



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 63 OF 2015**

**NURDIN AKASHA ABDALLA..... 1ST PLAINTIFF**

**NAJMA AKASHA ABDALLA..... 2ND PLAINTIFF**

**-versus-**

**YUSUF ABDALLA ..... 1ST DEFENDANT**

**KENYA KNITTING & WEAVING MILLS LIMITED..... 2ND DEFENDANT**

**REGISTRAR OF LANDS MOMBASA ..... 3RD DEFENDANT**

**RULING**

1. The Application under consideration is the Notice of Motion dated 7th April 2015 for the following orders:
  - i. Spent.
  - ii. Spent.
  - iii. That this Honourable Court be pleased to issue a temporary injunction restraining the 2nd Defendant either by herself or persons acting under her directions from either selling, alienating and/or parting with possession of land parcel Mombasa/Block XI/280 and or dealing in any way that might render restitution impossible pending the hearing and determination of the suit herein.
  - iv. Spent.
  - v. That a temporary order be issued, directed at the Registrar of Lands, Mombasa to place a caution prohibiting and o restricting any dealings in the register vis land parcel Mombasa/Block XI/280 pending the hearing and determination of the suit herein.
  - vi. The costs hereof be provided for.
2. The Application is supported by the Affidavit of NURDIN AKASHA ABDALLA sworn on 7th April 2015. The gist of the Applicants' case is that they are among the beneficiaries and heirs of the estate of the late **Ibrahim Akasha Abdalla** (“the deceased”) who died intestate on 3rd May 2000. That land parcel Number **Mombasa/Block XI/280** (hereinafter “the suit property”) situate within Tudor in Mombasa Island and on which sits a house forms part of the deceased's estate.
3. The Plaintiffs stated that the suit property was registered in the names of **Hayat Ghazi Mohamed** and **Fatuma Abdulrahman Mussa** on 27th August 2003 as trustees of the deceased and a Certificate of Lease issued. The Plaintiffs averred that vide a Sale Agreement dated 1st March 2005, the 1st Defendant had purportedly sold the suit property to the 2nd Defendant for Kshs. 4,500,000/= and proceeded to transfer the same to the purchaser on 30th March 2005. That the sale transaction was made possible by the 1st Defendant presenting a falsified Power of Attorney and Transfer Forms purporting to have capacity to deal in the suit property.

4. According to the Plaintiffs, there is no administrator of the estate of the deceased and the same is yet to be distributed fully. That in the absence of an administrator, none of the beneficiaries and/or heirs has the legal power or right to donate a power of attorney to anyone and/or execute any transfer documents in disposition of any part of the estate.
5. The Plaintiffs averred that the Power of Attorney and Transfer forms used to actuate the sale and transfer of the suit property bear falsified signatures purported to belong to the Plaintiffs none of whom executed the same. That the registration of the suit property in the name of the 2nd Defendant and the subsequent issuance of a Certificate of Lease in its name was illegal, unprocedural and was obtained through corrupt scheme and calls for reversal.
6. The 1st Defendant opposed the Plaintiffs' application through Grounds of Opposition and his Replying Affidavit both filed on 22nd April 2015. The 1st Defendant contends that the Plaintiffs lack the capacity and *locus standi* to bring the application and the suit, the application and suit are bad in law and incompetent for being res judicata and the application is frivolous and an abuse of the court process.
7. The 1st Defendant averred that he and his wife, NARIMAN YUSUF ABDALLA bought the suit property from the deceased in 1985. That the deceased frustrated the efforts to transfer the suit property to the 2nd Defendant and his wife by failing to discharge it from Standard Bank Limited where it had been charged on 16th April 1980. The 1st Defendant stated that he instructed the firm of MAKECHA & COMPANY ADVOCATES to sue for specific performance of the sale contract to facilitate transfer of the suit property to them.
8. The 1st Defendant further stated after the demise of the deceased, his (the deceased's) family including the Plaintiffs herein who had all along been aware of the sale of the suit property to the 1st Defendant willingly and voluntarily executed the powers of attorney and transfers by personal representatives upon which a court order was granted on 6th December 2004 ordering the Land Registrar Mombasa to transfer the property to the 1st Defendant and his wife. That upon the issuance of the said court order, it became apparent that nobody was in possession of the original title document for the suit property so the 1st Defendant applied for the issuance of a provisional certificate to facilitate the transfer.
9. According to the 1st Defendant, the suit property was discharged from Standard Bank Limited in 2004 and no registrable interest could have been effected in favour of Hayat Ghazi Mohamed and Fatuma Abdulrahman Mussa on 27th August 2003 as alleged by the Plaintiffs. The 1st Defendant contended that in the year 2005, the Plaintiffs brought up a suit in the High Court being Civil Suit Number 74 of 2005 in which the subject matter was substantially the same and involved the same property as in the instant case which suit was concluded at the behest of the Applicants. Lastly, the 1st Defendant stated that the suit property had already been sold to him and his wife long before the demise of the deceased and therefore the Plaintiffs cannot lay claim and contend that it was still part of their late father's estate.
10. The 2nd Respondent filed its Replying Affidavit sworn by KAMAL BHUSHAN JOSHI, one of its directors, on 2nd June 2015. It is deposed that the 2nd Defendant bought the suit property from the 1st Defendant at Kshs. 4,500,000/= vide a Sale Agreement dated 1st March 2005. The 2nd Defendant states that at the time of the said purchase, the suit property was registered in the name of the 1<sup>st</sup> Defendant and his wife who duly executed the transfer documents and a Certificate of Lease was subsequently issued in favour of the 2nd Defendant on 30th March 2005. The 2nd Defendant averred that the Plaintiffs are guilty of failure to disclose the existence of HCCC No. 74 of 2005 which was withdrawn after lengthy discussions with both families of the deceased and the 1st Defendant.
11. The Plaintiffs filed a Further Affidavit sworn and filed by NURDIN AKASHA ABDALLA on 16th July 2015. The Plaintiffs averred that the 1st Defendant did not show that he bought the suit property from the deceased because he only produced a purported invoice as evidence of the transaction and not a sale agreement as required by law. The Plaintiffs stated that the purported order issued on 6th December 2004 in Nairobi HCCC No. 1287 of 2004 was issued ex-parte without the participation of the Plaintiffs. That the said order of 6th December 2004 was issued pursuant to misrepresentation and concealment of material facts on the part of the 1st Defendant and his wife hence the same are null and void. According to the Plaintiffs, Mombasa HCCC No. 74 of 2005 was withdrawn before hearing and full determination thus the present suit cannot be res judicata as claimed.

12. The Plaintiffs filed their written submissions on 7th October 2015, submitting that this court has the jurisdiction to grant the prayers sought in the application by reason of **sections 1A, 3, 3A and 63 (e)** of the Civil Procedure Act Cap. 21 of the Laws of Kenya and **Order 40 Rule 1** of the Civil Procedure Rules 2010. The Plaintiffs submitted that they filed this suit in their capacity as the heirs and dependants of the deceased and have taken out citation proceedings in Mombasa High Court Succession Cause No. 9 of 2012. That they do not seek to alienate and or confer a personal interest from the suit property for themselves but are seeking to preserve the same for the benefit of the estate only pending the determination of the said citation proceedings before the High Court.
13. The Plaintiffs submitted that **section 26** of the Law of Succession Act grants dependants of a deceased's estate the right to seek a court's resolution of any disputes. The Plaintiffs relied on the case of **ELIZABETH KAMENE NDOLO -VS- GEORGE MATATA NDOLO, Nairobi Civil Appeal No. 128 of 1995** and further submitted that if as alleged by the 1st Defendant that they did sign an agreement/consent transferring the suit property to the 2nd Defendant, then it is the same legal capacity as heirs and beneficiaries of the deceased's estate that they bring the instant suit.
14. It is the Plaintiffs' submission that this suit is not *res judicata* because the earlier suit, to wit, Mombasa HCCC No. 74 of 2005 was not filed by them and it was duly withdrawn before the issues could be canvassed to conclusion. The Plaintiffs relied on the case of **NGUGI -VS- KINYANJUI & 3 OTHERS CIVIL APPEAL NO. 1 OF 1986**. The Plaintiffs submitted that they do not have the capacity to alienate and or transfer any part of the deceased's estate as the succession proceedings are ongoing and there is no administrator in place to effect any such alienation therefore the title that the 2nd Defendant holds is still part of the estate of the deceased.
15. It is the Plaintiffs submission that they have established a *prima facie* case with a probability of success by demonstrating that the title to the suit property was illegally conferred by the 1st Defendant to the 2nd Defendant and the latter who has exclusive possession of the suit land may deal in the same to the detriment of the deceased's estate. It is their submission that they stand to suffer irreparable injury incapable of reparation by way of damage. That should the 2nd Defendant be allowed to retain possession of the suit property without any inhibition in dealing therein, there is a real and present danger that he may dispose of the same to avoid apparent dispute that is the subject matter of this case.
16. On balance of convenience, the Plaintiffs submitted that although the same tilts in favour of the 2nd Defendant who is in present occupation of the suit property, the orders sought in the application are merely preservatory in nature pending the hearing and determination of the suit and the Defendants don't stand to suffer any prejudice that is not compensable by way of costs were the same to be granted.
17. I did not see the 1st Defendant's written submissions in the court file. The 2nd Defendant filed his written submissions on 16th November 2015 and opened her submission that she is a purchaser of the suit property for value without notice. That a purchaser who has bought land without prior knowledge that there were wrangles should not be punished. The 2nd Defendant submitted that the Plaintiffs have come to court with unclean hands because they failed to disclose the existence of HCCC No. 1287 of 2014 and relied on the case of **BAHADRALI EBRAHIM SHAMJOR AL NOOR JAMAL & OTHERS, Civil Appeal No. 2010 of 1997 (unreported)** to support his argument that the applicant has obligation to make full and fair disclosure of material facts. Further, the 2nd Defendant submitted that the court can only issue an injunction if the non-disclosure of fact is innocent and in the instant case, the non-disclosure is not innocent because the Plaintiffs participated in HCCC No. 1287 of 2004 and HCCC No. 74 of 2005. The 2nd Defendant relied on the case of **ABRAHAM MUTAI & 5 OTHERS -VS- PAUL M. MUTWII & 34 OTHERS (unreported)** to support this submission.
18. Further, the 2nd Defendant submitted that the Plaintiffs have been aware that the 1st Defendant sold the suit property to the 2nd Defendant since the year 2005. That they have not told court what is urgent now in 2015. It is the 2nd Defendant's submission that the Plaintiffs lacked capacity to bring this suit. That what was filed in court was just a citation which has not been heard and which does not give them *locus standi* to file this suit on behalf of the estate of the deceased. To buttress this submission, he relied on the case of **VIRGINIA EDITH WAMBOI OTIENO -VS- JOASH OCHIEN OUGO & OMOLLO SIRANGA, Civil Appeal No. 31 of 1987 1 KAR (1982-1988)** where the Court of Appeal (Nyarangi, Platt and Gachuhi JJA) held that:

*“But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception.”*

The 2nd Defendant also submitted that this suit is res judicata and it should not be entertained as the parties and subject matter herein are the same as in HCCC No. 1287 of 2004. He asked the court to dismiss both the application and the suit.

19. The issues for determination as captured by the pleadings and the submissions are three. First and which will determine both the application and the suit is whether this suit is res judicata. The Plaintiffs denied this suit is res judicata because civil suit HCC no 74 of 2005 was withdrawn before it could be heard on its merits. No details were provided by the 2<sup>nd</sup> Respondent whether the suit No. HCCC No 1287 of 2014 is pending or was concluded on its merits. It was his duty to do so having raised the issue of res judicata. Since HCCC No 74 of 2005 was withdrawn, the exparte order in HCCC 128 of 2004 cannot be a basis for this matter to be found to be res judicata. I find no proof has been made and therefore make a finding the application and the suit is not res judicata.
20. The second issue is whether the Applicants have *locus standi* in bringing this suit. The Respondents aver that the Applicants do not have locus because they are not the administrators of the estate of the late Akasha Abdalla Ibrahim. In the plaint, paragraph 5 thereof, the Applicants described themselves as among the beneficiaries and heirs to the estate of the deceased. At paragraph 6 the Applicants pleads that the suit property Mombasa/Block XI/280 formed part of the estate of the deceased Akasha Abdalla Ibrahim. Lastly in paragraph 7 they state that they have brought this suit by virtue of beneficial ownership and by virtue of having commenced the citation proceedings in Mombasa HC succession cause No 9 of 2012. They have submitted that they derived their capacity from the provisions of section 26 of Cap 160. There was no pleadings in HCC 1287 of 2004 annexed. What is annexed is only an exparte order issued in an interlocutory application. The Court is not shown evidence that this case has been finalised having been determined on merits.
21. Does the law permit beneficiaries or heirs to a deceased estate to commence proceedings in the nature of the claim sought herein? In paragraph 9 of the affidavit in support of the motion, the Applicants admit that a transfer was already made on behalf of the 2<sup>nd</sup> defendant. They are questioning this transfer and avers that ***“The estate of the deceased estate which is yet to be distributed has been unlawfully deprived of the suit property ...”*** The impact of this statement is that the Applicants are attempting to secure the interest of the estate and by extension their interests as beneficiaries.
22. The citation proceedings referred to by the Applicant has not been concluded three years later. The Applicants themselves admit they do not have grant of letters of administration of the deceased estate. The case of **Elizabeth Kamene Ndolo** referred to by the Applicant dealt with instance where the Court could interfere with the will of a testator where the testor failed to provide for a dependant. The provisions of section 26 of the Law of succession Act (CAP 160) also relates to provision of dependants not provided for. It does not apply in this instance as the Applicants have not complained of being left out since no cause has been taken out in respect of the deceased estate. The Applicants submit that they have legal capacity by virtue of the Respondent making a claim that they signed a consent/agreement transferring the suit property to the Respondent.
23. However a party cannot confer locus on another merely by making allegations of that party initiating or undertaking some action. Locus is given by law or the rights which inheres in that person. In the case of **Trovisik Union International & Another vs Mrs Jane Mbevu, C.A.C.A No 145 of 1990**, it was held by the Court of Appeal that where a party seeks to file suit on behalf of the estate of a deceased person, he must of necessity obtain letters of administration.
24. In essence, the applicants have not given any justification why they have not applied for limited of administration to commence the suit. Without letters of administration they have no locus to bring this suit to secure the interest of the deceased estate. In any event the issues raised herein do not fall under those that can be brought under Order 37 of the Civil Procedure Rules which would

have made the Court exercise descretion in their favour. Applicants have no locus to bring this application and the suit. On basis, the application must fail. Consequently, I will not consider the third issue which is considering the application on its merits.

25. My final orders is that the notice of motion dated 7<sup>th</sup> April 2015 together with the plaint dated 7<sup>th</sup> April 2015 be and is hereby struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendant for want of *locus standi* by the plaintiffs.

**Ruling Dated and Delivered in Mombasa this 19<sup>th</sup> day of April, 2016**

**A. OMOLLO**

**JUDGE**