



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

ENVIRONMENT AND LAND CASE NO. 37 OF 2016 (OS)

ANN KHAKASA NAYELE & 8 OTHERS.....PLAINTIFF

VERSUS.

FAMILY BANK LIMITED & ANO.1ST DEFENDANT

RASHID WALWANDA NAYELE.....2ND DEFENDANT

RULING.

[1]. This notice of motion is brought under Sec. 3, 3A 63(e) of the Civil Procedure Rules 2010 and order 40 Rule (1) of the Civil Procedure rules 2010. The applicants apply for an interim injunction to restrain the 1st respondent by himself or it's servants and agents from selling, auctioning or otherwise disposing land parcel No. S. Malakisi/S. Kilisiru/65 pending the hearing of this suit.

[2]. The applicants application is grounded on the facts;

(a). That the said land was advertised for sale by Public auction after it was used by the 2nd Respondent to secure a loan.

(b). That the respondent obtained a transfer of the same to himself fraudulently without obtaining the letters of administration.

(c). That the applicants were the beneficiaries to the estate of Nayele Sudi deceased (the previous registered owner) and were the beneficial owners and the people in actual possession.

(d). That the applicants were not party to the dealings between the respondent(s) herein and that they would suffer irreparable loss unless the orders sought were not granted and finally that the suit had a prima facie case with overwhelming chances of success.

[3]. The 1st respondent filed a replying affidavit sown on 2nd June, 2016 through its Senior Legal Officer Anthony Ouma. Mr. Ouma argued that the instant application is a ploy by the applicants to delay the 1st respondent in exercising its right to statutory power of sale. It denied that it was privy to any illegal transaction and stated that first respondent applied for a banking facility and the facility was secured by the LR. No. S. Malakisi/Mwaliye/479. The 1st defendant had no knowledge of the defect in the title and a Charge was duly registered. The respondent in its affidavit explained how it advanced Kshs.800,000/= to Joseph Mandu Soita on the security of LR. No. S. Malakisi/Mwaliye/479 and the said security was later substituted by Land parcel S. Malakisi/S. Kilisiru /65 registered in the name of Rashid Walwanda Nyele. The respondent states that the said Rashid Walwanda Nyele defaulted on repayment prompting the second respondent to commence security realization process against LR. S. Malakisi/S.

Kilisiru/65. It avers that the 2nd respondent has been accorded ample time to repay the said loan but has failed to do so.

[4]. The 1st respondent avers that the 2nd respondent moved to Sirisia Principal Magistrates Court in CMCC 3 of 2016 to try to stop the sale but his application was dismissed. The 1st respondent also argues that the applicants herein has not obtained letters of administration of the deceased Estate. Further that there is no consent filed in court by the other 8 applicants to confirm that they have consented to filing of this affidavit by Ann Khakasa Nayele the 1st applicant. Finally the 1st respondent argues that granting the orders sought would be prejudicial to the 1st respondent.

[5]. In the Originating Summons filed herein the applicants attached a copy of the register for S. Malakisi/S. Kilisiru/65. The said land was registered in the name of Nayele Sudi on 20.6.72. Annexed to the said Originating Summons is a death certificate of Nayele Sudi showing his death as 3.10.79. The death certificate was issued on 9.5.2016. The said land was registered in the name of the 2nd defendant Rashid Walwanda Nayele on 20.3.2012 and a titled deed issued on the same day. A charge to Bungoma Trade development Joint Licensing Board for Kshs.90,000/= was registered on 13.4.12. The same was discharged on 12.1.2015 and a charge to the 1st respondent was registered on 24.6.2015 for Kshs.1,300,000/=. The contents of these documents have not been challenged by the respondents herein.

[6]. There is therefore no doubt that;

(a). The said Nayele Sudi died on 3.10.79.

(b). That S. Malakisi/S. Kilisiru/65 was registered in his name at his death.

(c). That no Letters of Administration of his estate has been filed in Court to determine the administrators of his estate.

(d). That the 2nd respondent was registered as owner of his land 33 years after his death without any letters of administration of his estate aforesaid.

(e). That the said 2nd respondent went ahead to borrow money twice on the security of S. Malakisi/S. Kilisiru/65, repaying once while the second borrowing is the cause of this Originating Summons.

[7]. Pertinent issues then arise herein as follows;

(i). Do the applicants have locus standi to bring this suit?

(ii). Can the 1st applicant have any locus for filing this case for the rest 8 applicants to file the Supporting Affidavit without authority from them?

(iii). Even if the applicants meets the threshold(s) in (i) and (ii) have they met the standards set out in the case of Geilla Vs. Cassman Brown & Co. Ltd 1973[CA] 358.

[8]. *Locus standi*

There is no doubt that Nayele Sudi is deceased. That he was the registered owner of S. Malakisi/S. Kulisiru/65. The Chief of the area where the land is situated did a letter dated 9.5.2016 saying that the applicants are his children. But are these the only beneficiaries therein? A Succession Cause must be filed in court to determine who are the administrators of his estate and thereafter, his heirs will be identified by the court and the estate distributed. Before a court of Law gives authority to anyone to file suit on behalf of Nayele Sudi's estate, anyone who attempts to do so without the courts sanction would have no Locus standi. The filing of this originating summons is misconceived because order 37 rule 1(a)

and (f) provides for executors, administrators, trustees devisee legatee heir or Legal representative. To have such standing as a heir etc one would have to be appointed as such by a court of law through a Succession Cause. No such cause has taken place here. The application has been brought by people who at the moment have no such standing.

[9]. Order 41 (3) provides as follows;

Where there are several Plaintiffs, one of them, with written authority filed with a Verifying Affidavit, may swear the verifying affidavit on behalf of the others.

No such authority has been shown or averred in the pleadings herein that the 1st applicant has authority to act for the other eight. The eight have not given the applicant authority to act for them pursuant for Order 1 rule 8 of the Civil Procedure Rules.

[10]. The principals governing the granting of injunctions are well laid out in the case of *Geilla Vs. Cassman Brown & Co. Ltd. 1973[CA] 358* that,

- (a). An Applicant must show a prima facie case with a probability of success.
- (b). That an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
- (c). When the court is in doubt it will decide the case on the balance of convenience.

[11]. On the first hand, on prima facie case, there is no doubt that the land in dispute here is said to be of a deceased person transferred to the 2nd respondent without letters of administration being obtained. None of the applicants have any locus to file this suit without first obtaining the Letters of administration of Nayele Sudi the deceased herein and previously registered owner. The applicants cannot therefore, before obtaining those letters, have a prima facie case.

[12]. Secondly, it has not been established to Court by evidence or otherwise, that even if they had locus standi and had a prima facie case that they would suffer irreparable injury not capable of compensation by damages.

[13]. Having so found, I need not consider the balance of convenience.

For those reasons, I dismiss the applicants application with costs to the respondents.

Ruling read on Open court in the presence of the Counsels.

Dated, signed and delivered on 29th September, 2016.

S. MUKUNYA

JUDGE.

In the presence of:

Court Assistant - Joy

Mr. Areba: For Advocate Were - For the Applicant

2nd Respondent In person.