



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT KITALE

LAND CASE NO. 125 OF 2012

ARTHUR I. SHIKANGA MULAMAPLAINTIFF

(Suing on behalf of DEBORAH CHITILWA AMAHWA)

VERSUS

ELPHAS NANDIDEFENDANT

RULING

BACKGROUND

1. The Applicant Arthur I. Shikanga Mulama obtained Limited Grant of Letters of Administration in respect of the estate of the late **Deborah Chitilwa Amahwa** alias **Deborah Musinya** (deceased). The family of the deceased has had a string of misfortunes. The deceased left behind a will. She appointed **David Amahwa Mulama** as the executor. The said executor died on 2/4/2007. Her only daughter and sole beneficiary of her estate had died on 12/7/2005. The only child of the sole beneficiary who is granddaughter of the deceased was involved in a serious road accident which incapacitated her. She is in Sweden where she is being taken care of.
2. The Applicant is the son of **David Amahwa Mulama** who had been appointed as executor of the estate of the deceased. The deceased had purchased some 5 acres out of **LR No 7393**. The deceased utilised the 5 acres until she died on 27/2/1997.

APPLICANT'S SUBMISSIONS

3. The Applicant contends that sometime in 2015, there were Government surveyors who were going round in Trans-Nzoia assisting land owners with survey with a view of getting individual titles. The Applicant learnt that the Respondent had approached those surveyors to come and assist him start the process of acquisition of title for the 5 acres belonging to the deceased. The Respondent was claiming that he bought the 5 acres from **John Shikanga Amahwa** in February 2008.
4. **John Shikanga Amahwa** is a brother to the deceased. According to the sale agreement between him and the Respondent, John Shikanga Amahwa had indicated that her sister (the deceased) who had an interest in the land had consented to the sale. The Applicant argues that as at the time the deceased is alleged to have given consent to the sale, the deceased had already died the previous year. She was therefore not there to give the consent to sale of her land.
5. The Applicant contends that the alleged sale was fraudulent as the said **John Shikanga Amahwa** had no authority to transact any business on behalf of the deceased.

RESPONDENT'S SUBMISSIONS

6. The Respondent opposed the Applicant's application based on replying affidavit sworn on 30/10/2015. The Applicant contends that the Applicant's application is misconceived as the estate of the deceased had been distributed to conclusion as per certificate of confirmation issued on 17/5/2000. That the Applicant's claim is based on an agreement which has been caught up by limitation.
7. The Respondent states that he has been occupying **Plot No. 5** where he has put up a home where he stays with his family. In February 2008, he entered into a sale agreement with **John Shikanga Amahwa** who sold him **Plot No 6** which was neighbouring his plot. He paid **Kshs 1,560,000/=**. That he has been utilising the land since then. Sometime in 2015, officials from the Ministry of Lands visited the suit property and carried out a survey with a view to issuing titles. It is after the survey exercise that the Applicant came up to claim the land. That this is the first time the Applicant claimed the land.

ANALYSIS

8. The Applicant is seeking an injunction to restrain the Defendant/Applicant from interfering with the suitland. The principles for grant of a temporary injunction were set out in the case of ***Giella – vs- Cassman Brown Co. Ltd [1973] EA 358***. Firstly an Applicant must show that he has a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless otherwise the Applicant might suffer damage which will not be compensatable in damages.

Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

9. I now have to determine whether the Applicant has met the threshold stated in the Giella case (Supra). It is not contested that the Applicant obtained Limited grant of Letters of Administration in respect of the estate of the deceased. It is also not contested that the deceased had interest in 5 acres which she had purchased on 18/6/1986 from one **Mathews Mulabu Lubobi**.
10. The deceased's interest in the suitland is confirmed in the sale agreement annexed to the Respondent's replying affidavit. The deceased died on 27/1/2007. A year later her brother **John Shikanga** sold her **5 acres** to the Respondent and alleged in the sale agreement that the deceased had consented to the sale. As at the time of the sale, the deceased had died and she was not there to give consent to sale of her land. It is therefore clear that **John Shikanga Amahwa** took advantage of the death of the deceased to defraud her of her property.
11. **John Shikanga Amahwa** was not authorised to transact any business on behalf of the deceased. The deceased had already written a will in which she had appointed **David Amahwa Mulama** as her executor. The sale of the **5 acres** to the Respondent was therefore fraudulent. I find that the Applicant has demonstrated that he has a prima facie case with probability of success.

CONCLUSION

12. I find that this is a proper case where an injunction should issue. The injunction orders which were issued on 1/10/2015 and subsequently extended are hereby confirmed. The upshot of this is that an injunction is hereby issued restraining the Defendant/Respondent, his servants and or agents from interfering in any manner with the **5 acres** out of **LR No. 7393** at Trans-Nzoia belonging to the estate of **Deborah Chitilwa Amahwa** until the hearing and determination of the suit herein.
13. The Respondent shall pay costs of this application.

It is so ordered.

Dated, signed and delivered at Kitale on this 21st day of April 2016.

E. OBAGA

JUDGE