



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO.74 OF 2012

MBARAKA KIPKOECH SALAH.....APPLICANT/PLAINTIFF

VERSUS

ABDUL KIBET ROTICH.....1ST RESPONDENT/DEFENDANT

RULING

The application is brought by way of Notice of Motion and is dated 28th May, 2012 and is made under the provisions of **Order 40 Rules 1, 2, 3, and 4** of the **Civil Procedure Rules**.

The applicant prays for the order as listed hereunder:

1. THAT the application be certified as urgent and service be dispensed with in the first instance and be heard *ex parte*.
2. THAT an order of injunction of the honourable court do issue against the 2nd defendant whether by himself or through his agent, servants, assigns, personal or legal representatives from collecting and receiving any or all rents from all or any tenants of all those premises situated in plot No.7 Kaptumo Trading Centre, Nandi County pending the hearing and determination of this suit.
3. THAT in the alternative and without prejudice to the foregoing in prayer 2 above all the tenants be ordered and compelled to pay all the rents due and payable in respect of those premises situate in plot No.7 Kaptumo Trading Centre into an Account at a reputable bank in the name of the Plaintiff herein.
4. THAT preservative orders do issue in favour of the plaintiff/applicant preserving and protecting the property of the Estate of the deceased SALLAH MBARAK pending the hearing and determination of this application and until further order of the court.

In the alternative, the applicant prays that the property be preserved and that the rents be deposited in an interest earning account.

The applicant relies on the grounds on the face of the application and on the supporting affidavit made by MBARAK KIPKOECH SALA made on 28th May, 2012. The suit property is Plot No.7 situated at Kaptumo Trading Centre.

The applicant avers that the property belongs to the Estate of the late SALLAH MBARAK (deceased) and that the 1st respondent is the administrator of the estate of the late FATUMA ABDALA (deceased).

The applicant further avers that the 1st respondent purported to sell the suit property to the 2nd respondent,

whereas he had no *locus* as the property was not listed as a property forming part of the Estate of FATUMA ABDALLA.

The applicant contends that the 1st respondent has conceded that he had no *locus* and was willing to refund to the 2nd defendant the monies received as purchase price.

The 1st respondent in response relied on his replying affidavit made on 18th September, 2012 and on the annexures, thereto.

The 1st respondent concedes that he sold the suit property to the 2nd respondent, though he had no *locus*. That he later realised that the suit property did not form part of his late mother's estate and that it actually belonged to his late uncle's estate. He was willing to refund the monies to the 2nd respondent and prayed that the rental income henceforth be deposited in a joint bank account.

The 2nd respondent in response opposed the application and relied on the replying affidavit made by the ELICKY K. KOGO on 14th September, 2012.

The 2nd respondent avers that the applicant has not taken out Letters of Administration over the Estate of SALLAH MBARAK and therefore has no *locus* to bring this application.

The 2nd respondent avers that he is a bona fide purchaser for value having bought the suit property from the 1st respondent. He further avers that he had been in peaceful occupation of the suit property for a period of over ten (10) years and that the applicant should be stopped from interfering, trespassing or dealing with the suit land in a manner that was detrimental to the 2nd respondent.

The 2nd respondent prayed that the Application be dismissed in its entirety as it was vexatious, frivolous, scandalous and an abuse of the court process.

After hearing the submissions of all counsel for the parties, I find the following issues for determination:

1. *locus*
2. preservative orders.

On the issue of *locus* of the applicant, I have perused the court file and the annexures and find that the applicant petitioned the court vide succession *Ad Litem* cause No.36 of 2012. The applicant was granted Limited letters of Administration. Therefore, I find that the applicant has *locus* and this application is properly before this court.

In this case, the 1st respondent concedes that he had no *locus* or legal interest in the suit property. That he sold the suit property to the 2nd respondent on the mistaken belief that it belonged to his late mother's estate. He later realised that the suit property belonged to his uncle's estate and he is willing to refund to the 2nd respondent monies paid out as purchase price.

The applicant herein seeks for injunctive orders, presumably as against the 2nd respondent only, as the 1st respondent has conceded to the application.

A party seeking for injunctive orders must satisfy the court that he has met the threshold as set down in the case of **Giella V. Cassman Brown and Company Limited** (1973) EA 358. The principles set down in the above cited case are *inter alia*:

- i. *prima facie* case with a high probability of success;
- ii. irreparable loss and damages not bein an adequate remedy;
- iii. where in doubt, thenb the court should determine the matter on a balance of concenience.

In the current case, there appears to be no title to the suit property as none of the parties concerned have annexed a copy or extract of title thereto.

This court notes that the 1st respondent has conceded that he had no *locus* to dispose of the suit property. He had done so under the mistaken belief that it formed part of his late mother's estate.

This court is satisfied that the applicant has made out a *prima facie* case which has high chances of success. That notwithstanding, this court opines that the rights and interest of the parties to the suit property shall be determined at the full hearing.

On the issue of damages, this court reiterates the fact that there appears to be no title document to the suit property and to date no transfer appears to have been effected to the 2nd respondent.

The 2nd respondent has possession of the suit property and is enjoying the rental income of the suit property. This court finds that the monies received as rental income is quantifiable and can be refunded and therefore the issue of irreparable loss does not obtain.

Considering the circumstances of the case, I find that this is a suitable case for preservatory orders and not injunctive orders.

For the reasons stated above, I shall proceed to make the following orders:

- i. The 2nd respondent is hereby restrained from alienating, wasting or damaging the property known as plot No.7 Kaptumo Trading Centre pending the hearing and determination of the suit.
- ii. All rents accruing from plot No.7 Kaptumo Trading Centre to be placed in a joint interest earning bank account, with immediate effect, pending hearing and final determination of this suit.
- iii. The joint bank account to be opened in the joint names of the firms of advocates acting for the applicant and the 2nd respondent.
- iv. Parties at liberty to apply.
- v. The costs shall be in the cause.

It is so ordered.

Dated and Signed at Eldoret this..... day of.....,2013.

A. MSHILA

JUDGE

Dated, Signed and Delivered at Eldoret this 21st day March, 2013. Hon. Justice Fred A. Ochieng.

FRED A. OCHIENG

JUDGE