



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 119 of 2012

TABARNO BUSIENEI *Alias* MARTHA J. BUSIENEI

JOSEPH IKIGU THUKU.....PLAINTIFFS

VERSUS

SUSAN KIPRONO DEFENDANT

RULING

The Applicants herein brought a Notice of Motion dated 14th September, 2012 seeking temporary injunction restraining the Defendant/Respondent from selling, transferring, leasing, charging or in any other way disposing of or interfering, cultivating, using or in any other way whatsoever interfering with the Plaintiffs/Applicants user of the land comprised in Title No. Trans-Nzoia/Sinyererere/36. The Applicants obtained a temporary injunction ex-parte on 27/09/2012. The motion was finally heard inter-partes on 24/04/2013. The temporary orders of injunction were obtained ex-parte on the ground that the Respondent had gone to Court and obtained a grant in Kitale High Court Succession Cause No. 237 of 2009 without disclosing that there was an earlier succession cause in respect of the same estate undertaken vide Kitale Senior Resident Magistrate Succession Cause No. 24 of 1988. The Applicants argued that the property in issue had vested in themselves vide Eldoret HCCC No. 170 of 1991 (OS), Kitale SRM Land Case NO. 30 of 1996 and Kitale CM Land Case No. 13 of 2004 and that no appeals had been preferred against the said judgment. The Applicants contend that the Succession Cause which the Respondent carried out vide Kitale High Court Succession Cause No. 237 of 2009 and the subsequent registration of the Respondent as owner property known as Trans-Nzoia/Sinyererere/36 was irregular. The Applicants argue that the property comprised in the said title which was 32 acres had been fully taken up by the Applicants and that it should not have been subject of Succession Cause No. 237 of 2009. The first Applicant contends that she acquired 22 acres out of the suit land by way of adverse possession vide Eldoret High Court Civil Case No. 170 of 1991 (OS). The first Applicant then surrendered 11 acres to her brother Kimutai Arap Bii by virtue of decree in Kitale Senior Principal Magistrate's Land Case No. 30 of 1996. The second Applicant contends that he obtained 9 acres of the suit land on the strength of the decree in Kitale Senior Principal Magistrate's Court Land Case No. 13 of 2004 and that he later bought one acre from Kimamai Rotich Siratei a a cost of Kshs 138,000/- making a total of 10 acres.

The Applicants' application was opposed through the Respondent's Replying Affidavit sworn on 26/03/2013 in which the Respondent contends that the issues being raised in the present suit were addressed in Succession Cause No. 237 of 2009. The Applicant contends that Succession Cause No. 24 of 1988 relates to Kiprono Tanui Kipngetich who died on 10/03/1988 whereas Succession Cause No. 237 of 2009 relate to the estate of Kiprono Arap Tanui who died on 1st March, 1990.

I have carefully gone through the Applicants' as well as the Replying Affidavit by the Respondent and the submissions by Counsel for the parties herein. The Applicants prayers in the plaint herein are for

cancellation of the Respondent's title and registration of the same in the Applicants' names. The basis of this is that the land comprised in the title which is being sought to be cancelled had vested in them based on judgments in Eldoret HCCC No. 170 of 1991, Kitale SPM Land Case No. 30 of 1996 and Kitale SPM Land Case NO. 13 of 2004.

The Applicants are seeking a temporary injunction against the Respondent pending the hearing and determination of the suit herein. The principles for grant of a temporary injunction are now well set out in the celebrated case of ***Giella Vs Cassman Brown & Co. Ltd. [1973] EA 358***. The 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 deciding whether to grant the injunction sought, I will examine the application herein in light of the above principles. When the Applicants filed this application, the first Applicant did not disclose to Court that she had unsuccessfully tried to annul the grant issued to the Respondent in Succession Cause No. 247 of 2009. The first Applicant's application for annulment of the grant was on the basis that there was an earlier Succession Cause in respect of the same deceased on the basis of which she moved against the administrators of the estate of the deceased in Eldoret HCCC No. 170 of 1991 where she obtained orders granting her 22 acres on the basis of adverse possession. The first Applicant did not convince the Court that there was indeed a Succession Cause in respect of the same deceased on the basis of which she moved against the administrators of the estate of the deceased in Eldoret HCCC No. 170 of 1991 where she obtained orders granting her 22 acres on the basis of adverse possession. The first applicant did not convince the Court that there was indeed a Succession Cause in respect of the same deceased. The question of the names Kiprono Tanui, Kiprono Arap Tanui and Kiprono Tanui Kipngetch were addressed and the Court arrived at a finding that there were no convincing reasons shown to make a finding that all the three names were referring to the same person. The Court found that there were no grounds to annul the grant issued to the Respondent herein. The Respondent obtained title based on the grant which the first Applicant unsuccessfully sought to nullify. The question which then emerges is whether the Applicants have shown that they have a prima facie case with a probability of success. From the submissions filed by the first Applicant who was the objector in Succession Cause No. 247 of 2009, it was contended that the suit property herein was sold by the deceased to the brother of the first Applicant herein Kimutai Arap Bii on 26/06/1970. If this is the position by the first Applicant, the question which then begs for an answer is as to why she decided to bring a case against the alleged administrators of the estate of the deceased in Eldoret HCCC No. 170 of 1991. If she was indeed convinced that the land had been bought by her brother in 1970, then she should have directed her claim for adverse possession to her brother Kimutai Arap Bii. The first Applicant's claim is based on land obtained by adverse possession against the administrators of the estate of the deceased one Kiprono Tanui Kipngetch. This deceased has not been shown that he is the one known as Kiprono Arap Tanui. The alleged administrators never came up to shed light on the names as the Court found during the objection proceedings. The Applicants particularly the first Applicant did not bother to demonstrate that the three names refer to one and the same person. How then is the Court to find that she has a prima facie case with a probability of success. What the 1st Applicant has tried to do is to avail a letter from the Registrar of Persons Trans-Nzoia purporting to nullify the Death Certificate which the Respondent herein used to obtain Grant For Letters Of Administration in respect of her deceased husband. It is not clear on the grounds upon which the registrar arrived at canceling the Death Certificate. If the first Applicant wanted the letter to assist her case, she should have taken the letter during the objection proceedings in Succession Cause No. 247 of 2009. Her inclusion of the letter amounts to asking this Court to review a ruling in respect of a grant which has already been confirmed before a different Court.

The 2nd Applicant contends that he obtained 10 acres from Kimaiyo Rotich Siratei based on decree in Kitale SPM Land Case No. 13 of 2004. It is also contended that the said Kimaiyo Rotich Siratei bought the land from the administrators of the estate of Kiprono Tanui Kipngetch who in turn sold it to him. If this is the position, then Siratei could have bought the land from the administrators who have nothing to do with the estate of Kiprono Arap Tanui whose estate had vested on the Respondent. I therefore find that the Applicants have failed to demonstrate that they have a prima facie case with a probability of success. I do not have to consider the other two principles. The upshot of this is that the

Applicants' application fails and is hereby dismissed with costs to the Respondent. The interim orders of injunction earlier given are hereby discharged.

It is so ordered.

Dated, signed and delivered in Open Court on this 22nd day of May, 2013.

E. OBAGA
JUDGE

In the presence of Mr. Chebii for Chemwok for Respondent and Mr. Kiarie for the Applicants.

Court Clerk: Joan.

E. OBAGA
JUDGE
22/05/2013