



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA

ELC CASE NO. 122 OF 2015

ISAAC MAINA KAHWAI.....1ST PLAINTIFF

JOHN CHEGE KAHWAI.....2ND PLAINTIFF

SAMUEL GAKUYA KAHWAI.....3RD PLAINTIFF

VERSUS

RUTH KABURA KAHWAI.....1ST DEFENDANT

LUKA KINUTHIA KAHWAI.....2ND DEFENDANT

PAUL MUIRURI KAHWAI.....3RD DEFENDANT

RULING

On 14th October 2015, the plaintiffs/applicants filed this suit against the defendants/respondents seeking the following orders:-

a. A declaration that the sub-division carried on the parent title number LOC 2/KANDERENDU/169 registered in the names of the deceased KAHWAI KINUTHIA and the sub-subsequent transfers for the following sub-divisions:-

- *LOC 2/KANDERENDU/1716*
- *LOC 2/KANDERENDU/1717*
- *LOC 2/KANDERENDU/1718*
- *LOC 2/KANDERENDU/1719*
- *LOC 2/KANDERENDU/1720 and*
- *LOC 2/KANDERENDU/1721*

was illegal, criminal and fraudulent and an order be issued for the cancellation of all the title resultant thereto with the land reverting to the name of the deceased KAHWAI KINUTHIA as per entry in the Green Card.

b. Alternatively, all the parcels of land as in (a) above being sub-divisions of the parcel title number LOC 2/KANDERENDU/169 be registered in the joint names of the plaintiffs.

c. The costs and interest of the suit.

d. Any other or better relief this Honourable Court may deem fit to grant.

The suit was premised on claims by the plaintiffs/applicants that whereas the parties herein are related with the plaintiffs/applicants and the 2nd and 3rd defendants/respondents being siblings and the 1st defendant/respondent being their mother and although the land parcel No. LOC 2/KANDERENDU/169 was registered in the names of their late father and husband respectively **KAHWAI KINUTHIA** (deceased), who died on 30th November 2012, the plaintiffs/applicants discovered that in or about the month of November and December 2012 the 1st defendant/respondent had connived with the other defendants/respondents and the local administration to fraudulently sub-divide the said land giving rise to six parcels being LOC 2/KANDERENDU/1716 – 1721 which parcels were then registered in the names of the deceased and the defendants/respondents. It is the plaintiff/applicant's case that the said sub-division was done fraudulently particulars of which are pleaded in paragraph 6 of the plaint hence this suit.

Simultaneously with the filing of this suit, the plaintiffs/applicants filed a Notice of Motion under **Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules** seeking the following orders:-

1. Spent.

2. The Honourable Court be pleased to issue an order restraining the defendants/respondents by themselves, their agents, servants or any person claiming under them from selling, transferring, sub-dividing, leasing out or in any way alienating land parcels No. LOC 2/KANDERENDU/1716 – 1621 until this suit is determined.

3. The Honourable Court be pleased to issue an order restraining the defendants/ respondents jointly and severally from evicting the plaintiffs/applicants or damaging their house, structures and crops from their respective portions that they occupy and cultivate pending the hearing and determination of this suit.

4. The Honourable Court be pleased to give any other administrative order or direction as it may deem fit, necessary and expedient.

5. The costs of this application be provided for.

That Notice of Motion was premised on the grounds set out therein and supported by the affidavit of **ISAAC MAINA KAHWAI** the 1st plaintiff/applicant and it is clear from those pleadings that the plaintiffs/applicants and the 2nd and 3rd defendants/respondents are siblings and children of the 1st defendant/respondent and their father **KAHWAI KINUTHIA** (deceased) who died on 30th November 2012 was at all material times the registered owner of the parcel No. LOC 2/KANDERENDU/164 which is their ancestral land and where they live. However, following the demise of their father, the plaintiffs/applicants discovered that the 1st defendant/respondent in connivance with the other defendants/respondents and the local administration had sub-divided the land parcel No. LOC 2/KANDERENDU/169 resulting in land parcel No. LOC 2/KANDERENDU/1716 to 1721 (the suit land) some of which are registered in the names of the defendants/respondents (parcel No. 1718, 1719 and 1720) while parcels No. 1716, 1717 and 1721 are registered in the names of the deceased. The 1st plaintiff/applicant has further deponed that all this sub-division was carried out fraudulently and before succession was done and every time the plaintiffs/applicants have questioned this fraud, they have been subjected to Police harassment and intimidation and he has since been charged in **KIGUMO COURT CRIMINAL CASES No. 1206 of 2013 and 1465 of 2015** where fabricated charges have been levelled against him. It is their case that the suit land was reserved for them by their late father and the

defendants/respondents were allocated parcel No. LOC 2/KANDERENDU/450 and another parcel in Rift Valley.

The application is opposed and in a replying affidavit, the 1st defendant/applicant (**RUTH KARURA KAHWAI**) deponed that the application is bad in law, incompetent and an abuse of the Court process because one cannot file a suit in respect of the Estate of a deceased person unless letters of administration have first been obtained. That the defendants/respondents are willing to demonstrate that sub-division and the transfers were done lawfully and within the law and this suit is bad in law and further, the plaintiffs/applicants have not established a case for the grant of the orders sought.

The defendants/respondents also filed a Notice of Preliminary Objection on the following grounds:-

a. That the suit and Notice of Motion offend the provisions of Section 3 and 82(a) of the Law of Succession Act as the plaintiff/applicants are not the legal representatives of the deceased.

b. That the plaintiff/applicants are total strangers as they lack the locus standi to institute a suit on behalf of the Estate of KAHWAI KINUTHIA who died on 30th November 2012 as they are not the administrators of the Estate as no grant of letters of administration has been granted to them.

c. That the Court is invited to have the entire suit and the application dismissed with costs as it is not properly before it.

When counsel for the parties appeared before me on 3rd December 2015, it was agreed that both the Notice of Motion and the Preliminary Objection be canvassed together by way of written submissions. Those submissions were to be filed by 23rd February 2016 but it took upto 7th April 2016 for all the submissions to be filed with the plaintiffs/applicants being the culprits for that delay. Counsel must obey timeliness but this Court will not punish litigants for the indiscretions of their legal advisors.

I have considered the Notice of Motion and the Preliminary Objection together with the rival affidavits, annexures and submissions of counsel.

I will first consider the Preliminary Objection because if it is up-held, then there will be no need to interrogate the Notice of Motion.

A Preliminary Objection, it has been stated, consists of a pure point of law which has been pleaded or arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit – **MUKISA BISCUIT COMPANY LTD VS WEST END DISTRIBUTORS (1969) E.A 696**. The issues raised by the defendants/respondents in their Preliminary Objection are matters of law regarding whether or not the plaintiffs/applicants have the legal capacity to file this suit and also question their locus standi.

I understand the defendants/respondents to be claiming that the plaintiffs/applicants have filed this suit on behalf of the Estate of the deceased yet they do not have a grant of letters of administration authorizing them to do so. However, a closer look at the plaint herein shows that the plaintiffs/applicants have not filed this suit as the legal representatives of the Estate of the deceased. It is clear from paragraphs 4 and 5 thereof that the plaintiffs/applicants have filed this suit in their own rights as persons who live on the suit land and therefore have a beneficial interest in it. They have pleaded as follows:-

4 “Prior to his death, the deceased was the legal owner as first registered owner of land parcel number LOC 2/KANDERENDU/169 measuring 3.2 Acres which is both family and ancestral land which was reserved by the deceased for the three (3) plaintiffs”

5 “The plaintiffs as sons of the deceased and legal beneficiaries thereof have all their lives lived in land where they have build and do cultivate as their only source of livelihood. The deceased in his life time had given the defendants their own parcels of land”

It is not in dispute that no succession has been done in respect of the Estate of the deceased and therefore neither the plaintiffs/applicants nor the defendants/respondents have obtained a grant of letters of administration in respect of the Estate of **KAHWAI KINUTHIA**. If therefore the plaintiffs/applicants had approached this Court suing as the legal representatives of the Estate of the deceased before obtaining the grant of letters of administration in respect of his Estate, then, on the authority of **TROUSTIC UNION INTERNATIONAL & ANOTHER VS MBEYU & ANOTHER 2008 1 K.L.R (G & F) 730**, their capacity to file this suit would be successfully challenged by way of a Preliminary Objection such as this one. However, as I have already found above, the plaintiffs/applicants have not approached this Court as legal representatives of the Estate of the deceased. They have moved this Court in their personal capacity as parties who have lived on the suit land all their lives and have a beneficial interest in the same. Therefore, the issues of them having come to Court before obtaining a grant of letters of administration in respect to the Estate of the deceased does not arise.

It is also argued that the plaintiffs/applicants have no capacity to file this suit. The plaintiffs/applicants have identified themselves in paragraph 1 of their plaint as male adults of sound mind and it has not been suggested that they are not what they claim to be.

They have also pleaded that they are children of the deceased who was the original registered owner of land parcel No. LOC 2/KANDERENDU/169 from which the resultant suit land was carved and on which they live and have a beneficial interest therein. They cannot therefore possibly lack capacity to file this suit and if their lack of capacity is hinged on the absence of a grant of letters of administration in respect to the Estate of the deceased. I have already addressed that in the preceding paragraph of this ruling.

It follows therefore that the Preliminary Objection raised by the defendants/respondents is not well founded and must be dismissed with costs.

I shall now address the plaintiffs/applicants Notice of Motion which seeks a temporary injunction pending the hearing and determination of this suit. The conditions for the grant of such an injunction are now well settled and in the case of **GIELLA VS CASSMAN BROWN & COMPANY LIMITED (1973) E.A 358** which has been adopted by superior Courts in this country, it was held that an applicant for such an order must show a prima facie case with a probability of success. Secondly, a temporary or interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and thirdly, if in doubt, the Court will decide the application on a balance of convenience.

A prima facie case, on the other hand, was defined by the Court of Appeal in the case of **MRAO LIMITED VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS (2003) K.L.R 125** as a case which, on the material presented to the Court, a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal by the latter.

An interlocutory or temporary injunction is an equitable remedy and therefore any party approaching the Court for such an order must do so with clean hands. Finally, as was held in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILMS SALES LTD (1986) 3 ALL E.R 776 at Page 780 – 781;**

“A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong”

It is common knowledge that the purpose of such an injunction is to conserve or preserve the property subject of the suit pending its determination. It is also not in dispute that the plaintiffs/applicants live on the suit land which was previously registered in their late father's names. They therefore claim a beneficial interest in the suit land. That claim has not really been rebutted by the 1st defendant/respondent's replying affidavit which confined itself mainly on the issue of the plaintiffs/applicants capacity and the claim that the sub-division and transfer of land parcel No. LOC 2/KANDERENDU/169 giving rise to the suit land was lawful. Whether that sub-division and transfer of the suit land to the defendants/respondents was lawful (as claimed by them) will be determined at the trial

through oral evidence. For now, this Court cannot make any factual findings on that. All that I am required to find out is if the plaintiffs/applicants have established a prima facie case and bearing in mind their relationship to the deceased who was the registered proprietor of the original parcel of land prior to its sub-division and further that they live on the suit land, this Court is satisfied that they have a beneficial interest in the land and have established a prima facie case.

Further, it is clear from the pleadings herein that the deceased died on 30th November 2012 and by 18th December 2012, less than a month later, the suit land had been transferred into the names of the defendants/respondents. All this was done even before succession had been commenced and the deceased's Estate distributed. That amounts to intermeddling with the Estate of a deceased person which is a Criminal offence under **Section 45 of the Law of Succession Act**. That also entitles the plaintiffs/applicants to the orders sought in their Notice of Motion.

On the issue as to whether the plaintiffs/applicants have demonstrated that they would suffer irreparable injury that cannot be adequately compensated by an award of damages, it has been shown that as the children of the deceased, they have a beneficial interest in the suit land which is part of their inheritance and not parcels of land bought on commercial basis. This is family land which they have lived on throughout their lives and in such circumstances, it cannot be argued that damages would be adequate remedy should the same be alienated. The plaintiffs/applicants have therefore also met the second test in the **GIELLA** case (supra).

And finally, even if this Court were to consider the application on the balance of convenience, the scales would tilt in favour of the plaintiffs/applicants firstly because they are in possession of the suit land and therefore denial of an order of injunction would prejudice their interests as it would render them vulnerable to dispossession of the same. Secondly, there appears to be a clear transgression of the law on the part of the defendants/respondents in intermeddling with the property of a deceased.

Ultimately therefore and upon considering all the matters herein, this Court renders itself as follows:-

- 1. The defendants/respondents Preliminary Objection is dismissed.***
- 2. The plaintiffs/applicants Notice of Motion is allowed.***
- 3. Costs shall be borne by the defendants/respondents.***
- 4. It is further directed that the parties comply with the pre-trial directions and have this suit heard and determined in the next twelve months.***

It is so ordered.

B.N. OLAO

JUDGE

3RD JUNE, 2016

Ruling delivered, dated and signed in open Court this 3rd day of June 2016.

Mr. Wandaka for Mwangi Ben for Applicants present

Ms Nafula for Morigori for Respondents present.

B.N. OLAO

JUDGE

3RD JUNE, 2016