



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENTAL COURT
AT MOMBASA
LAND CASE NO. 376 OF 2010

CHARLES KIPROP & 6 OTHERSPLAINTIFFS

- VERSUS-

- 1. LAZARO CHEBII CHEPKAITANY**
- 2. SUSAN MBUGUA CHEPKAITANY**
- 3. PATRICK MBUGUA DEFENDANTS**

RULING

BACKGROUND

[1] Land parcel no. 1055 (original number 1013/2) Sec. VI/M is registered in the name of Lazaro Chebii Chepkaitany now deceased and the second defendant herein. His first wife died on 28/4/1992 and he later married the 2nd defendant under the African Christian Marriage and Divorce Act Cap. 157 on 24th April 2002 with whom he lived in a rented house at Chaani Mombasa. The 1st defendant died intestate on 29th January 2011.

Prior to his death his children the plaintiffs herein filed this suit praying for an injunction to restrain him and his 2nd wife the 2nd defendant and 3rd defendant from selling disposing or alienating in anyway the suit property aforesaid.

The plaintiffs brought an application under Certificate of Urgency on 27th October 2010 praying for orders compelling the 2nd and 3rd defendants to allow the plaintiff full access to the 1st defendant to whom they allege, that, he was gravely ill with cancer and further for an order that the defendant be restrained from selling disposing alienating or in any other way dealing with the suit property pending the hearing of this application. The access to the first defendant was granted and the title to suit property was ordered to be deposited in Court. The Court on 7th October 2011 stopped any further dealing with suit property No. 1055 (original no. 1013/2 Sec. VI/MN until further orders of the court.

[2] The 2nd defendant on 8th February 2012 filed this application praying for a temporary injunction

restraining the plaintiff by themselves, their agents and/or servants from developing, leasing, transferring, constructing, cultivating or in any other way interfering with the suit property pending the hearing and determination of this suit. This was prompted by an allegation by the applicant (in this application of 8th February 2012) that the plaintiff respondents were leasing the suit premises and proceeding with construction of permanent structures as shown on the annexures therein.

This fact was not denied by the respondent/plaintiffs who have said that they have always developed the property on need basis (para 6 replying affidavit)

ANALYSIS

[3] The applicant seeks temporary orders of injunction against the plaintiffs to restrain them from developing, leasing, transferring, constructing, cultivating or in any other way interfering with the suit property. They allege the respondents took advantage of the orders they obtained in court on 28th October 2010 and entered the said piece of land and started to lease it out to 3rd parties who are constructing. The applicant raises issues of ownership, possession and whether this suit is maintainable due to lack of letters of administration of the 1st defendant's estate. The applicant raises the issue of the fact that she has filed a succession cause No. 10 of 2011 now pending in court and the fact that she is the legal wife of the 1st defendant (now deceased) and is entitled under the Law of Succession Act (Cap. 160) Laws of Kenya to administer the estate of her deceased husband.

[4] The respondent argues that the defendant's application is fatally defective in that the suit land belongs to the 1st defendant who is deceased and that the 2nd defendant though his wife has no letters of administration of his estate and she cannot seek the orders that he has applied for since the land does not belong to her. That she has unclean hands in that she has not complied with the court order of 28th October 2010 to deposit the title of the suit property in court. Finally that the applicant used a forged fraudulent death certificate. The original death certificate is no. 036775 and that the applicant has not met the bench mark as set out in the case of *Geilla vs Cassman Brown & Co. Ltd* [1973] EA 358.

THE LAW

For one to bring an action on behalf of a deceased person, one must have Letters of Administration of his Estate.¹ There is no doubt in this case the defendant was dead when this application was filed. The applicant did not have letters of administration of his estate. However the applicant was not a stranger to these proceedings. She was sued by the respondents together with the 1st and 3rd defendant to stop her selling the suit property. It was well within the knowledge of the respondents then that she was not the registered proprietor of the suit property and yet they proceeded to sue her. Her position as a defendant did not change as a result of the death of the 1st defendant. In any case, she is not a stranger who has entered into these proceedings after the death of the deceased. She is his legal wife. Her position as such is recognized by the Succession Act Cap. 160.

She has indeed filed Mombasa Succession Cause No.7 of 2011 for the estate of the 1st defendant who was her husband. She has a duty to protect the estate of the first defendant until the succession cause is determined. The applicant herein is a dependant pursuant to Sec.29 of the Succession Act. She ranks first in priority. She is entitled to personal and household effects of the deceased absolutely and a life interest in the whole residue of net intestate estate. (See Sec. 35 Succession Act). The respondent herein who had raised an objection against the applicant in bringing her application have themselves not filed any application to be granted letters of administration Ad Colligenda Bona under Sec. 67 (1) of Cap 160 for the estate of their father the 1st defendant. They have instead in their own words continued to develop the suit property on need basis. This is undesirable where there are many beneficiaries known to each other and whose shares have not been determined by the Court.

The subject matter of this case is Plot no. subdivision number 1055 (original number 1013/2/VI MN No. 9403. The owner of this property is the 1st defendant now deceased. This suit cannot move one more step until the administrator of his estate is identified by the Court. If there was no succession cause pending in the family division in this court for the appointment of the administrator of the estate of the

1st defendant, I would have appointed the applicant and the respondent as joint administrators to enable this suit to proceed. Unfortunately now we have to wait for the case to be finalized by the family division.

What orders should be made herein?

Since none of the parties herein has letters of administration of the estate of the deceased in respect of the suit property herein the application herein shall be stood over generally as no further orders can be made in the suit regarding the suit property, before the administrators of the estate of the 1st defendant are ascertained and/or appointed.

CONCLUSION

This Court makes an order that status quo pertaining on land parcel subdivision number 1055 (original number 1013/2/V1/MN) CR. No. 9403) should be maintained and no further construction, leasing, developing or any other way interfering with the suit property shall be done by any of the parties to this suit or their agents and/or servants, licencees or any other person until the Succession cause aforesaid is determined and/or further orders from this court.

This suit shall be stood over generally pending the determination of the succession cause aforesaid.

There shall be no order as to costs.

Dated and delivered in open court at Mombasa this 18th day of October 2013.

S.N. MUKUNYA

JUDGE

18.10.2013

In the presence of:

James Otieno Advocate for Kanyi Juma Advocate for the respondent.

Njeru & Co. Advocates for the applicants.

1 See Otieno v Ougo & another(No.4) [1987] KLR page 407 (see note 8)