REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 172 OF 2009

PAUL K. RUTO ….. APPELLANT

VERSUS

MARY JEMAIYO RUTO …....................................... 1ST RESPONDENT

ROBERT CHIRCHIR .... 2ND RESPONDENT

DAVID CHIRCHIR …... 3RD RESPONDENT

(Being an appeal from a ruling delivered by Hon. D. Alego in Eldoret Chief Magistrate's Civil Case No. 179 of 2009 on 16th October, 2009)

JUDGMENT

The Appellant herein was the Applicant and the Plaintiff in the lower court proceedings while the Respondent was the Defendant and the Respondent in the application that is subject of the appeal herein

In the main suit, the Appellant sought an order of permanent injunction to stop the Defendants by themselves or through their servants and/or agents from interfering or dealing in whatever way with the parcel of land known as [**MOIBEN/LOLKINYEI BLOCK 8 (CHEBARUS) 164],** claim for mense profits against the Defendants for interfering and resultant loss to the Plaintiff for the year 2009 planting season, costs and interest thereon.

The Appellant's case was that he had lived on the land, enjoyed quiet and uninterrupted possession between the years 2000 and 2009 when the Defendants invaded the land and ploughed it without his permission.

In the suit, the Appellant filed a Chamber Summons application dated 31st March, 2009 in which he sought a temporary injunction to issue against the Defendants by themselves or through their servants from interfering, entering or in any way dealing with that piece of land known as [**MOIBEN/LOLKINYEI BLOCK 8 (CHEBARUS) 164].**

The application was opposed vide a Replying Affidavit sworn by Robert K. Rutto, the 2nd Defendant, on his behalf and that of the 1st and 3rd Defendants.

According to the 2nd Defendant, the suit land had been subdivided into five (5) portions and duly distributed to the estate beneficiaries, but that unfortunately the whereabouts of the title to the land is unknown. He states that the suit land belonged to Kipchirchir Ruto, who is now

deceased but in whose name the title remains.

Effectively therefore, the sub-division of the suit land to any beneficiaries is informal.

It is his contention that no succession cause has been filed. He denounces any sale agreement made between the deceased and the Plaintiff.

In her ruling delivered on 16th October, 2009, the learned Magistrate, found that she had no locus standi to decide on the application which should be subject of a succession cause.

It is against this finding of the learned Magistrate that the Plaintiff filed this appeal. He has raised four (4) grounds of appeal namely:-

1. The learned magistrate erred in law and fact by not taking into consideration the grounds raised in the application the affidavit filed and submissions/reasons advanced by the applicant.

2. The learned magistrate misdirected herself on a point of law and fact by holding against the weight of evidence tendered by affidavits that the subject matter in the case was a succession issue.

3. The learned magistrate erred in law by making a finding that she had no jurisdiction to entertain the application but could entertain the suit.

4. The learned magistrate erred in law by misdirecting herself to extraneous issues and therefore arrived at a wrong decision.

This being an appellate court cannot interfere with the findings of the trial court unless it is based on misapprehension of the evidence or the Judge or Magistrate (my own) is shown demonstrably to have acted on wrong principles – **EPHANTUS MWANGI & ANOTHER –VS-DANCUN MWANGI WAMBUGU (1982 – 1988) 1 KAR, 278**.

Therefore, my task is to determine whether the learned Magistrate acted judiciously and within the law guided by the right principles in arriving at a finding that she had no locus standi to determine the application before her.

In his submissions, counsel for the Appellant reiterated that by disregarding the contents of the affidavits, the learned Magistrate misdirected herself and missed pertinent points which required evaluation as per the principles of granting an injunction.

He submitted that the agreement between the deceased and the Appellant were legal and had been attested (witnessed) by a Chief in the presence of the Respondents. It was his submission that the Respondents failed to appreciate the fact that, by the time the deceased died, the purchase transaction had been completed, and that the land was no longer part of the deceased's estate and hence cannot be subjected to succession proceedings.

The Respondents on their part concurred with the ruling of the learned Magistrate. It is their submission that interest in title to land is conferred by the Registered Land Act (currently the Land Registration Act, Act No. 3 of 2012). That under S. 28 of the former, the rights of a registered proprietor shall not be liable to being defeated and such rights shall be held by the proprietor from all interests and claims.

The Respondent concurred with the learned Magistrate that the suit revolves around the Law of Succession Act, Cap 160, Laws of Kenya. It is their contention that they are in the process of filing a succession cause in respect of the entire estate of the deceased.

They also denied having knowledge of any sale agreements between the deceased and the Appellant or letters of consent before the Land Control Board.

I have now appraised myself with submissions made by the respective counsel.

Facts on record shows that the suit land[**MOIBEN/LOLKINYEI BLOCK 8 (CHEBARUS) 35]** is still in the name of the deceased Kipchirchir Ruto. Under Paragraph 9 of the Replying Affidavit, the Respondent had referred the court to annexture RC1 as the official certificate of search from the land registry and certificate of death of the deceased. But only one copy of the death certificate is annexed. A perusal of the physical court record too reveals that only a copy of the death certificate was annexed to the Replying Affidavit.

Be that as it may, it is not in contention that as at date, the suit land is registered under the then Registered Land Act which gave sole proprietorship to the holder of the title – in this respect, the deceased, Kipchirchir Ruto.

My evaluation of the depositions contained in the Replying Affidavit are a testimony that no Succession Cause has been filed by the family of the deceased with a view to distributing his estate. What the Respondent is calling a distribution of the estate is an informal one which is not recognized in law, unless and until the same is formalized through a succession cause.

Paragraph 6 of the Replying Affidavit shows that the informal distribution has been in the following manner:-

(a) Forty (40) acres to the deceased’s four (4) sons each of whom is to take ten (10) acres.

(b) Four (4) acres to the deceased’s two wives/widows in equal shares of two acres each.

The intrigue in the sub-division of the suit land has been brought about by the presence of the Appellant. The Appellant claims to have purchased the land from the deceased through assisting the latter to pay a loan of Ksh. 48,700/= he owed to Agricultural Finance Corporation (A.F.C).

The Appellant in proving that he paid this amount has annexed a copy of receipt issued to him by A.F.C. upon the payment. It is annexture ‘PK.5’ in the Supporting Affidavit.

The copy of receipt shows that the sum of money was received from “**Paul K. Ruto A/C Kipchirchir Ruto”.** Below the names and the stated amount paid is ticked the purpose for which the money was paid which is “**instalment/interest payment”**.

A further sum of Ksh. 3,900/= was paid on the same date (29/6/2000) for the same purpose.

Annextures ‘PKR 1’ and ‘PKR 2’ are sale agreements dated 30th June, 2000 and 26th February, 2001 respectively between th deceased as the Vendor and the Appellant as the Purchaser.

In the first sale agreement, the Vendor sells two (2) acres to the Appellant while in the second agreement, he sells a further two (2) acres, thus disposing of four (4) acres of the suit land to the Appellant.

Annextures ‘PK 3’ and ‘PK 4’ are letters of consent from the Land Control Board dated 27th June, 2002 and 8th August, 2002 respectively. The first is in respect of sub-division of the suit land into five (5) portions and the second is in respect of a transfer of one hundred and sixty two (162) Hectares from the name of the deceased into the name of the Appellant.

The scenario presented by this kind of sub-division throws the court into a total confusion. This is because it does not shed light on how the deceased intended to sub-divide his land in a specific manner.

I have taken the trouble to give the case presented in the affidavit so as to shed light that indeed the Appellant filed the suit in the subordinate court because he believes he has a genuine case. The pleadings however, as they are, try to portray the picture that the Appellant bought the whole parcel of the suit land, whereas documents I have referred to paint a picture that he may only be entitled to a portion of it.

Be that as it may, this court must address itself as to whether, the orders sought in the suit and by extension the application that is subject of this appeal were deserving before the subordinate court, or any other court through a civil suit.

I have already noted that the title to the land is still in the name of the deceased. The most unfortunate unfolding is that the Appellants, who are closest to the deceased claim they have no clue as to its whereabouts.

Whether or not the Appellant properly and legally purchased the whole or a portion of the suit land is subject of determination by the trial court.

It is common knowledge that once a deceased dies, his/her property cannot devolve to his/her heirs unless and until a succession cause has been filed by the administrators of the estate. Upon confirmation of such grant, the administrators of the estate distributes the estates not only to the heirs but also to such other persons claiming beneficial interest in the estate. The category of persons in the latter majorly include the Purchasers. The Appellant definitely falls under this category given that he purchased a portion of the suit land. Therefore, it is only prudent that he awaits the time of distribution of the estate, whereupon he shall claim his beneficial interest as a Purchaser.

However, according to him (Appellant), he has tilled the land since he purchased it in the year 2000 and that hell broke loose in the year 2009 when the Respondents deemed him as a stranger in the suit land.

He thus moved the subordinate court by way of the Chamber Summons application dated 31st March, 2009 so as to protect what he feels is his right to continue occupying and working what is rightfully his.

The issue for determination before the Honourable Magistrate was whether or not the order for injunction was merited.

Guidelines on principles to be applied in granting an injunction are well laid by the superior courts. Notwithstanding the fact that the Appellant's claim to the suit land has a law of succession inclination, the learned Magistrate was obliged to determine whether or not the Appellant deserved the orders of injunction he had sought.

It is in the evaluation of facts and law presented before her, some of which include the issues that I have enunciated in this Judgment, that she would have arrived at a finding as to whether or not the order of injunction was merited. In particular the lower court would have addressed itself to issues as to the likelihood of the suit succeeding. Such would be guided by factors such as the nature of the interest the Appellant has in the suit land.

Another pertinent issue for consideration would be whether, if the order sought is not granted, the Appellant stood to suffer irreparable loss.

In essence it was wrong and a misapprehension of facts presented by the application, that

the learned Magistrate ruled that she had no “**locus standi”**.

In my view, she misapprehended the fact that the merit of an application was to be determined upon evaluating the principles laid down for consideration in granting an injunction. The manner in which she ruled was unprocedural given that the main suit is still pending. Moreso, as I have pointed out above, even if she felt inclined to dismiss the application, this should have obtained after evaluating whether or not the prayer for injunction was merited.

It is in that ruling that she would have given an indication to the parties on the need to file a succession cause.

I do accordingly find that dismissal of the application on ground that the learned Magistrate had no locus standi was erroneous. In the result, I allow the appeal with orders that the ruling delivered on 16th October, 2009 dismissing the Chamber Summons application dated 31st October, 2009 is hereby set aside. The said application is reinstated and shall be heard on its merit by another Magistrate other than the one who heard the same and delivered the ruling.

Costs of the appeal to the Appellant.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 21st day of June, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

Mutai holding brief for Limo for the Appellant

Tororey holding brief for Cheptarus for the Respondents