



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELC CIVIL SUIT NO. 162 OF 2014
MICHAEL MAISHA MWITA (Suing as the Administrator
and personal representative of the Estate of
FRANCIS MWITA KICHERE).....PLAINTIFF/APPLIANT
-VERSUS-
1. THOMAS BWIRE MWITA
2. JOHN BOKE MWITA
3. DORIS GIROSE MWITA
4. JANE MATOKORE MWITA
5. MOHAMED AHMED ABDALLA
6. DAULA MOHAMED OMAR.....DEFENDANTS/RESPONDENTS

RULING

1. In the notice of motion dated 1st July 2014 the plaintiff/applicant sought the following orders ;

1. Spent

2. Spent

3. **The defendants, either by themselves, servants and /or agents be stopped by a temporary injunction from trespassing, alienating, disposing off and dealing in or in any manner interfering with the suit property known as Mombasa/Block/XV/207 on until hearing and final determination of this suit.**

4. **Costs be provided for.**

2. The application is supported by his affidavit which he deposes that he has obtained letters of

administration of the estate of Francis Mwita Kichere – deceased. He deposed that the deceased acquired the suit property MSA/Block XV/207 in 1986 from Awadh Sale. The applicant continued that Awadh Sale later gave this land to his son Mohamed Hamoud Awadh.

3. The applicant contends that when Francis – deceased complained, Awadh Sale agreed to return the land back to them upon payment of Kshs 122,450 but which has not been to date due to family wrangles. He also avers to lodging objection proceedings in succession cause No 45 of 1995. The applicant is unhappy with sale of the suit plot to the 5th and 6th Defendants by his siblings whom he avers did not have capacity to sell. He states that the land is still registered in the name of Mohamed Awadh and he questions the legality of title of 5th and 6th Defendants.

4. The applicant annexed copies of the sale agreement and search showing the suit land is still in the name of Mohamed Hamoud Awadh. He urged the Court to grant the orders to preserve the estate property.

5. The application is opposed by the 5th and 6th defendants/Respondents. By a replying affidavit sworn by the 5th defendant, the Respondents aver that the Plaintiff's suit is based on misrepresentation and falsehoods because the succession of the Estate of Francis Mwita – deceased was fully determined by the probate and administrators Court in Succession Cause No 46 of 1995.

6. The 5th Respondent deposes that the decision by the applicant to obtain a separate limited grant over an estate that is administered and distributed is an abuse of Court process. He deposed further that the applicant had made a similar application in the succession cause which was dismissed by the Court in very strong terms. He annexed a copy of that order.

7. The Respondents depose that they purchased the suit property lawfully and obtained a valid title deed. It is their contention that being purchasers for value without notice their title cannot be defeated. They urged the Court to dismiss the application.

8. The parties filed written submissions which reiterated the facts set out in the pleadings. I have read and considered them while reaching this decision. The applicant has the burden to establish any of the principles for granting injunction for this application to succeed i.e. prima facie case, irreparable loss or in whose favour balance of convenience tilts.

9. The applicant avers on one hand that the suit property belongs to the estate of Francis Mwita Kichere – deceased. On the other hand he alleges the suit property is registered in the name of Mohamed Hamoud Awadh. If the Court proceeds on the basis that the suit property belongs to the estate of the late Francis, does the applicant have case with a probability of succeeding?

10. The applicant deposed that he filed objection proceedings in respect of Succession Cause No 46 of 1995 taken out by Anne Nyambiji Mwita. He did not however annex the result of that objection proceedings. The 5th and 6th Respondents annexed an order issued on 1st March 2004 indicating that the grant of letters of administration earlier revoked were restored to Anne Nyambiji Mwita. The Respondents also annexed certificate of confirmation of grant issued to ANNE NYAMBIJI MWITA on 3rd August 2005.

11. On the basis of the two documents (Order issued on 1st March 2004 and Grant dated 3rd August 2005), this Court has a doubt in her mind whether the applicant has capacity to bring this suit therefore capable of establishing a case with probability of succeeding. The applicant annexed a limited grant issued on 26th June 2014 in Succession Cause No 286 of 2013. He has not explained why he took out fresh letters of administration when there was a grant already issued. The limited grant cannot overtake the certificate of confirmation of grant issued. In any event the doctrine of equity is that the first in time prevails.

12. The second limb is the assertion by the applicant that the 5th and 6th Respondent's title is null and

void for the reason that the property is still registered in the name of Mohamed Hamoud Awadh. If this is the case as demonstrated by the certificate of official search annexed as “MM 9 and MM 10”, then the applicant cannot sustain a suit as the administrator of the estate of Francis Kichere – deceased when the said property by his own document does not belong to the deceased estate. On this account too he has failed to show a prima facie case with a probability of succeeding.

13. The second principle for granting injunction is whether the loss to be suffered cannot be compensated in damages. The applicant in paragraph 27 of the supporting affidavit deposed, “*That there is a high possibility the*

Defendants jointly or severally will move to evict the tenants and take possession of the suit land and cause great loss and damage to the plaintiff”.

14. The applicant has not explained how the defendants taking possession of the suit property would result into his or the estate’s loss. I have read the submissions rendered and I have not come across the explanation why the loss the applicant anticipates cannot be compensated by an award of damages if his suit succeeds. It is not enough to merely state that a party will suffer irreparable loss without expounding what is irreparable.

15. Taking all the facts presented and the applicable law, I find that the application has not met the threshold laid in the case of **Giela vs Cassman Brown**. It is without merit and hereby dismiss it. The earlier orders of injunction issued are discharged. The costs of the application awarded to the 5th and 6th Respondents.

Ruling dated and delivered at Mombasa this 9th day of September 2016.

A. OMOLLO

JUDGE