



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO. 274 OF 2013

DANCAN MOSONGO NYAKONI.....PLAINTIFF

VERSUS

PETER NYAKONI KEREU.....DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant seeking; a permanent injunction to restrain the defendant from trespassing on, dispossessing, harassing or in any other way interfering with the plaintiff's quiet occupation and possession of all that parcel of land known as **LR No. South Mugirango/Nyataro/318** (hereinafter known as "**the suit property**"), a declaration that the title of the suit property held by the defendant is null and void and that the same should be revoked and, a declaration that the Plaintiff's mother is the lawful owner of the suit property and that the same should be registered in her name. In the Plaint dated 18th June, 2013, the plaintiff claimed that the defendant had caused the suit property to be transferred to his name fraudulently through the use of forged and illegal documents. The Plaintiff claimed further that after the said illegal transfer, the defendant proceeded to remove the boundary that had separated the suit property from the defendant's parcel of land known as **LR No. South Mugirango/Nyataro/317**(hereinafter referred to as "**Plot No. 317**") and claimed ownership of both parcels alleging that they are under one title. The Plaintiff claimed that the defendant thereafter threatened the Plaintiff and his family with eviction from the suit property and prohibited them from utilizing the same. It is for the foregoing reasons that the Plaintiff sought the reliefs that I have set out at the beginning hereof. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 20th June, 2013 seeking a temporary injunction to restrain the defendant from transferring, charging, clogging and/or dealing in any other manner with the suit property pending the hearing and determination of this suit. In his affidavit sworn on 20th June, 2013 in support of the application, the Plaintiff reiterated the contents of the Plaint that I have highlighted above. The Plaintiff contended further that the defendant transferred the suit property into his name illegally and that the documents used by the defendant to transfer the suit property into his name are the subject of investigations by the police. The Plaintiff annexed to his affidavit in support of the application; a copy of the document of transfer dated 9th July, 2002 by which the suit property was transferred by one, Abonyo Kereu to the defendant, a copy of a certificate of official search dated 27th May, 2004 with respect to Plot No. 317 which shows that the same is registered in the name of one, Barasio Kereu, a copy of a certificate of official search with respect to the suit property dated 27th May, 2004 which shows that the same was registered in the name of the defendant on 9th July,

- 2002, a copy of an identity card for one, Maria Obonyo Kereu, a copy of a burial permit for one, Maria Obonyo Kereu dated 28th March, 2013, a copy of an extract of the register for the suit property and a copy of a letter from the assistant chief of Nyabera Sub-location dated 8th April, 2013 addressed to whom it may concern concerning the said Maria Obonyo Kereu.
2. The Plaintiff's application was opposed by the defendant. In his replying affidavit sworn on 26th June, 2013, the defendant deposed that the Plaintiff is his son by his second wife and that the Plaintiff lacked the locus standi to institute this suit. The defendant contended that one, Maria Abonyo Kereu (deceased) referred to hereinabove is his step-mother and that the defendant, his mother and siblings have stopped him from burying her. The defendant denied all the allegations contained in the Plaintiff's affidavit in support of the injunction application. The defendant termed the Plaintiff's claim herein as misconceived, baseless and unmerited.
 3. The application came up for hearing on 2nd July, 2013 when Mr.Ochwangi, Advocate appeared for the Plaintiff and Mr. Nyariki, advocate appeared for the defendant. In his submission in support of the application, Mr.Ochwangi relied entirely on the grounds set out in the body of the application and on the Plaintiff's affidavit sworn on 20th June, 2013 in support of the application and urged the court to allow the same. In response, Mr. Nyariki submitted that this suit has been brought by the Plaintiff on behalf of a deceased person without the Plaintiff first obtaining a grant of letters of administration with respect to the estate of the said deceased that would have enabled the Plaintiff to maintain this suit. The defendant's said advocate submitted that in the circumstances, the Plaintiff lacks the *locus standi* to bring this suit together with the present application for injunction. Counsel submitted that the Plaintiff's injunction application has no merit and the same should be dismissed together with the entire suit.
 4. The principles applicable to applications for interlocutory injunction are well settled. As was stated in the case of **Giella -vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for interlocutory injunction must show that he has a prima facie case with a probability of success against the respondent and that unless the order is granted he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. I must admit at the outset that I have not been able to understand the Plaintiff's case herein. I have been unable completely to appreciate the Plaintiff's cause of action against the defendant. From the material placed before this court, the suit property which is in dispute in this suit was registered in the name one, Abonyo Kereu who seems also to be known as Maria Obonyo Kereu(deceased). The suit property was transferred to the defendant on 9th February, 2002 by the said deceased. It has not come out clearly in the Plaintiff's pleadings but it appears that it is this transfer which the Plaintiff is disputing in this suit. The Plaintiff's contention seems to be that the deceased, Abonyo Kereu a.k.a Maria Obonyo Kereu did not transfer the suit property to the defendant and that the document of transfer that was purportedly executed by the said deceased was a forgery. What has not come out from the Plaintiff's pleadings is the Plaintiff's relationship with the deceased that would entitle him to challenge the said transfer and to seek the revocation of the defendant's title over the suit property. What is even more intriguing is that the Plaintiff has sought an order that his unnamed mother be declared the lawful owner of the suit property. Again, the Plaintiff has not brought out in the pleadings on what basis he is seeking such relief on behalf of his mother who seems to be alive and the interest that his said mother has on the suit property a part from the alleged occupation. As rightly submitted by the advocates for the defendant, the Plaintiff has no locus standi to maintain a suit to protect the interest of a deceased person without first obtaining a grant of letters of administration empowering him to administer the estate of the deceased or to file a suit with a view to protect the estate. It follows that the Plaintiff has no right to challenge the transfer of the suit property by the deceased to the defendant. The Plaintiff also has no right to bring this suit on behalf of his mother as there is no evidence that the mother is of unsound mind and that the Plaintiff has brought the suit as her next friend.
 5. Due to the foregoing, I am not persuaded that the Plaintiff has established a prima facie case with a probability of success against the defendant. Having reached that conclusion, I am not obliged to

consider whether the Plaintiff would suffer irreparable harm unless the order of injunction sought is granted. The Plaintiff's Notice of Motion application dated 20th June, 2013 lacks merit. The same is accordingly dismissed with costs to the defendant.

Dated, signed and delivered at Kisii this 20th day of September, 2013

S. OKONG'O,

JUDGE.

In the presence of:-

No appearance for the Plaintiff

Mr. Nyariki for the Defendant

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.