



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.164 OF 2011

CHRISTOPHER OGUTU.....PLAINTIFF

VERSUS

MAURICE OMOLO PINTO & 4 OTHERS.....DEFENDANTS

RULING

On 22/4/2013, this court heard interpartes the Notice of Motion filed on 4/2/2013 and dated 25/1/2013. The motion is anchored on Order 40 Rule 1 and 2 of Civil Procedure Rules and Sections 1A, 1B and 3A of Civil Procedure Act. It was brought under a Certificate of urgency.

Essentially, what is sought at this stage is prayer 3, which is for a temporary injunction, restraining the respondents whether by themselves, their agents, servants and/or employees from interfering, disposing, trespassing into or in any way dealing with Land parcels No. **NYAKACH/KABOTHO/EAST 3979, 3980, 3981, 3982, 3983, 3984, 3985, 3986, 3987 and 3988** until the suit is heard and determined.

The court is also asked to provide for costs.

The grounds advanced in support allege that the respondent (which one is not clear) is busy selling the land and has also fraudulently sub divided it.

In supporting affidavit, the applicant/plaintiff depones to have filed a suit against **ZABLON OYOO OMULLO** alias **WILLIAM TOLBERT SHIKUKU** (3rd defendant/respondent). The case however was withdrawn when the said **SHIKUKU** pleaded lack of knowledge of the land.

Shikuku is said to have continued selling the land. The applicant alleged Shikuku is the administrator of the estate of the late **WILLIAM OMULO** having obtained letters of administration unlawfully and fraudulently. Shikuku is said to be hellbent on sub-dividing the land further.

A replying affidavit by 2nd defendant/respondent for himself and the others is on record. He denied that **ZABLON OYOO OMULO** and **WILLIAM TOIBET SHIKUKU** are one and the same persons.

He stated that Zablou is his brother while Shikuku is a person he sold land to, the same being parcel No. **KISUMU/KABOTHO EAST/3984**.

It was denied that the applicant herein is the administrator of the estate of the late **WILLIAM OMULO**. It was asserted that the administrator is **JOSIAH PINTO OGONY**, who was appointed as such vide Succession Cause No.137/1984. The second defendant continued to say that Shikuku has never been an

administrator. The applicant is also said not to have lodged objection to succession proceedings.

As stated at the beginning interpartes hearing took place on 22/4/2013. The application was stated to be essentially against 1st, 2nd, 3rd and 4th defendants/respondents, who are related to plaintiff/applicant.

The original piece of land was **NYAKACH/KABOTHO EAST/519** which has now been sub-divided into parcels: **NYAKACH/KABOTHO EAST/3979, 3980, 3981, 3982, 3983, 3984, 3985,3986, 3987 and 3988**. The sub-division is said to have taken place without the consent of the plaintiff/applicant who is the son of the late **WILLIAM OMULO**.

The court is being asked to stop further transactions. Some of the transactions that have already taken place – like selling some parcels – are said to be surrounded by mischief.

In response, Omondi for respondents said **JOSIA PINTO OGONE** was the administrator of the land. The applicant is not the administrator, Omondi said. The grant given to him was limited only to the filing of this suit.

Omondi pointed out that for the court to grant injunctive relief, the applicant must demonstrate a prima facie case with a probability of success or demonstrate he will suffer irreparable loss. Where the court is in doubt as to these two requirements, then it is enjoined to decide the matter on a balance of convenience.

The original land – **NYAKACH/KABOTHO EAST/519** was said to belong to the late **WILLIAM OMULO**. The late Omulo was father to applicant, 1st defendant, 2nd defendant and father in law to 4th defendant. The 3rd defendant Shikuku was a purchaser of a parcel of land resulting from the various sub divisions of the original piece of land.

The court was told that **JOSIAH PINTO**, the administrator, distributed the estate of the deceased and his work ended at that.

The applicant, it was said, is not the administrator. He never also lodged any objection to succession proceedings.

Mwamu for applicant replied by saying the court has not been given confirmation of Grant document. He said there can be no distribution of estate without such confirmation.

I have considered the application, the replying affidavit, and the hearing that took place on 22/4/2013. It is the respondent's counsels who captured properly the essentials necessary for granting an injunctive relief. The applicant's counsel did not make any reference to them. Simply Put, the plaintiff's counsel didn't endeavour to demonstrate that a prima facie case was established. But may be an argument can be advanced that his address to the court precisely aimed at establishing such a case. If that be the case, then there was a serious counter- move by the other side. And there are also some lapses in the application which go against the applicant. For instance, the applicant says he is the administrator of the estate of the late Omulo's estate. To that effect, he should have availed the necessary grant. He did not and what he has is only a grant to enable him file this suit. In contrast, the other side was able to show that one Josiah Pinto was the administrator. The applicant also deponed that the 3rd defendant **SHIKUKU** fraudulently obtained letters of administration. As proof of that, he availed annexure CO-3. A look at annexure CO-3 show **JOSIA PINTO OGONY** as administrator instead of **SHIKUKU**. There is also the mention of **SHIKUKU** (3rd defendant) as the same person as **ZABLON OYOO OMULLO**. This is done at para 2 of supporting affidavit. But it is shown well that Zablun and Shikuku are two different persons.

The allegation of distribution of the estate of the late Omulo by Josiah Pinto was denied on the ground that there is no confirmation of grant. But in the respondents list of documents, such confirmation is shown by a Certificate of Confirmation dated 15/9/1986.

It is therefore clear that there are some untruths coming from the applicant's side. Injunctive relief is an

equitable remedy and sincerity is very important. When the situation is the way the applicant presented it, no one can say a prima facie case is established.

The next thing is to consider whether the plaintiff would suffer irreparable loss or, as alternative, whether damages would be an adequate remedy.

The court was not addressed on this. It has not been demonstrated that the plaintiff would suffer irreparable loss or that he can't be adequately compensated in damages. This is another weakness in the presentation of the applicant's application.

And when the arguments and counter – arguments are considered the court is unable to find that the balance of convenience lies in favour of the applicant.

When all is considered therefore, this application is for dismissal and the same is dismissed with costs.

A.K. KANIARU – JUDGE

31/7/2013

31/7/2013

A.K. Kaniaru – Judge

Roseline O. - Court clerk

No party present

interpretation – English/Kiswahili

Onsongo for Mwamu for Applicant/plaintiff

Omondi M (absent) for 1st, 2nd, 3rd and 4th defendants

M/s Aliongo for 5th and 6th defendants.

COURT: Ruling on application dated 25/1/2013 and filed on 4/2/2013 read and delivered in open COURT.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

31/7/2013