceased's children. He states that the defendant invaded the deceased's home and embarked on a mission of squandering the Estate when she is not in the plaintiff's view, entitled whatsoever in any capacity. The plaintiff alleges that the defendant has sold most of the household goods and that she has withdrawn monies from the deceased's bank account at National Bank and she is now intending to sell the suitland and disappear with the proceeds. It is the plaintiff's case that the defendant has no basis whatsoever to intermeddle in the deceased's estate as she is not a beneficiary. It is the plaintiff's case that the balance of convenience lies in the issuance of an injunction to safeguard the deceased's estate.
6. The application is further supported by the supplementary affidavit whose contents will be reviewed later in this ruling.

7. The application is opposed by the defendant. In her replying affidavit sworn on 28/3/2017, the defendant avers that the plaintiff is her **brother in law** as she was married to the deceased in the **year 2007** and lived with the deceased till his demise in the **year 2016**. The defendant avers that soon after the demise of the deceased, the plaintiff introduced the issue of inheriting the defendant as a wife but the defendant declined and demanded that the plaintiff keep off from her “home” and that is when the plaintiff vowed to kick the defendant out of the deceased’s estate, prompting her to seek help from the Provincial Administration. The defendant has annexed a letter from the Chief’s office which she obtained as a prelude to commencement of succession proceedings and she avers that the plaintiff is not named therein as beneficiary or intended administrator. The defendant further states that she will challenge the Grant of Letters of Administration to the deceased’s estate issued to the plaintiff as she alleges that they were issued through misrepresentation to the issuing court. She accuses the plaintiff of coming to court with unclean hands by concealing material facts from the court.

8. However the plaintiff has in his supplementary affidavit sworn on 18/4/2017 denied the alleged marriage of the defendant to the deceased under any known custom or law, or that he ever tried to inherit her as a wife: He states that’s since she was not a wife to the deceased, she was not inheritable. The plaintiff alleges that the defendant only came to attend the deceased’s burial and later refused to leave after the ceremony. He brands the defendant a fraudster who has corrupted the chief to support her false claims to the estate and who intends to leave after squandering the estate. The plaintiff avers that he is the person who maintained his brother during his illness and bore his medical and burial bills and expenses respectively. He states he has no personal interest in the estate left behind by the deceased and that he is only interested in safeguarding the welfare of the children the deceased left behind.

9. In her further affidavit sworn on 8/9/2017, the defendant reasserts that she was married to the deceased and that a delegation from the deceased’s family took dowry of Kshs.18,000/= to her parents, a fact which she says was chronicled in a dowry agreement dated 8/8/2009 exhibited as exhibit “VM2” in her affidavit. She further alleges enmity from her in laws and avers that the plaintiff could not possibly have cared for the deceased during his illness as the plaintiff was based in Nyahururu where he worked. She claims to have cared for the deceased. She accuses the plaintiff of not caring for the welfare of the children. She asserts that the plaintiff has no locus to agitate on behalf of the deceased’s estate in view of his ranking in succession matters.

10. I have considered the application, the supporting affidavits and the responses and annexures in detail. They depict the picture of a conflict between the deceased’s brother and the deceased’s alleged widow. At the centre of the conflict is the issue of entitlement to the deceased’s estate. The question of who is a beneficiary to the estate, other than the acknowledged biological children of the deceased, needs to be answered. In the meantime, the plaintiff has taken out Letters of Administration to the deceased’s estate while the defendant is alleged to be squandering the assets of the Estate.

11. Besides, when this court learned of the existence of other proceedings relating to the suitland, the court on 27/7/2017 ordered the parties to disclose through filing of documents, the nature of those proceedings. Thereafter the plaintiff filed an affidavit he sworn on 22/8/2017; the exhibits thereto show that the plaintiff in this case had also filed **H.C. Misc. Civil Application No. 46 of 2016 - Bungoma**, seeking an inhibition. **Under Section 68 of the Registered Land Act Cap 300** on the basis that intruders were threatening to take possession of the deceased’s property including the suitland herein. From the record of proceedings in the Bungoma Case attached, there is evidence that an order of inhibition was given by the **Bungoma High Court** on **5/12/2016** inhibiting the registration of any dealings in Land Title Number **Bungoma/Kiminini/835** until the same is removed by that court. There is no indication in any of the plaintiff’s affidavit on this record that that order of inhibition has been lifted by the court.

12. An order of inhibition under **Section 68 of the Land Registration Act, (Act No. 12 of 2012)** is issued by a court inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with land, lease or charge.

13. **Section 69** of the same Act states that so long as an inhibition remains registered, any instrument that is inconsistent with the inhibition shall not be registered. **Section 70 of the Act** provides that the

registration of an inhibition shall not be cancelled except under certain conditions, and in my view, in the current case the only relevant condition for the cancellation of the inhibition issued by the **Bungoma Court in ELC Misc. No. 46 of 2016** is the issuance of a consequent order of the court, cancelling the inhibition.

14. Considering the fact that the plaintiff has not declared that the inhibition issued in **Bungoma ELC Misc. No.46 of 2016** has been cancelled, I find that the seeking of prayer No. (b) and (c) in the Notice of Motion dated 14/3/2017 to be quite superfluous.

15. Regarding prayer No. (d), which seeks a mandatory injunction it is now trite that mandatory injunction may be issued sparingly by the court and in a limited number of deserving cases. In the case of **Maher Unissa Karim -vs- Edward Oluoch Odumbe 2015 eKLR** the court, in an application seeking order of eviction of the respondent, observed that the test for granting a mandatory injunction is different from that enunciated in the **Giella -vs- Cassman Brown Case** as the threshold is mandatory injunction application is higher. The court therein cited the case of **Kenya Breweries Ltd -vs- Washington Okeyo 2002 EA 109** as having considered the principles that govern the grant of mandatory injunctions. The court there stated as follows:-

***“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances it will not normally be granted.***

***However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application”.***

16. I need not go further than this passage. However the court in that case cited the **English case of Locabail International Finance Ltd -vs- Agro-Export & Another 1986 ALL ER 901** in which the English Court stated as follows:-

***“Moreover, before granting a mandatory injunction the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and high standard than required for a prohibitory injunction”.***

17. In the **Maher Case (Supra)**, the court held as follows:-

***“In my most considered view the plaintiff’s case herein passes the tests outlined in the above authorities referred to for the grant of a mandatory injunction. On the facts of this case.....there is absolutely no tenant/landlord relationship and.....the plaintiff has acquiesced on his rights of vacant possession of the suit premises coupled with the fact that the defendant has only contested owing rent arrears and not that he is in illegal occupation of the premises (trespasser), and since the tenancy lapsed on 31<sup>st</sup> January, 2015, the defendant herein Edward Oluoch Odumbe cannot have an answer to the plaintiff’s claim as he has not given any even by way of affidavit or orally in court. He simply asked for more time to vacate the premises as he was looking for alternative premises. In my view, therefore, there are special circumstances in the plaintiff’s case in that this court cannot aid a trespasser to continue with his illegal acts of unlawfully occupying the plaintiff’s premises rent free when the plaintiff must have incurred money in acquiring it and is not receiving any benefit out of it. The plaintiff is by law entitled to have the defendant evicted if he does not vacate voluntarily as he is an outright trespasser”.***

18. Is the case against the defendant so clear in the instant application? In my humble view the answer is “no”. The defendant has not acknowledged that she is a trespasser. There is still the issue of whether or not she was the wife of the deceased which has not been resolved. There is also the issue of ranking in succession matters which has been raised by the defendant, casting doubt as to whether the Grant of Letters of Administration was made to the appropriate person. Finally there is the overarching issue of

whether or not the dispute herein should be resolved by the High Court which has jurisdiction in succession matters.

**19.** Having consideration of the above factors, this court is now convinced beyond reasonable doubt that a mandatory injunction cannot issue in the current application. I therefore find that the entire application is without merit and the same is dismissed with costs.

Dated, signed and delivered at Kitale on this **30<sup>th</sup>** day of **October, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**30/10/2017**

**Coram:**

Before Mwangi Njoroge - Judge

Court Assistant – Isabellah/Picoty

Ms. Mwemeke holding brief for Karani for the defendant

N/A for the plaintiff.

**COURT**

Ruling read in open court in the presence of counsel for the defendant.

**MWANGI NJOROGE**

**JUDGE**

**30/10/2017**