REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 70 of 2012

DAVID SUGUT …..... 1ST PLAINTIFF/APPLICANT

EDWARD K. CHUMA ..... 2ND PLAINTIFF/APPLICANT

VERSUS

MERCELA CHEPTOO CHUMA .....DEFENDANT/RESPONDENT

R U L I N G

This is a ruling in respect of an application dated 19th November, 2012. The application is brought under the provisions of Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules as well as section 3 of the Civil Procedure Act. The Applicant prays for preservatory orders forbidding and/or prohibiting sale, transfer of land known as Kitale Municipality Block 1/Lessos/1311 pending hearing and determination of the suit herein. The Applicants also seek costs of the application. Interim orders had been granted in respect of an application dated 21/02/2012. This application was however withdrawn on 26/11/2012 and the Applicants indicated that they had filed a fresh application dated 19/11/2012 for which interim orders were granted in the presence of counsel for the Applicants and Respondent. The application dated 19/11/2012 was set down for hearing on 22/01/2013. At the hearing, the Court was informed that the 1st Applicant, David Sugut had died and had been buried shortly before this application came up for hearing. Mr. Mutai for the Applicants submitted that the suit land was originally LR No. Kitale Municipality Block 1/Lessos 63 which was in the name of Titus Sawe Arap Chumo. The said Titus Sawe Arap Chumo died on 12/01/2008 and letters of administration in respect of his estate were granted to David Rugut and Edwin Chuma who are the Applicants in this application. The two applications were issued with grant of letters of administration on 20th June, 2011. As the administrators were preparing for distribution of the estate of the deceased, they realized that the property originally known as Kitale Municipality Block 1/Lessos/63 which was in the name of the deceased Titus Sawe Arap Chuma had been transferred into the name of the Respondent who had gone ahead to subdivide the same and given portions of it to her children and retaining the suit land now known as Kitale Municipality Block 1/Lessos/1311 which the Applicants now want preserved until the suit herein. is heard and determined. The original land was 83.48 Hectares but is now 74.16 Hectares because upon the land being transferred to the Respondent's name, she subdivided it and transferred it to her children hence the balance of 74.16 hectares which is in her name. Records from the lands office show that the land in issue was transferred to the Respondent on 31/12/2004 and Title Deed issued to her on 18/01/2008. On 29/05/2009, a caution against the title was registered at the instigation of one Michael W. Chumo who was claiming beneficiary interest. The said caution was removed on 06/05/2011 pursuant to a Court order. This paved way to closure of the original Title Kitale Municipality Block 1/Lessos 63 which resulted into 13 other individual titles where the suit land is one of them.

The Applicants contend that the transfer of the land into the name of the Respondent was fraudulent. The Respondent herein. is wife of Titus Sawe Arap Chuma who transferred the land into the Respondent in 2004. The Applicants contend that the signature on the transfer was forged and that the

Land Control Board consent to subdivide granted is suspect as it was obtained from South Kwanza Land Control Board as opposed to Central Land Control Board where the suit land falls. The Applicants also took issue with the removal of a caution lodged against the title arguing that it was done without their knowledge. The caution lodged against the title was removed pursuant to a Court order in miscellaneous application No. 6 of 2011 at Chief Magistrate's Court at Kitale. The Applicants therefore contend that this being their case, the suit land is part of the estate of the deceased which should be available for distribution. It is on this basis that the Applicants have come to Court seeking the orders set out hereinabove.

The application was opposed by the Respondent based on the replying affidavit of the Respondent sworn on 18th July, 2012. I must point out from the beginning that this replying affidavit was in response to the application dated 21/02/2012 which was subsequently withdrawn. When a fresh application was filed by the Applicants. At the start of the hearing of the application, Mr. Bosek for the Respondent pointed out that he was aware that the application dated 21/02/2012 had been withdrawn but that he was nevertheless going to rely on the replying affidavit in response thereto to oppose the fresh application. Mr. Mutai in his submissions stated that the Applicant's application remained unopposed as no replying affidavit had been prepared in opposition to the same. With due respect to Mr. Mutai, I do not think that this is the position. A replying affidavit by the Respondent remained on record. It was never withdrawn. Though it was in reference to the application which had been withdrawn, it still answered the allegations raised by the Applicants in the fresh application. There was no need for Mr. Bosek to ask his client to do a fresh reply to be in line with the fresh application. What prompted the filing of the fresh application is that the earlier one had in its prayers indicated that preservatory orders were being sought until the determination of the application whereas in the fresh application, this was changed to read “until the determination of the suit”. This is a minor change which did not call for a fresh replying affidavit. In any case, since the Court allowed Mr. Bosek to proceed to reply, it can still consider his arguments which are on record and the interest of justice demands that whatever pleadings are on record should be considered by the Court without undue regard to procedural technicalities. Mr. Bosek argued that the suit land is not available for distribution as part of the deceased's estate. He argued that he suit land had been given to the Respondent as a gift *inter vivos* almost 4 years into the demise of the deceased. It therefore follows that the suit land is not available for distribution. The suit land was transferred to the Respondent on 31/12/2004. The deceased died on 12/01/2008. Mr. Bosek argued that a gift *inter vivos* is indefeasible and cannot form part of the estate of a deceased.

It is not in dispute that the suit land is registered in the name of the Respondent. What the Applicants contend is that the registration was fraudulent and that is why they want preservatory orders preserving the property until determination of the suit. These preservatory orders are in form of injunction. The question which then calls for determination is whether the Applicants have demonstrated that they have a prima facie case with a probability of success. The principles for grant of temporary injunction were well set out in the celebrated case of **Giella Vs Cassman Brown & Co. Ltd. 1973 EA 358 at 360**. The principles were reiterated in the Kenyan case of **Teresa Shitakha Vs Mary Mwamodo & 4 others (1982 – 1988) IKAR 965 at 966**. Those principles are first an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which will not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.

In the present case, it has been shown that the subject of this case was transferred to the Respondent in the year 2004. The transferor died in 2008. The transfer was executed before an Advocate of the High Court Mr. Walter Wanyonyi. The Respondent subsequently obtained title and proceeded to subdivide the land which she gave to among others, her children and the remainder which is subject of this suit is in her name. A caution which was lodged against the title was removed through a legal process. Besides, the Applicants claiming that it was done without their knowledge, there is nothing which they did to rectify what they allege was done without their knowledge.

They for instance, did not move to set aside the proceedings if they were not aware of the same. The other allegation is that the signature of the deceased was forged. This is just but an allegation. The plot was

transferred into the Respondents name over 3 years prior to his death. There is no allegation that he was not in a good mental state to do so. Can these allegations without more show that the Applicants have a prima facie case with a probability of success? The answer is I think no. The plaintiff's have not demonstrated that they have a prima facie case with probability of success. A property which had been transferred before a deceased died cannot form part of his estate available for distribution. There is nothing which prevents a man from transferring his property to his wife. The deceased was a polygamous man. He had other wives who were not residing on the property. This property was transferred to the Respondent well before the demise of the deceased. She has subdivided it and given it to her children. I do not think that an injunction in the circumstances will be in the interest of justice. The balance of convenience. herein tilts against grant of injunction. I decline to grant an injunction. The interim orders of injunction granted herein are hereby discharged. The upshot hereof is that the application dated 19/11/2012 fails and the same is dismissed with no order as to costs given the fact that these are family members.

It is so ordered.

Dated, signed and delivered in Open Court on this 14th day of March, 2013.

E. OBAGA

JUDGE

M/S Nyakibia for Bisok for Defendant/Respondent: Present

Mr. Kiarie for Mr. Limo for Plaintiff/Applicant: Present

E. OBAGA

JUDGE
14/03/2013

MR. KIARIE

I have instructions to ask for a mention date for parties to confirm if they will have complied with pre-trial requirements.

COURT

Mention on 10/04/2013.

E. OBAGA

JUDGE
14/03/2013