



NO.83

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 99 OF 2012

“FAST TRACK”

JACTON LIECH MBWAYO..... PLAINTIFF

-VERSUS-

CHARLES RABEL LIECH.....DEFENDANT

RULING

1. The plaintiff herein is the father of the defendant. The plaintiff brought this suit against the defendant on 20th March, 2012 claiming that sometimes in the year, 2010, the defendant through acts of fraud and misrepresentation caused the Plaintiff’s parcel of land known as LR No. W. Nyokal/ Kanyikela/ 1026 (hereinafter referred to as “**the suit property**”) to be registered in the name of the defendant. The Plaintiff in his Plaint dated 19th March, 2012 prayed for the rectification of the register of the suit property by cancellation of the name of

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the defendant as the proprietor thereof and in place thereof the registration of the plaintiff as the proprietor. Together with the Plaint, the plaintiff filed a Notice of Motion application also dated 19th March, 2012 seeking a temporary injunction to restrain the defendant from selling or transferring the suit property pending the hearing and determination of this suit. When the plaintiff’s application for injunction came up for hearing before Lady Justice R. Korir on 16th May, 2012, the judge after hearing the plaintiff on the application and the defendant in response thereto of her own motion referred the dispute for resolution by a panel of elders to be convened by the District Officer, Nyarongi Division, Ndhiwa District. There was no time frame fixed within which the said District Officer was to file his report in court. The court order referring the matter to the said District Officer was extracted and served upon him. The said District Officer convened a meeting of the elders that he had chosen pursuant to the said court order on

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11th July, 2012. The plaintiff’s claim against the defendant was heard by the elders in the presence

of both parties and a ruling thereon was delivered on the same day. The proceedings and ruling of the said panel of elders were filed in court by the said District Officer on 23rd July, 2012. The panel of elders ruled that the suit property be divided into two portions between the Plaintiff and the defendant. The elders decided that the defendant should retain in his name the portion of the suit property where his homestead is situated and should to transfer to the plaintiff the remaining portion. The panel drew a sketch map of how the said sub-division was to be carried out.

2. The decision of the said panel of elders was read to the parties by this court on 26th November, 2012. Whereas the plaintiff agreed with the said decision, the defendant rejected the same arguing that he had already sub-divided the suit property into five portions and transferred some of the portions to third parties. According to him therefore, it was not possible to

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implement the said decision of the panel of elders. The matter was adjourned and the defendant was asked by the court to produce at his next court appearance evidence of the alleged sub-division that he claimed to have carried out over the suit property. On 8th February, 2013, the defendant produced in court, five (5) certificates of official search for land reference numbers, W. Nyokal/ Kanyikela/ 1679, 1680, 1681, 1682 and 1683. The said certificates showed that the 5 parcels of land referred to therein were sub-divisions of the suit property. The said certificates confirmed the defendant's contention that he had already sub-divided the suit property into 5 portions. The sub-divided parcels are however still in the names of the defendant contrary to his earlier assertion that he had transferred some of the portions of the suit property to third parties. In view of this development, the court asked the parties to go home and discuss how the dispute herein which involves father and son could be resolved amicably. The matter

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was adjourned to 19th March, 2013 for mention when the parties were to report back to court on the outcome of the negotiations they were to hold with a view to resolve the matter out of court.

3. On 19th March, 2013, the parties informed the court that the negotiations had broken down irretrievably and that the matter could not be resolved out of court. The court was asked by the parties to give the way forward in the circumstances. This ruling is therefore as a result of that request. The courts are required by Article 159 (2) (c) of the Constitution of Kenya to promote alternative forms of dispute resolution. The decision to refer the dispute herein to a panel of elders for resolution was informed by the said provisions of the constitution. The reference was made under Order 46 rule 20 of the Civil Procedure Rules which gives the court the power of its own motion, to adopt any appropriate means of dispute resolution for the purposes of achieving the overriding objective of the

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civil procedure act and the rules made thereunder of facilitating the just, expeditious, proportionate and affordable resolution of civil disputes. The panel of elders to which the dispute herein was referred to heard the parties and reached a decision that the disputed property the subject of this suit be sub-divided into two so that the defendant is registered as the proprietor of the portion on which he already had a homestead and the other portion be registered in the name of the plaintiff. This decision of the panel of elders was accepted by the Plaintiff while the defendant rejected the same for the reason that I have already mentioned above. Since the parties have not agreed unanimously to

the decision of the panel of elders, the attempt by the court to have this matter resolved through alternative dispute resolution mechanism has failed. In the circumstances, pursuant to the provisions of order 46 rule 20 (3) of the Civil Procedure Rules, I order that this suit shall proceed to hearing and determination in the normal manner. The plaintiff's

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application for injunction dated 19th March, 2012 that was stayed pending the out-come of the reference of the dispute herein to the panel of elders for resolution should be listed for hearing on a priority basis. The interim order of injunction granted herein on 16th May, 2012 shall remain in force pending the hearing and determination of the said application for injunction. Orders accordingly.

Signed, dated and delivered at Kisii this 21st day of June, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Plaintiff present in person.

No appearance for the defendant

Mobisa Court Clerk

S. OKONG'O,

JUDGE.

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