



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 117 OF 2015

ELIZABETH MWIKALI & MARGARET MUTUNGI.....PLAINTIFFS

-versus-

SHANZU WAYANI MULTI-PURPOSE

CO-OPERATIVE SOCIETY LIMITED.....1ST DEFENDANT

AUGUS DISII 2ND DEFENDANT

RULING

1. The Application under consideration is the Notice of Motion dated 27th May 2015 for the following orders:

- i. Pending the *inter partes* hearing and determination of this suit, a temporary injunction be granted to restrain the 1st Defendant from conveying the suit property referred to Plot 155 as comprised in Subdivision No. 3532 (Original Number 2921) of Section I Mainland North, situate in Mombasa County to the 2nd Defendant.
- ii. Pending the *inter partes* hearing and determination of this suit, a temporary injunction be granted to restrain the 1st Defendant, any of their officers and/or agents and employees, from amending its members Register by deleting the names of the persons nominated by the late MONICAH MUENI MUTUNGI as the beneficiaries of her shares in the 1st Defendant's Savings and Co-operative Society and in particular, as the beneficiaries to the property referred to as Plot 155 as comprised in Subdivision No. 3532 (Original Number 2921) of Section I Mainland North, situate in Mombasa County.
- iii. Pending the *inter partes* hearing and determination of this suit, a temporary injunction be granted to restrain the 2nd Defendant and/or his agents and employees, from selling, alienating, transferring and/or in any other way dealing in or with the suit property referred to as Plot 155 as comprised in Subdivision No. 3532 (Original Number 2921) of Section I Mainland North, situate in Mombasa County.

2. The Application is supported by the Affidavit of ELIZABETH MWIKALI sworn on 27th May 2015. The gist of the Applicants' case is that the Applicants have obtained Letters of Administration *ad litem* of the Estate of the late MONICA MUENI MUTUNGI (hereinafter "the Deceased") who was a fully paid up member of the 1st Defendant and a beneficiary of land known as Plot 155 as comprised in Subdivision No. 3532 (Original Number 2921) of Section I Mainland North (hereinafter "the suit property").

3. The Applicants aver that prior to the Deceased's death, she had nominated her children who include the 1st Applicant as her beneficiaries in respect of her shares in the 1st Defendant. That one PHILIP MUSAU KIOKO purportedly acting as the widower of the Deceased illegally sold the suit property to the 2nd Defendant.
4. It is the Applicants' case that the Estate of the Deceased will suffer irreparable loss if the suit property is conveyed to a stranger who was never a beneficiary of the Estate of the Deceased.
5. While urging the Application' Mr. Mogambi, learned counsel for the Applicants submitted that the Applicants have established a prima facie case as they have shown that they are the legal representatives of the deceased and therefore her shares in the 1st Defendant vests in them.
6. On irreparable loss, counsel for the Applicants submitted that denying the Applicants right to land without any legal basis is an injustice upon which a price cannot be put.
7. On balance of convenience, counsel urged the court to weigh the rights of the Applicants pursuant to the will of the Deceased against the rights of the 2nd Defendant who owns the property illegally and to find that the balance of convenience tilts in favour of the Applicants.
8. The application is opposed by both Defendants. The 1st Defendant relies on a Replying Affidavit of ELIZAPHAN NYAGAH sworn and filed on 16th September 2015. The deponent states that when the Deceased died in 1994, her husband, Philip Musau Kioko, requested the 1st Defendant to change the registered names for the suit property to the said husband's name. The husband subsequently filed case RMCC NO. 144 OF 1996: PHILIP MUSAU KIOKO V. SHANZU WAYANI CO-OPERATIVE SOCIETY in which judgment was entered directing the 1st Defendant to register Philip Musau Kioko as the owner of the suit property.
9. It is the 1st Defendant's case that pursuant to the said judgment, a certificate of ownership was issued to Philip Musau Kioko.
10. Mr. Mkomba, learned counsel for the 1st Defendant submitted that his client transferred the suit property to Philip Musau Kioko pursuant to a valid court decree which has not been reviewed or set aside. Counsel stated that since the certificate of ownership was issued to Philip Musau Kioko on 22nd November 2004, this suit is barred by limitation of actions.
11. The 1st Defendant's counsel submitted that the prayers sought by the Applicants have been overtaken by events hence it cannot be said that they have established a prima facie case.
12. On irreparable loss, counsel submitted that the value of the suit property can be easily ascertained hence the loss can be remedied by replacement of the value of the suit property. He urged that balance of convenience is only considered where there is doubt about the first two requirements.
13. The 2nd Defendant opposed the application through his Replying Affidavit sworn and filed on 17th September 2015. The 2nd Defendant avers that he bought the suit property from Philip Musau Kioko with the full knowledge of the Applicants. That the Applicants were also informed of the court judgment in RMCC No. 144 of 1996 by the 1st Defendant. That despite having knowledge of the transfer to the 2nd Defendant, the Plaintiffs did not bring this suit since 1997 and the delay is not only unexplained but is also inordinate and inexcusable.
14. The 2nd Defendant contends that since the judgment in RMCC No. 144 of 1996 has not been challenged, this court has no jurisdiction to entertain this suit as the court's appellate jurisdiction has not been challenged. Further, that the dispute herein pits the Applicants against the Estate of Philip Musau Kioko who has not been enjoined to these proceedings.
15. Mr. Wameyo, learned counsel for the 2nd Defendant stated that there is no *prima facie* case established since the documents of the Applicants are self- contradictory. That the limited grant shows

that the Deceased died on 30th September 1994 yet her membership form to the 1st Defendant was signed on 10th July 1995. That the date in which the Deceased was admitted as a member of the 1st Defendant is shown as 25th September 1992, before she applied.

16. The Applicants did not file a response to contest the issues brought out in the Defendants replying affidavits. They do not deny the 2nd defendant is in possession of the subject plot.

17. Although the applicants deposed the 1st defendant was in the process of transferring the plot into the name of the 2nd defendant. However the 1st defendant annexed a certificate to show the transfer was effected in 2004 pursuant to a court order.

18. The defendants responses clearly show that the actions the plaintiffs/Applicants are seeking to stop as prayed in nos 2 & 3 of the motion have already taken place. Were the court to grant such orders, the said order would attempt to undo what happened 10 years ago and that would not be proper in the circumstances.

19. In terms of prayers 4, the applicants have not demonstrated that the 2nd defendant is in the process of alienating or selling the suit plot. The 2nd defendant pleaded that he took possession in 2004 and to date the has not parted with the possession of the said plot.

20. The applicants have also given an estimate value of the suit plot at Kshs 3,000,000 at paragraph 14 of the support affidavit. This means that the loss can be estimated and damages paid in compensation. The plaintiff cannot give value of the plot and at the same time state that damages would not be a sufficient remedy.

21. Taking the above analysis vis-a-vi the principles for granting injunctions. I find the plaintiffs application does not meet any of these principles. The result of this failure is that the application is found without merit and is dismissed with costs to the defendants.

Ruling dated and delivered in Mombasa this 19th day of February, 2016

A. OMOLLO

JUDGE