



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 191 OF 1994

MARGARET WAIRIMU NGUGI.....PLAINTIFF

VERSUS

MICHAEL MWANGI GATONYE.....DEFENDANT

RULING

By her application dated 17th January, 1994 the plaintiff seeks an injunction restraining the defendant from evicting her from LR No Nganda/Mutomo/31 and from interfering with the plaintiff's possession of the suit premises until the final determination of this suit. She also seeks orders to stop the defendant from selling, transferring mortgaging or in any way dealing with the said property until further orders of this court.

The applicant (Margaret) is the daughter-in-law of the respondent (Michael).

She says that her husband and Michael had constructed a building on the plot in question and father and son were occupying half portion each of the building.

Father and son were partners in a business they were carrying on at all material times, so she says.

She has by a letter of 7th December, 1993 been threatened to be evicted. This threat is in the letter of 7th December, 1993 addressed to Margaret by advocates for a firm known as "Murimi Hardware & Farmers Store".

It is this business in which father and son were partners. So Margaret says through her advocates' letter of 10th January, 1994.

Margaret has obtained a grant '*ad colligenda bona*' for limited administration of the estate of her late husband. This grant was issued on 1st September, 1993.

Margaret has been (so she says) living on the disputed property for 13 years plus and had exclusive use of the premises; that extensive renovations were carried out to the premises costing Shs 80,000/- plus; that otherwise she has obtained title by adverse possession; that she has three children who are the defendant's grand children.

Michael says that having bought the land in 1971 he started building on it in 1974; that his son was in school.

At this stage of the hearing of the application I had ascertained that the son must have been about 23 years of age in 1974. He cannot have been then a school-boy.

Michael says that he allowed his son to occupy the premises in question to live in for the time being pending his finding a suitable land to build a house for his family.

Michael also says that he had agreed to let his son help him run the business of 'Murimi Hardware & Farmer's Store' which he had started in 1975.

Paragraph 6 of Michael's affidavit in my view is important. He says his deceased son was never a partner in the said business but only used to help as a son and that for that reason he had given to him suit premises to stay with his family.

Whatever may have been the relationship between father and son in terms of business and property I have no doubt that it was based on a kind of relationship which would or did give rise to a partnership in business as well as property.

Now that the son is no more, problems have started. There seems to be history of troubles after the death of the son.

There is a dispute as to who bought LR No Ngenda/Kimunya/1224. At least the fact of there being an incomplete uninhabitable building being on it is not disputed as photographs prove it.

There are too many issues raised. Eventually the trial court will have to

decide whether or not the defendant is estopped from denying the deceased son's right to occupy half the property.

The law is clear. If a father allows a son to build (or if both build together) a house on father's property and allows him to stay there the son gets right to live there. This is the principle of promissory estoppel. The son, say, builds. The father allows him to do so. The son continues to build and lives there for many years. If such were the facts, which I cannot decide now, the son would get possessory title. At least this is an issue which the trial court would have to go into.

I think it is now settled law that promissory or proprietary estoppel can be used to base a cause of action on. The doctrine of equitable estoppel applies in East Africa. See *Nurdin Bandali vs Lombank Tanganyika Ltd* [1963] EA 304.

Facts not quite unsimilar to those in the present case were instance. In *Re: Whitehead, Whitehead vs Whitehead & others* reported in [1948] N ZLR 1066 or *Dillwyn vs Llewelyn* [1861-73] All ER 348 or *Inwards & others vs Baker* [1965] 1 All ER.

Also see *Chase International Investment Corporation & another vs Laxman Kestora & others* [1979] KLR 143 where it was held (with some doubt from Wambuzi JA but who did not dissent) that proprietary estoppel can be used for founding a cause of action. Even Wambuzi JA did not dissent with what was stated by Scarman LJ in *Crabb vs Arun District Council* [1975] WLR 84).

I have also so held, as a Commissioner of Assize, in HCCC No 1882 of 1980 (unreported); *Kenya Cannery Ltd vs Doge* on 28th October, 1988.

Another issue for trial court would be to decide whether or not the deceased was in fact a partner in the business known as Murimi Hardware & Farmers Store.

Whilst I cannot answer these issues at this stage, on the cold print evidence before me, at least I have reason to believe that the plaintiff has a sustainable and provable case.

However, without saying that there is a *prima facie* case with a probability of success and I have no difficulty in saying so that damages will not be an adequate remedy. If the plaintiff and the defendant's three grand children are thrown out of the suit premises they will suffer irreparable harm that

cannot be atoned for by damages.

Even the balance of convenience lie on the side of the plaintiff. I do not see how the children and the plaintiff can live in the half finished structure that the defendant is referring to.

I was urged to dismiss the application on the ground that the plaintiff had not disclosed to Court the existence of other suits between the parties. Reference to those suits is in paragraph 16 of the Michael's replying affidavit.

Unfortunately no particulars of such suits are given. I was informed from the bar that HCCC No 5504 of 1993 is in respect of motor vehicle; that RMCC No 4571 of 1993 is a discontinued burial suit; that RMCC No 8707/93 is a fresh burial suit numbered in Thika as RMCC No 594 of 1993. I am also informed that the deceased's mortal remains are buried on suit land.

In all the circumstances I do not think there is any attempt to mislead the Court. The issue of eviction appears to be foremost in the mind of Margaret at the moment.

I grant the application as prayed in prayers 2 and 3 of the application dated 17th January, 1994. The costs of this application will be plaintiff's in any event.

Dated and Delivered at Nairobi this 4th day of March 1994.

A.B.SHAH

JUDGE



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