REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ELC. NO. 31 OF 2012

ATTORNEY GENERAL

BUSIA DIARY CO-OPERATIVE…….....…….. PLAINTIFFS

VERSUS

JAMES NDIRANGU NG'ANG'A ……RESPONDENT

RULING

1. The application under consideration, which is a motion on notice dated 13/7/2016 and filed on the same date, was brought by the second plaintiff - **BUSIA DAIRY FARMERS CO-OPERATIVE SOCIETY –** against first **JAMES NDIRANGU NGANGA,** who is the defendant, and second **BENSON NGANGA NDIRANGU**, who is the Interested party for the purpose of the application.

2. The application is brought under order 40 Rules 1 & 4 of Civil Procedure Rules and section 3A of Civil Procedure Act (cap 21). The application originally had four (4) prayers but prayers 1 & 2 are now moot, having been for consideration at an earlier stage. For consideration therefore are prayers 3 and 4, which are as follows:

> Prayer 3: That restriction be placed on land parcel NO. BUSINMUNICIPALTIY/20 restraining the defendant, the current registered owner, or any other person acting through them from transferring, charging, developing, with the said parcel of in any other way dealing till the hearing and
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> Prayer 4: The costs of this application provided for.

3. From the supporting affidavit accompanying the application, it is clear that a restraining order was issued in this suit to prevent the defendant from moving in, wasting, damaging, selling, disposing or developing land parcel **NO. BUSIA/MUNICIPALITY/20** pending hearing and determination of the suit.

4. In breach of the order, the defendant is said to have set aside the injunction in Misc Application NO. 7 of 2006 in the Chief Magistrate court, Busia, and, having done so, proceeded to transfer the land to one **BENSON NGANGA NDIRANGU.**

5. The 2nd plaintiff avers that the Chief Magistrate has no power or jurisdiction to set aside an order of the High Court or handle a matter currently before such court.

6. The application was responded to in three ways: the replying affidavit dated 26/7/2016, the notice of objection dated the same (26/7/2016), and a supplementary replying affidavit of the same date (26/7/2016). All the responses are by the interested party - BENSON NGANGA NDIRANGU.

7. The responses raise issues among them being that the applicant has no locus as he has not filed pleadings in this case; that then as a party; that the interested party is not yet formerly enjoined as a party; that any legal rights the applicant may raise concerning the land was judicially extinguished by decisions in BUSIA PMCC . NO. 229/07; that the party called JOSEPH NDIRANGU NGANGA is unknown; that the application is RES-JUDICATA; that the application is an abuse of the court process; and that the application as brought by the appellant is meant to scuttle quick disposal of this suit for reasons only known to him.

8. The application was argued before me on 27/7/2016. It was argued in a reverse manner. I will explain: the usual manner is where the applicant argues his application. The respondent responds and, if need be, the applicant comments on the response. This one however started the opposite way. The interested party thought that he could argue his preliminary objection as a standalone issue.

He started arguing it but along the way, he started mixing it with his other responses. Counsel for the applicant objected. Eventually it was agreed that the applicant would respond and additionally put forward all the arguments supporting his application. The respondent was allowed to raise his arguments alongside the arguments of the interested party.

9. The arguments raised both sides are generally a rehash or restatement of what the parties had availed in writing. There was an emphasis of this, an amplification of that, but nothing went beyond what was averred in writing. I see no need to repeat the arguments. It would amount to regurgation.

10. I have considered the application, the responses made, and the rival arguments. I need to make a few observations before setting out what will ultimately lead to my decision. I will start with the application and then come to the responses.

11. The application is stated to be brought under Order 40 Rules 1 and 4 of Civil Procedure Rules. A look at Order 40 will show that it deals with injunctions. It does not deal with restrictions. Yet the applicant is asking for a restriction, not an injunction. In my view, it was wrong for the applicant to invoke Order 40. That order does not contain the correct law for his purposes. But I realize that Order 51 Rule 10 (1) of Civil Procedure Rules enjoin that the applicable law should be stated but failing to do so should not lead to rejection of an application. It is for this reason that I will not reject the application herein.

12. But I need to further consider whether a restriction is the right order to issue from court if deserved. An order of restriction is provided for under Section 76 of The Land Registration Act, 2012.The relevant part of that section provides as follows:

> ***Section 76 (i)*** **For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Rgistrar considers fit, make an order hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular lease or charge."**

13. It is clear from the provision that granting of an order of restriction is solely the business of the Land Registrar. He can issue it of his own violation or on application by an interested party. In simple terms, the Registrar is the one to issue a restriction.

14. What then should the applicant have applied for? An inhibition. And here is why: An inhibition serves the same purpose as an order of Restriction. An inhibition issues from the court, not from the Registrar. An inhibition is provided for under section 68 of The Land Registration Act, 2012, and the relevant part provides as follows:

> ***Section 68 (1)*** **'The court may make an order (herein after referred to as an inhibition" inhibiting for a particular time, or until the occurrence of a particular event or generally until a further order, the registration of dealing with any land , lease or charge"**

15. The distinction then is simple: a restriction issues from the Land Registrar. An inhibition issues from court. Both orders can serve the same purpose but when you are invoking the power of the court, you ask for inhibition.

16. A question then arises: Is the application herein to be rejected? The obvious answer is NO. This is a case whose circumstances are unique. Records show that the court in this case did not issue an order of restriction. It issued an order of injunction. The Registrar noted the injunction in the Land Register. It is apparent that based on that order, he proceeded also to place and order of restriction. That is the order that was removed by the lower court. It is clear that the applicant is seeking to have the Land Registrar reflecting what was there before in order to cater for the interests. But in a rather confused way, it makes an application for injunction and asks for an order of restriction in the same vain.

17. Can the other side be heard to say that court is being too lenient to the applicant even after noting these blunders? Let's look at the other side. It will be noted that side is not without fault either. The Lower court order that was relied on is dated 5/5/2016. As extracted, it talks of inhibition/caution. As pointed out earlier, the Land Registrar tells of injunction and restriction. The legal provisions dealing with inhibitions and cautions are totally different from the legal provisions dealing with restrictions/injunctions. If we were to be overly strict, it is possible to argue that there was no lower court order addressed to the injunction and Restriction that were in the land registrar at the time.

18. What next then? The reality has to be faced. The Lower court order was effectively used to remove the injunction and restriction then noted in the Land Register. And it was so used even when, strictly speaking, it was not addressing the two orders. And if we have to excuse that error, then we can also excuse the applicant for coming to court the way it did.

19. I now turn to the responses made by the other side. If the court fails to exercise caution, some of the arguments raised in the responses serve as an invitation to reconsider some of the issues raised elsewhere in the suit. For instance, the issue of RES JUDICATA is raised. The interested party and the respondent would most likely want the court to treat it as an issue for the application only. The court would be ready to view it that way but following has to be satisfied:

> a) That a similar application raising similar issues was filed here or elsewhere and conclusively decided on its merits
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> or
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> b) That such application ought to have been made but was not.

20. In the whole suit itself, the issue of Res-judicata was raised.

And the issue as raised refers to previous decided cases concerning the land between the 2nd plaintiff and the respondent. When the interested party and the respondent were expounding on this issue in the context of this application on this issue in the context of this application, they were referring to the same cases. This essential means that they want the court to revisit the issue and possibly decide it in their favour. I refuse to be drawn into this scenario.

21. Arguments were also raised that the 2nd plaintiff is not a proper party. Court records show that these arguments were raised earlier. In spite of that, the 2nd plaintiff was made a party. Why should I be invited to revisit the issue? The fact of the matter is that the 2nd plaintiff is a party in these proceedings and has even participated in the hearing that has so far taken place.

22. It is apparent therefore that there is danger that a consideration of the issues raised in the arguments would amount to a premature determination of some issues which are germane to the determination of the main suit. And that would happen while the 1st plaintiff (A.G) has not been given a chance to give his input in this application.

23. So much for the shortcomings and pitfalls associated with each side. There is a larger, clearer picture that emerges from what transpired: NOTE THIS:

a) Records show that the order removed in Misc. Application No. 7 of 2016 at Chief Magistrate's court here in Busia was made pursuant to orders issued in this case and in this court.

b) That the orders were meant to preserve the status Quo, specifically to prevent dealings that may be prejudicial to any party in the suit.

c) That at the time the order was removed, the applicant was a party in this case and therefore had an interest in having the prevailing status ***Quo*** maintained.

d) That good practice demands that no such order be removed without involving, or at least hearing, the applicant.

e) That contrary to all this, the 1st plaintiff (A.G) and the defendant (respondent) went to the lower court and got the order removed. They did this in total disregard and exclusive of the 2nd plaintiff (applicant) who also had an interest in having the prevailing status quo maintained.

f) That good practice and fair play would require that the removal of such order or any other dealing relating to it be done within the confines of this suit, not in a separate matter.

g) That when the order was removed, the defendant (respondent) promptly moved to gift the land to his father (interested party) possibly to remove the land from the reach of the 2nd plaintiff (applicant).

24. All the arguments raised by the respondent and interested party belie the above clear picture. The arguments are diversionary and serve as a distraction. They serve to obfuscate and thwart the real objective meant to be served by the order that was removed.

25. There is no running away from the suspicion that the defendant (respondent) was trying to steal a march on the 2nd plaintiff. There is no logical explanation as to why an order made in a pending suit that is available and accessible had to be made in a different and separate matter in a different court. The contrived stratagem was obviously to exclude the 1st plaintiff. My decision is based on all the forestated considerations.

26. The interested party cannot run away from the reality of this case. He cannot use the technicality of the law to limit the reach of justice. The applicant has invoked section 3A of the Civil Procedure Act (Cap 21). That is the provision that enables the court to always endeavor to do justice in a given situation.

The 2nd plaintiff's application has merit. I therefore allow the application in terms of prayers 3 and 4. But I will vary prayer 3 abit. Instead of restriction, I order that an order of INHIBITION do issue exactly in the terms stated in prayer 3. For the avoidance of doubt, and for purposes of prayer 4, costs are awarded to the 2nd plaintiff.

A.K. KANIARU

JUDGE

17/8/2016

A.K KANIARU, J

Ichuloi – CC

interested Party present.

Okutta for interested party.

Okutta also for M/S Njoroge for defendant

J.V. Juma for Planitiff.

Interpretation – English/Kiswahili.

COURT – Ruling on application dated 13/7/2016 read and delivered in open court. Right of appeal in 30 days. Proceedings and Ruling to be typed and supplied to any party wishing to get them

A.K. KANIARU

JUDGE

DATED AND DELIVERED ON 17TH DAY OF AUGUST, 2016

IN THE PRESENCE OF;

1ST PLAINTIFF……..

2ND PLAINTIFF…….

RESPONDENTS……

JUDGE.