



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 493 OF 2014

JAMES MBETHE MUCHIRI..... PLAINTIFF

VERSUS

DANIEL KIMANI NGURURI.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 23rd April 2014 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendant from entering into, constructing, subdividing, surveying, mortgaging, selling, cultivating and or in any other way interfering with the plots known as P61 (C977) and P61B (MAP 4C 373) in L.R. No. 10904/2 Kangundo Road, Nairobi (hereinafter referred to as the “suit properties”) pending the hearing and determination of this suit, that the OCS Embakasi Police Station be directed to supervise compliance with the order and that the costs of this Application be awarded to the Plaintiff/Applicant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, James Mbethe Muchiri, sworn on 23rd April 2014 in which he averred that he is the personal representative of the estate of Marthar Wangui Muchiri alias Wangui Muchiri, his deceased mother, who was the registered owner of the suit properties. He annexed a copy of a share certificate. He added that he had applied for limited grant to enable him to represent his deceased mother’s interest in the suit properties. He annexed a copy of the petition. He stated further that he entered into various sale agreements with the Defendant/Respondent culminating with the one dated 5th May 2013 in which he was selling the suit properties to the Defendant/Respondent. He further averred that the Defendant failed to honour the terms of the sale agreement by failing to pay the balance of the purchase price amounting to Kshs. 450,000/- yet he has taken possession of the suit properties and has commenced construction of houses thereon. He indicated that he wishes to retake possession of the suit properties as he intends to put up his own buildings thereon.

The Application is contested. The Defendant/Respondent, Daniel Kimani Ngururi, filed his Replying Affidavit sworn on 11th June 2014 in which he averred that he is legally in occupation of the suit properties having purchased them from the Plaintiff/Applicant vide sale agreements dated 29th September 2012 and 5th May 2013. He stated that he first purchased Plot No. P61 (C977) measuring 120 feet by 100 feet from the Plaintiff/Applicant at a consideration of Kshs. 600,000/- on 29th September 2012 out of which he paid a deposit of Kshs. 50,000/- leaving a balance of Kshs. 550,000/- payable on or before 15th

January 2013. He stated further that before 15th January 2013 when he was meant to pay the balance of the consideration, the Plaintiff/Applicant approached him indicating that he wanted to sell to him the adjacent Plot No. P 61B (MAP 4C 373) whereby he agreed to purchase the suit properties at a combined consideration of Kshs. 850,000/- which agreement was reduced in writing culminating in the sale agreement dated 5th May 2013. He added that he paid the Plaintiff/Applicant an additional Kshs. 370,000/- leaving a balance of Kshs. 430,000/- which was to be paid once the Plaintiff/Applicant identified a motor vehicle he wanted to buy. He further averred that on 7th August 2013, the Plaintiff/Applicant informed him that he had identified a motor vehicle registration number KBT 704C, Toyota Probox which was being sold for Kshs. 550,000/- whereby the Plaintiff/Applicant requested him to pay the entire purchase price though it exceeded what he owed the Plaintiff/Applicant by a sum of Kshs. 120,000/-. He averred that he paid the seller of the said motor vehicle, one Paul Kamotho Mwathia, the total purchase price of Kshs. 550,000/- upon the Plaintiff/Applicant's promise to refund the excess amount of Kshs. 120,000/- at a later stage. He further averred that he later on came to learn that the said motor vehicle was stolen when the police came for the original log book which was by then in his possession. He indicated that the Plaintiff/Applicant and one Paul Ndungu recorded statements at the Nyeri CID offices over the theft of the said motor vehicle. He stated further that the Plaintiff/Applicant has failed to refund him the excess amount of Kshs. 120,000/- he paid for the said motor vehicle and has further failed to transfer the suit properties to him. He added that he took possession of the suit properties way back in the year 2012 and has commenced construction thereon which the Plaintiff/Applicant is aware of.

The Plaintiff/Applicant filed his written submissions.

Before I determine whether or not to grant the temporary injunction, I will first determine whether the Plaintiff/Applicant has *locus standi* to institute this suit on behalf of his late mother's estate to which the suit properties belong. Under **section 82** of the *Law of Succession Act (Cap 160 Laws of Kenya)* provides that,

***“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers; (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate*”**

In **Gitau and two others –vs- Wandai and Five Others [1989] KLR 231** the court held thus:

“Any act done concerning the estate of the deceased by a person who has not obtained representation amounts to intermeddling with the estate.”

And in the **Matter of Wilson Nzuki Ngolo (deceased) Machakos High Court Probate and Administration Cause Number 152 of 2000** the court held that:

“Only a person who has a grant or other legal authorization may handle the property of a deceased person.”

By his own admission, the Plaintiff/Applicant has submitted that he has not obtained a Limited Grant to commence this suit. He has added that this is a technical objection which sections 1, 1A, 1B, 3 & 3A of the Civil Procedure Act and Article 159 of the Constitution are supposed to cure. He further submitted that this court can allow the Plaintiff/Applicant to proceed with this suit as he waits for the Limited Grant to be issued by the court. I will differ with the Plaintiff/Applicant on that issue of representation. It would be dangerous if the court could allow unauthorized persons to deal with the estate of deceased persons without the necessary court documents. The issue of representation is critical in this case as it goes to the heart of the suit which would seek to assess whether or not the suit properties were in fact legally sold to the Defendant/Respondent. Without the Limited Grant, the Plaintiff/Applicant has absolutely no authority to file this suit or to prosecute it. Any dealings with the suit properties by the Plaintiff/Applicant remain of no legal effect unless the Plaintiff/Applicant has been authorized by the court to conduct those dealings by way of a Limited Grant or Grant of Letters of Administration. In the circumstances, I find that the Plaintiff/Applicant is not authorized to administer the estate of his deceased mother and further that he is

not entitled to file this suit.

In light of the foregoing, this suit is hereby dismissed with costs to the Defendant/Respondent.

DELIVERED AND SIGNED AT NAIROBI THIS 19TH

DAY OF JUNE 2015.

MARY M. GITUMBI

JUDGE