



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
LAND AND ENVIRONMENT DIVISION

ENVIRONMENT AND LAND COURT CASE NO 7 OF 2016

FRANCIS K. MUNYUA MBOGORI.....1ST PLAINTIFF
JANE GAITI KINOTI.....2ND PLAINTIFF
MUTUGI KAMAU.....3RD PLAINTIFF

(Suing as the Legal Representative and Administrators of the Estate of

IBRAHIM KAMAU MBOGORI Alias M'MBOGORI M'RAMERE (Deceased)

VERSUS

M'MWIRIGI M'AMOO.....1ST DEFENDANT
MWENDA M'AMOO.....2ND DEFENDANT
JULIETA JENARO.....3RD DEFENDANT
JOHN RUNGU.....4TH DEFENDANT
DAVID KITHINJI.....5TH DEFENDANT

RULING

1. This application is dated 16th February, 2016. The applicants state that they predicate the application Under Order 40 Rules 1,2,3 and 4, Order 51 Rule 1, Sections 1A, 1B, 3A and Section 63 (c) and (e) of the Civil Procedure Act, Article 159 (d) of the Constitution of Kenya 2010 and all other enabling provisions of the law.

2. The application seeks the following orders:-

1. THAT on the first instance this application be certified as urgent and the same be heard ex parte on a priority basis.

2. THAT this Honourable Court be pleased to issue orders of temporary injunction to restrain the 5th defendant by himself, his agents, servants, employees or anybody else whatsoever acting under his names from constructing, charging, selling, entering, demolishing, fencing or in any other way interfering with plot number 16 Nkubu Town pending the interparties hearing of this application.

3. THAT upon the issuance of the orders prayed for in prayer 2 above the same be served upon the O.C.S Nkubu Police Station to ensure compliance with the Court Order.

4. THAT this Honourable Court be pleased to issue an order of temporary injunction to restrain the 5th defendant by himself, his agents, servants, employees or anybody else whatsoever acting under his names from constructing, charging, selling, entering, demolishing, fencing or in any other way interfering with plot number 16 Nkubu Town pending the hearing and determination of this suit.

5. THAT this Honourable Court be pleased to issue any further order as may be necessary for the ends of justice in this suit.

6. THAT the costs of this application be paid by the Defendants.

3. The application is supported by the affidavit of FRANCIS K. MUNYUA MBOGORI and has the following grounds:-

(a) Plot No. 16 Nkubu Town belongs to the 1st and 2nd plaintiff's late father and 3 other people and all of them are now deceased.

(b) The defendants have committed fraud by seeking to sell the suit plot without letters of Administration to the 5th defendant and have already received part of the purchase price.

(c) The Plaintiffs are the legal representative of the estate of M'MBOGOGRI M'RAMARE Alias IBRAHIM KAMAU MBOGORI whose estate has not been administered and distributed.

(d) The defendants are intermeddling with the estate of the deceased properties and plot No. 16 Nkubu town is part of the estate.

(e) The Plaintiffs stand to suffer irreparable loss and damage if plot No. 16. Nkubu Town is transferred to 3rd parties and the 5th Defendant.

(f) Despite the plaintiffs protests the defendants have continued interfering with the said plot and the 5th defendant has commenced construction at the rear thereon.

(g) The Plaintiffs have a good Prima facie case with high chances of success.

(e) Unless the orders prayed / sought herein for are granted, the defendants will achieve their wrongful activities and deprive the plaintiffs of the said plot.

(i) It is only fair and just that the orders sought herein be granted to protect and preserve the suit property.

4. Interim Orders in terms of Prayers 2 and 3 were granted by this Court on 22nd February, 2016.

5. The applicants say that the 1st to 4th defendants have purported to sell plot No. 16 Nkubu Town to the 5th Defendant, who has started putting up a building on the rear part of the Plot, when they do not have Letters of Administration. They assert that the defendants/respondents dealings and interference with plot No. 16 Nkubu Town are illegal, unlawful and fraudulent.

6. The respondents concede that Plot No. 16, Nkubu market belonged to deceased persons. They say that the 4 families of the deceased owners have agreed to sell the Plot and share the proceeds and meet their financial needs. They opine that the Plot is small and cannot practically be shared out to the 35 or so members of the 4 families. They say that it is only the 1st Plaintiff who is not in agreement with the proposal to sell the plot to the 5th defendant. They further say that the 1st Plaintiff has misled the 2nd and 3rd Plaintiffs.

7. The Respondents have opposed the application. They say that there are 4 deceased persons and that it is only in respect of one of the deceased persons, M'MBOGORI M'RAMARE, that the Plaintiffs have obtained a Limited Grant ad Litem for the purposes of filing this suit. They say that the estates of the other deceased persons are not involved.

8. The respondents state that the Estate of M' Mbogori M'Ramare is only entitled to ¼ share of the subject property only. They claim that out of M'Mbogori M'Ramare's 14 children, only the 3 Plaintiff's are opposed to the arrangement to sell the property to the 5th Defendant. They claim that any injunction will affect the other ¾ fraction owners of the suit property.

9. The respondent's contend that what is involved here is a pure probate matter and argue that for that reason, this suit is in the wrong Court. They say that since Letters of Administration had not been obtained in respect of all the deceased persons, this application should be dismissed. In support of this assertion they proffer the following cases:-

(1) Virginia Edith Wamboi Otieno Versus Joash Ochieng Ougo and Omolo Siranga, (1982-88) IKAR 1049

(2) Charles Mburugu M' Irambu Versus Isabella Mburugu M'Irambu -HC SUCCESSION CASE NO. 431 of 2008, MERU.

(3) Giella Versus Cassman Brown & Co. Ltd, [1973] EA 358.

10. The Plaintiff's argue that they are properly in Court as they had obtained a Limited Grant. They say that their suit is intended to protect the interest of the estate of Ibrahim Kamau Mbogo alias M'MBogori M'Ramare. They have proffered the following authorities in support of this assertion.

(a) Charles Mburugu Versus Isabella Kairuthi Kathurima, Meru Succession Cause No. 431 of 2001.

(b) Case Book on the Law of Succession by W.M Musyoka, pages 355-360.

(c) Sections 54 to 55 of the Law of Succession Act (cap. 160)

11. I have considered the pleadings, the Submissions and the authorities proffered by the parties. I opine that the authorities filed by the parties in support of their respective propositions are good law in their respective circumstances.

12. In the Circumstances of this case, the applicants obtained Limited Grant of Letters of Administration Ad Litem granted by the Hon. Justice Gikonyo, Judge, in Miscellaneous Succession Cause No. 358 of 2015. The said grant is specific that the applicants have no power to distribute the estate.

13. The suit under which this application is filed seeks to preserve the subject matter. It does not seek to distribute the same. In other words it seeks a preservation of the status quo pending directions and determination of pertinent issues in a Succession cause.

14. In a joint defence filed by the defendants, paragraph 6 thereof states as follows:-

“ The 5th defendant avers that he also owns Plot No. 15B which borders Plot No. 16 which he is developing but have (sic) never interfered or made any construction on Plot No 16 Nkubu Market. The defendants further aver that the members of the four families decided to give the 5th defendant possession of Plot No. 16 pending the legal process and the Plaintiffs who are 3 among 14 members of their families have rebelled and changed their minds”.

15. It is not clear what “giving” the subject plot to the 5th defendant entails. Although the defendant denies that he has made any construction on the suit property, it is his word against that one of the

applicants. For preservation purposes, the precautionary principle must apply. In any case, the parties can agree to sell the suit property to the 5th defendant once the apposite Succession process is concluded.

16. The parties are in agreement that the competing claims will have to be arbitrated upon and determined by a Judicial Officer presiding over a Succession Cause.

17. I issue the following orders:-

1. Pending further directions from a Court which will hear Succession issues Spawned by this application, an Injunction is issued restraining the 5th defendant by himself, his agents Servants, employees or anybody else whatsoever acting under his names, from constructing, charging, selling, entering, demolishing, fencing or in any other way interfering with Plot Number 16 Nkubu Town pending the hearing and determination of this suit, whose hearing and determination will be unnecessary once the Court which will hear the apposite Succession Issues will Commence its work and give appropriate directions.

2. The O.C.S, Nkubu Police Station is ordered to ensure full compliance with and obeisance to order 1 above.

3. Costs shall be in the cause.

18. It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 27th DAY OF JULY, 2016

IN THE PRESENCE OF:-

CC:Daniel/Lilian

Kiogora Arithi for the Plaintiffs/Applicants

Gikunda for the Defendants/Respondents

Rimita h/b D.J. Mbaya for the Defendants/Respondents

P. M. NJOROGE

JUDGE