



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
LAND AND ENVIRONMENT CASE NO.236 OF 2013

AGGREY ONYANGO NYAUSE.....PLAINTIFF

VERSUS

WASHINGTON ADERO OWADA

INSIDE OUT LEARNING TRAINING INSTITUTE

THE DISTRICT LAND REGISTRAR – KISUMU

THE HON. ATTORNEY GENERALDEFENDANT

R U L I N G

1. This ruling follows interpartes hearing of the Notice of Motion dated 13/9/2013 and filed on 16/9/2013. The interpartes hearing took place on 27/11/2013. The application is brought under order 40 Rules 1A, 2,3 and 4 of civil Procedure Rules and Sections 1A, 1B, 3 and 3A of Civil Procedure Act (Cap 21) and all other enabling provisions.
2. Originally, four (4) prayers were sought but prayer 1 is now spent and Prayer 2 which was granted exparte, ends with the delivery of this ruling. The relevant prayers are now 3 and 4, which are as follows:

(3) That pending the hearing and determination of this suit, this court be pleased to issue an order of temporary injunction restraining the 2nd defendant – Inside Out Learning Training Institute – whether by itself, its employees or servants from entering, constructing or continuing to construct permanent or temporary structures or dealing in any other manner whatsoever with Land Parcel No. **KISUMU/KADERO GOT NYABONDO/2327**.

(4) That costs of this application be in favour of the applicant.

3. The applicant, who is also the plaintiff, is **AGGREY ONYANGO NYAUSE** – and his application is premised on the following grounds.

(a) That the applicant is entitled to the whole of Land parcel **KISUMU/KADERO GOT NYABONDO/2327** (hereafter the suit property).

(b) The 2nd respondent has obtained title deed to the suit property fraudulently by colluding with 3rd and 4th respondents.

(c) That the 2nd respondent is moving swiftly to entrench himself in the suit property by making various development.

(d) The applicant is likely to suffer irreparable loss.

4. In the supporting affidavit, the applicant depones, inter alia, that he purchased the suit property on or about 22/10/1999 from 1st respondent at 110,000/=; that the 1st respondent was selling the suit property in order to buy, and he indeed bought, another piece of land; that at the time of sale, the suit property was registered in the name of 1st Respondents late father – **PITALIS OWADA** – and the understanding was that the 1st Respondent would start the process of succession and ultimately transfer the suit property to the plaintiff; and that the 1st Respondent later changed his mind and, even without resorting to succession process, transferred the land to 2nd respondent.
5. The applicant, it was deponed, noticed the 1st Respondents reluctance and filed citation proceedings against him but the suit property was nevertheless transferred to 2nd Respondent during the pendency of the said proceedings. The process of such transfer is said to be tainted with fraud and/or illegalities and that is why the 3rd and 4th respondents are brought on board.
6. The 1st Respondent filed a replying affidavit on 30/9/2013. He deponed, inter alia, that the matter is belatedly brought to **COURT** since its over 12 years after the alleged purchase and the applicant has never taken steps to conduct transfer.
7. The Cause of action is said to be time-barred by Limitation of Actions Act. The purchase price too, it was deponed, was never paid in full. The 1st Respondent is said to have paid only 50,000/= and thereafter secretly tried to transfer the suit property to his sister – **EDWINA ADHIAMBO NYAUSE**, something that makes his hands dirty and therefore underserving of an equitable remedy.
8. According to 1st Respondent, transfer to the plaintiff couldn't be done without completion of payment. And the placement of restriction and commencement of citation proceedings were all without basis and amounted to intermeddling with the estate of a deceased person – in this case the 1st Respondents late father.
9. The 1st respondent said he is ready to refund the money already paid. And that money is 50,000/=; not 110,000/=. He asserted too that the suit property was legally and properly transferred to 2nd Respondent.
10. The applicant's application is also said to be defective as it relates to property of a deceased person yet the applicant has come to Court without any grant. And what the 1st Respondent stands to lose is only 50,000/= compared to over 2 million shillings which the 2nd Respondent stands to lose.
11. The 1st Respondent's replying affidavit elicited a response from the applicant by way of a further affidavit. The response controverts some of the 1st respondents averments in the replying affidavit. The applicant refuted, for instance, the allegation that the sale of land to him was null and void. He said that the 1st Respondent's land which he is occupying at present was bought using the proceeds of the sale. He said too that he has made various efforts to have the land transferred to him but the 1st Respondent has frustrated every such effort.
12. According to the applicant, he paid the full purchase price of 110,000/= and has used the suit property to farm sugarcane for the last 14 years. This is in contrast to 2nd Respondent whose interest started only in 2013. The allegation that the suit is time barred therefore is improper as the applicant has been in occupation of the suit property all along.
13. And the 2nd Respondent cannot claim to be a purchaser for value without notice. At the time of transaction between the 1st Respondent and 2nd Respondent, the suit property was not in the 1st Respondent's name and there was a restriction placed on it by the area assistant-chief. The applicants case was still on the land too and the 2nd respondents allegedly knew this. There was even a caution given to the parties to deal first with the issue of refund of purchase money to the

applicant before entering into a sale transaction but all this was allegedly ignored.

14. The 2nd respondent, it was further deponed, should have exercised due diligence to establish the rights of the owner of the sugarcane on the suit property and also find out why a restriction had been put on the land. Instead, the 2nd respondent instituted the process of removal of the restriction and then ensured direct registration of the 1st Respondent as owner of the suit property in order to facilitate direct registration to itself. The 1st and 2nd respondent, it was claimed are dishonest and are out to ruin the applicant both financially and physically.
15. Not to be outdone, the 1st respondent filed a supplementary affidavit on 29/10/2013. The affidavit is essentially responding to the applicants further affidavit. In the affidavit, it is reiterated and averred that the applicant tried to meddle with the estate of the 1st Respondents late father. It is a lie, it was deponed, to say the 1st defendant has been in occupation of the suit property as alleged, the truth being that he has been farming it but has never lived on it. Further averred was that the applicant only paid 50,000/= towards purchase of the suit property and has never cleared the balance.
16. The 2nd Respondent, 1st respondent said, was a purchaser for value without notice. At the time the 2nd Respondent bought the land on 16/1/2013 – there was no restriction placed on it. The restriction came later – on 25/1/2013 to be specific. At the time of transfer to 2nd Respondent also, the restriction is said to have been removed. And the removal was by the very person who had placed it, the area Assistant chief. It was not fraudulent as alleged by applicant.
17. According to 1st Respondent, the applicant is not entitled to the prayers sought and should the court be minded to grant the prayers, then the applicant should be ordered to deposit security.
18. As stated at the beginning of this application, the interpartes hearing of the application took place on 27/11/2013. Arguments were presented by Nyanga for applicant, Ayayo for 1st Respondent, and P.D Onyango for 2nd Respondents. The arguments actually restate and reiterate what has already been availed in writing. Delving into what was argued would be a repetitive exercise.

I have already substantially stated the salient aspects in my highlight of what was availed in writing. But it is worth pointing out the Respondents side availed the decided case of **JAMIN KIOMBE LIDODO VS EMILY JERONO KIOMBE & Another: HCC NO.81/05**, Eldoret, where Jeanne Gacheche J. opined that where the applicant has not shown title to the suit land, it would be unsafe to assume that a prima facie case with probability of success has been shown.

19. A look through what was availed shows various issues that emerged. There is contention as to whether the applicant fully paid the purchase price for the suit property; whether the suit is caught up by Limitation of Actions Act (Cap 22); whether the 2nd Respondent is a bonafide purchaser for value without notice; whether the applicant has approached the court within clean hands; whether the Respondents have been fraudulent in their dealings regarding the suit property; and ultimately whether the applicant has presented a case deserving of the prayers being sought.
20. Some of these issues however are not suitable for canvassing through arguments in an application. They require evidence and facts. Full determination is therefore only possible after a full trial. One such issue, for instance is whether the applicant has paid the full purchase price for the suit property.
21. But there are two issues in my view which overshadow the others at this stage and which, when determined, would be a pointer to the way this application should go. The issues are whether this suit is caught up by the Limitation of Actions Act (Cap 22) and whether the applicant approached the court with clean hands. The only other issue to add is whether the applicant has met the criteria necessary for grant of injunctive relief. Such criteria would require demonstration of a prima facie case with probability of success, possibility of irreparable loss if injunction is not granted and, in case of doubt as to these two, whether the balance of convenience is in the applicants' favour.

This criteria was spelt out in the decided case of **GIELLA VS CASSMAN BROWN & CO. LTD: (1973) EA 358**.

22. But it is also clear that there are other considerations. In **KENYA HOTELS LIMITED VS KENYA COMMERCIAL BANK LTD & Another: (2004) 1KLR 80**, Ibrahim J (as he then was) observed that the court should look at all circumstances including the conduct of the parties. In other instances, one may satisfy one requirement and fail to satisfy the other. This is what happened in **CULTIVATE TECHNOLOGIES LTD VS SIAYA DISTRICT COTTON FARMERS CO-OPERATIVE UNION: (2004) 1 KLR 693** where an application was dismissed because though the defendant had shown a prima facie case with high chances of success, it failed to show that it would suffer irreparable loss which could not be compensated by damages.
23. And while still on the issue of irreparable loss and adequacy of damages, it could well turn out that in a given case, damages are an adequate remedy. But if the applicant shows that the respondent/defendant is not possessed of the means to pay such damages, the court will grant the injunctive relief. **DAVID BAKIBINGA** in his book **“EQUITY & TRUSTS”** at page 85, is making this point when, while expatiating on the issue of sufficiency of damages, observes that an injunction will still issue in a situation where damages are an adequate remedy if it is shown that the **“defendant is a pauper”**.
24. Ojwang J (as he then was) expounded more on the law in the case of **SULEIMAN VS AMBOSELI RESORT (2004) 2 KLR 589** when he stated that the court should also consider opting for the lower rather than the higher risk of injustice should it ultimately turn out to have been wrong.
25. As I pointed out earlier, the assertion by the 1st Respondent that the applicant's suit is caught up the statute of Limitations is important to consider. The applicant seems to have transacted with the 1st Respondent way back in 1999. This suit was filed on 16/9/2013. This seems to be well over 12 years that Section 7 of Limitation of Actions Act (Cap 22) provides as the period within which a matter of this type should be brought. The applicant tried to explain the delay in bringing it by explaining that he has all along been in occupation of the land.
26. With respect, this explanation is unsatisfactory. It is clear the 1st respondent refused to co-operate long ago. It is clear that leave of Court to bring the suit ought to have been sought. May be the applicant has other reasons to offer but at this stage, this assertion by the 1st Respondent is not satisfied by the explanation given.
27. And the fact that such a long period has passed without filing the suit raises the issue of delay. It is said that delay defeats equity. What the applicant is seeking is an equitable remedy. Without a plausible explanation being proffered by the applicant for the delay, it follows that he cannot avail himself of this remedy. The point I am making here is well made by **MARK P. THOMPSON** in his book **“MODERN LAND LAW”** (Fourth Edition) at page 540 where he observes:

“As with all equitable remedies, the grant of injunction is discretionary but that discretion is exercised in accordance with settled principles, so that, for example, delay in bringing an action may cause the injunction to be refused”

I must state here that there is paucity of good explanation for the apparent delay in this case. That disinclines me to exercise discretion in the applicant's favour.

28. I also mentioned the issue of whether the applicant has clean hands. It was brought to the court's attention that he has in the past tried to register the suit property in the name of his own sister. In the applicant's own depositions it is clear he tried to do this. It is apparent that when he tried to do this, the suit property was still in the name of 1st respondent's late father.

The applicant was not the administrator of the estate of the 1st Respondent's father. How then could he

try to do this? In the case of **KENYA HOTELS LIMITED** (Supra – see para 22 herein) we observed that the conduct of the parties is a relevant consideration in deciding whether to grant an injunction.

29. More importantly and specifically, the issue of conduct of the parties was stated in clear cut terms by Ringera J (as he then was) in the case of **MOSES NGENYE KAHINDO VS AGRICULTURAL FINANCE CORPORATION: HCCC NO.1044/2001** where he observed.

“And of course it requires no stressing that as an injunction is a discretionally equitable remedy, if the applicants conduct in relation to the subject matter does not meet the approval of a court of equity, the relief may not be granted however meritorious the case may otherwise have been”.

The applicant herein squandered his chances of a consideration in his favour when he tried to indulge in the kind of conduct mentioned here.

30. Does the applicant have a prima facie case? I doubt it, given the fact that credible averment is made concerning this matter being caught up by the Limitation of Actions Act (Cap 22). In fact, proof of this fact during hearing could well turn out to be fatal to the applicants case given that no leave of court was sought before bringing it.

31. And is the applicant likely to suffer irreparable loss? The applicant says he paid 110,000/= for the land. It appears he does not live on the land. He only farms on it. There does not appear to be any sentimental attachment to it. It appears to me then that this is one case where damages would suffice as a remedy.

32. And what about the balance of convenience? It seems to me that currently, the 2nd Respondent is the registered owner of the land. It has made developments on it. The orders sought by the applicant in the main suit do not seem to address the issue of making him the registered owner. Even if the orders are granted, the ownership will revert to the 1st Respondent's late father. That will not prevent the 1st Respondent from pursuing ownership and again refusing to transfer it to him. And noting that the Applicant has not made an alternative prayer for sufficient refund, I am unable to find that the balance of convenience lies in his favour.

33. All these considerations impel me to hold, which I hereby do, that the application herein is not meritorious. The application is therefore dismissed with costs.

A.K. KANIARU – JUDGE

21/7/2014

21/7/2014

A.K. Kaniaru – Judge

Dianga G. - Court Clerk

Parties – Absent

P.D Onyango for 2nd defendant/Respondent

Nyanga (Absent) for Plaintiff/Applicant

Ayayo (Absent) for 1st defendant/Respondent

Nyauma (Absent) for 3rd and 4th defendants

COURT: The ruling on application dated 13/9/2013 is read and delivered in open Court.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

21/7/2014