



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1288 OF 2013

JOHN BOSCO NGILA MBUI.....1ST PLAINTIFF

JOHN MUTEI MBUI.....2ND PLAINTIFF

**(Suing on behalf of the Estate of the
 Deceased RICHARD MBUI NDAVI)**

VERSUS

NEW AKAMBA UNITY1ST DEFENDANT

THE LAND REGISTRAR MACHAKOS.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

The Plaintiffs’ Application

The application before the court for determination is one brought by the Plaintiffs by way of a Notice of Motion dated 28th October 2013, and pursuant to the provisions of sections 1A, 1B 3A and 63(e) of the Civil Procedure Act and Order 40 Rules 1,2,3 and 4 of the Civil Procedure Rules. The Plaintiffs are seeking an order that a temporary injunction be issued against the 1st Defendant restraining it from alienating, disposing of, transferring, using and/or dealing with the parcel of land known as Athi River/Athi River Block 5/164 (hereinafter “the suit property”), pending the hearing and determination of this suit.

The application is premised on the grounds that Richard Mbui Ndavi (since Deceased), is the legal owner and proprietor of the suit property. Further, that on 12th September 2013, the 1st Defendant illegally and fraudulently transferred the said property to itself, and was consequently issued with a title deed on 1st October 2013. In support of the application, the Plaintiffs relied on an affidavit and further affidavit sworn by the 1st Plaintiff on 28th October 2013 and 15th January 2014 respectively, wherein he deponed that the Plaintiffs are the Administrators of the estate of the Deceased pursuant to the Letters of Administration granted in High Court Succession Cause No. 499 of 2007, which he annexed.

The deponent further explained that on 1st March 2012, the 1st Defendant and the Plaintiffs entered into a

sale agreement for the sale of the suit property, which sale agreement he annexed. However, that the letters of administration were issued to the Plaintiffs on 22nd March 2012, and as such the purported sale of the suit property was based on an illegal contract and was null and void. The deponent also annexed a copy of the certificate of confirmation of grant.

The deponent stated that some of the beneficiaries of the Deceased's estate were opposed to the sale, and that they subsequently instructed their Advocate to intervene. The said Advocates then wrote a letter dated 23rd July 2013 to the 1st Defendant on behalf of the Estate, informing it of the decision to cancel the sale of the suit property on the grounds that the Plaintiffs had no authority to enter into the same, as well as the fact that there were objections from the rest of the beneficiaries of the estate of the Deceased. Further, that the Advocates inquired on how the deposit of the purchase price could be refunded. However, that the 1st Defendant insisted that the Plaintiffs honor the sale agreement.

The Plaintiffs consequently then instructed their Advocates to commence proceeding for the rectification of the grant to expunge the name of the 1st Defendant, which proceedings are ongoing. The deponent averred that the 1st Defendant proceeded to transfer the suit property to his name on 12th September 2013, after the Plaintiffs were "duped" into signing some documents in the office of the 1st Defendant's lawyers, and that a title was issued to it on 1st October 2013. The Plaintiffs stated that they have been ready and willing to refund the purchase price that the 1st Defendant paid to the Estate of the Deceased.

The 1st Defendant's Response

Salome Syomweu Kinyili, the 1st Defendant's Secretary General, swore a Replying Affidavit on 14th November 2013 in response to the Plaintiffs' application. The deponent denied that the Plaintiffs had no capacity to enter into the sale agreement for the suit property, and stated that the said contract was not illegal as the Plaintiffs had letters of administration and signed the transfer. Further, that all the beneficiaries were present in court and did not oppose the confirmation of the grant and distribution.

The Submissions

The counsel for the Plaintiffs and 1st Defendant were directed to file written submissions in court. The Plaintiffs' counsel in submissions dated 26th February 2014 argued that the Plaintiffs had established that there is a real dispute for determination by the court, which is whether or not the sale of the suit property was proper. The counsel submitted that as at the time of signing of the sale agreement, the sellers did not have authority to sell the suit land as they had not taken out letters of grant of administration as required under the law. Further, that section 55(1) of the Law of Succession Act provides that no grant of representation shall confer power to distribute any capital assets until it has been confirmed, and the confirmation of grant was issued on 21st May 2012.

The Plaintiffs' counsel further submitted that there was fraud on the part of the 1st Defendant in the transfer of the suit property, and that under section 26(1) of the Land Registration Act of 2012, a certificate of title can be challenged if there are allegations of fraud or misrepresentation to which the registered person was a party. He relied on the decision in **John Kirori Wamurangi vs John Mwaniki Kiarie & Another (2013) eKLR** where allegations of fraud were found to be sufficient to show that the Applicant had a *prima facie* case.

Lastly, counsel for the Plaintiffs averred that if the orders sought are not granted, the 1st Defendant will alienate the suit property, and the beneficiaries of the estate will lose their legitimate right to the suit property. Further, that each land is unique and they will not be adequately compensated in damages. He also submitted that the balance of convenience tilted in the Plaintiffs favour as the suit property is in the 1st Defendant's hands, and has not been transferred to a third party, and asked that this *status quo* be maintained. The counsel relied on various judicial authorities in this regard.

The 1st Defendant's counsel filed written submission dated 4th March 2014. He submitted that the Plaintiffs have no arguable case, as the confirmation of grant was done in open court in the presence of all the family members, and still remains a valid and lawful decision of a court as it has not been set aside varied or reviewed by a court of competent jurisdiction. Further, that the allegations of fraud by the Plaintiffs have no basis as they executed all the documents used to transfer the suit property.

The Issues and Determination

I have read and carefully considered the pleadings, annexed evidence and submissions made. The question to be determined is whether the Plaintiffs have met the threshold for the grant of temporary orders of injunction. I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, which are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience. The first question I must answer is whether the Plaintiff has established a *prima facie* case.

A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Plaintiffs aver that they did not have legal capacity to enter into the sale agreement with the 1st Defendant. I have perused the annexures presented by the Plaintiffs as evidence, and note that the sale agreement is dated 1st March 2013, yet the letters of administration were issued by the High Court at Machakos on 22nd March 2012 and confirmed on 2nd May 2013, after the sale agreement had been entered.

The position in law is that one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition, under section 55 of the said Act it is provided in this regard that no grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71 of the Act.

The Plaintiffs also produced evidence of their summons for rectification of the confirmation of grant to remove the 1st Defendant from the list of beneficiaries for this reason. Under section 74 of the Law of Succession Act errors in names and descriptions may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

To this extent I find that the Plaintiffs have an arguable case, and that it is necessary for the suit property to be preserved pending the determination of the summons for rectification of grant and of this suit. However, I note that the suit property has already been transferred to the 1st Defendant, who has paid part of the purchase price and is in possession. The allegations by the Plaintiffs of fraud on the part of the 1st Defendant during the processes of the said transfer cannot be established at this stage, and will have to await full hearing.

I accordingly allow the Plaintiff's Notice of Motion dated 28th October 2013 only to the extent of the following orders:

1. The 1st Defendant, by itself or its agents and/or servants be and is hereby restrained from selling, transferring, alienating or in any other manner disposing of the parcel of land known as Athi

- River/Athi River Block 5/164 pending the hearing and determination of this suit.
2. The Plaintiffs shall not in any manner interfere with the 1st Defendant's possession and occupation of the parcel of land known as Athi River/Athi River Block 5/164
 3. The costs of the Plaintiffs' Notice of Motion dated 28th October 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 26th day of May , 2014.

P. NYAMWEYA

JUDGE