



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO.64 OF 2014**

ROBERT NYANGARESI ONUONGA

(Suing as the administrator of the estate of

ZAKAYO ONDARA NYANDORO).....PLAINTIFF

**VERSUS**

MARK NYABAYO RATEMO .....DEFENDANT

**RULING**

1. The plaintiff brought this suit against the defendant on 19<sup>th</sup> February 2014 seeking; a declaration that the transfer of all that parcel of land known as **LR No. Nyaribari Chache/B/B/Boburia/4831** (“hereinafter referred to as “**the suit property**”) to the defendant was fraudulent, illegal and improper, an order for the cancellation of registration of the defendant as the proprietor of the suit property and, a permanent injunction to restrain the defendant from entering into, cultivating, tilling, erecting structures or in any other manner interfering with the suit property. In his plaint dated 17<sup>th</sup> February 2014, the plaintiff who is the administrator of the estate of one, **Zakayo Ondara Nyandoro**, deceased (hereinafter referred to only as “**the deceased**”) averred that the suit property was at all material times registered in the name of the deceased who died on 13<sup>th</sup> June 2011 at a prime age of 98 years. The plaintiff averred that before his demise, the deceased was bedridden for a long period and was infact hospitalized for two (2) weeks preceding his death. The plaintiff averred that during the said period of the deceased illness and hospitalization, the deceased is purported to have caused the suit property to be transferred to the defendant on 8<sup>th</sup> June, 2011. The plaintiff averred that the purported transfer of the suit property by the deceased to the defendant was fraudulent and unlawful in that the deceased was not in a position to execute the transfer documents in favour of the defendant neither was he in a position to attend the land control board meeting for the necessary consent. It is on account of the foregoing that the plaintiff has sought the reliefs set out hereinabove.
2. Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 17<sup>th</sup> February 2014 seeking a temporary injunction to restrain the defendant from entering into, cultivating, tilling, erecting structures on and/or in any other manner interfering with the suit property pending the hearing and determination of this suit. The plaintiff’s application that was supported by the affidavit sworn by the plaintiff on 18<sup>th</sup> February 2014 was brought on the same grounds set out in the plaint that I have highlighted above. The plaintiff has stated that prior to the death of the deceased and thereafter, it was the plaintiff who was in occupation of the suit property and that he learnt of the defendant’s alleged fraudulent acquisition of the suit property in the

- month of January 2014 when the defendant forcefully entered the suit property and started tilling the same. It is this incident that prompted him to make inquiries at the land's office which inquiry unearthed the anomalies stated above. The plaintiff has stated further that the defendant's attempt to forcefully dispossess the plaintiff of the suit property is likely to lead to a breach of the peace and as such it is necessary for the orders sought to issue pending the hearing and determination of this suit. The plaintiff annexed to his affidavit in support of the application, a copy of the register for the suit property which shows that the same was registered in the name of the deceased on 6<sup>th</sup> December 1990 and that on 8<sup>th</sup> June 2011 the same was registered in the name of the defendant. It is not indicated on what account, the defendant got registered as the proprietor of the suit property.
3. The plaintiff's application was opposed by the defendant through a replying affidavit sworn on 28<sup>th</sup> February 2014. In his affidavit, the defendant admitted that the suit property was registered in the name of the deceased before the same was transferred to his name. The defendant deposed that the suit property was transferred to him as the grandson to the deceased following a family meeting that was held on 30<sup>th</sup> August 2013 after the death of one, Kerebi Chemtai Osoro who was the deceased's sister in law. The defendant contended that the plaintiff who is a nephew to the deceased has no interest or right in the suit property. The defendant contended further that the death certificate pursuant to which the plaintiff obtained a limited grant of letters of administration Ad Colligenda Bona on the strength of which this suit was instituted was a forgery. The defendant contended therefore that the suit herein is tainted with fraud. The defendant contended that he is in possession of the suit property on which he has planted maize and as such no good reason has been put forward to justify the injunctive reliefs sought against him. The defendant annexed to his affidavit; a copy of a certificate of official search dated 19<sup>th</sup> September 2013 on the title of the suit property, a copy of a title deed dated 8<sup>th</sup> June 2011 for the suit property, a copy of the minutes of a meeting that was held on 30<sup>th</sup> August 2013 and a copy of an agreement for sale dated 23<sup>rd</sup> September 2013 between the defendant and one, Loise Kerubo Onwong'a in respect of the suit property.
  4. On 7<sup>th</sup> May 2014, the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. The plaintiff filed his written submissions on 13<sup>th</sup> August 2014 while the defendant did so on 4<sup>th</sup> September 2014. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendant's affidavit filed in opposition to the application. Finally, I have considered the written submissions by the respective advocates for the parties. The law on temporary injunction is now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, an applicant for a temporary injunction must establish a prima facie case with a probability of success against the respondent. He must also demonstrate that he stands to suffer irreparable injury that cannot be compensated in damages if the order is not granted. In the event that the court is in doubt on the above, the application would be determined on a balance of convenience. The plaintiff's case is that the defendant acquired title to the suit property fraudulently. The plaintiff has contended that at the time when the deceased is said to have transferred the suit property to the defendant, he was hospitalized for an illness from which he never recovered. The plaintiff has contended that the deceased was not in a position to execute a transfer in favour of the defendant leave alone attending a land control board meeting to obtain consent for the transaction. The plaintiff has contended that the purported instrument of transfer through which the deceased is purported to have transferred the suit property to the defendant is a forgery.
  5. In his response to the plaintiff's claims, the defendant contended that he acquired the suit property following a family meeting that was held on 30<sup>th</sup> August 2013 and which was followed by an agreement for sale of the suit property between him and one, Losie Kerubo Onwonga made on 23<sup>rd</sup> September 2013. Under the said agreement for sale, the defendant is indicated to have purchased the suit property from the said Loise Kerubo Onwonga at a consideration of kshs. 500,000/=. The said Loise Kerubo Onwonga was obligated under the said agreement to apply for a grant of letters of administration in respect of the estate of the deceased and thereafter cause the suit property to be transferred to the defendant. From the foregoing, it is not clear how and under what circumstances the defendant was registered as the proprietor of the suit property on 8<sup>th</sup> June, 2011. The family meeting which is said to have approved the defendant's acquisition of the suit

property was held on 30<sup>th</sup> August 2013 more than 2 years after the defendant had been registered as the proprietor of the suit property on 8<sup>th</sup> March 2011 as aforesaid. The agreement for sale pursuant to which the suit property was to be transferred to the defendant after a grant of letters of administration in respect of the estate of the deceased had been obtained was itself made on 23<sup>rd</sup> September 2013 when the property was already in the name of the defendant. It is clear on the face of these documents that the defendant's explanation as to how he acquired the suit property raises many questions than answers. The defendant has not denied the plaintiff's contention that when the deceased is purported to have transferred the suit property to the defendant he was hospitalized and could not have executed a transfer in favour of the defendant. The defendant has also not denied the plaintiff's contention that no consent was obtained for the purported transfer because the deceased was not in a position to appear before the Land Control Board for the said consent.

6. I am satisfied from the foregoing that the plaintiff has established a prima facie case of fraud against the defendant. I am also satisfied that the estate of the deceased may suffer irreparable injury if the orders sought are not granted. The upshot of the foregoing is that the plaintiff's application dated 17<sup>th</sup> February 2014 is well merited. The same is allowed in terms of prayer (c) thereof. The plaintiff shall have the costs of the application.

**Delivered, signed and dated at KISII this 13<sup>th</sup> day of February, 2015.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Bigogo h/b for Soire for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**