REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Civil Suit 132 of 2011

1. MOSES SHADRACK KARISA &

2.RACHEL NYEVU KARISA .....PLAINTIFFS

-VERSUS-

PETER MBUGUA KIMANI .....DEFENDANT

R U L I N G

1. Before me is a Notice of Motion dated 30th August 2011 seeking to restrain the Defendant from selling, transferring, charging and/or mortgaging or alienating the parcel of land known as Plot NO. 18(ORIGINAL NO. 12/7) GROUP X, located at Mtondia/Mwangombe in Kilifi. The application is brought under 040 r 1 (a), 2 and 4 (1) Civil Procedure Rule.

2. It is premised on several grounds, the main one being that 20 acres of the suit property are part of the estate of the late SHADRACK JOSEPH KARISA (the deceased). The plaintiff applicants who claim to be the representative of the said estate assert that the deceased had beneficial interest in the portion claimed and that the same was fraudulently registered in the name of the defendant.

3. These grounds are further expanded in the supporting affidavit of MOSES SHADRACK KARISA, the 1st plaintiff. The plaintiffs claim that part of the suit land measuring 20 acres were purchased by the deceased in 1976, from the registered owner, JOHNSON SAMUEL KENGA (the vendor) and the deceased took possession, continued by the representatives. The vendor later reneged and refused to transfer the land, prompting the deceased to file Civil Suit No. 461/91 in which he obtained orders of specific performance in 1992. The plaintiffs complain that seven years later and unknown to them, the vendor sold his entire parcel of land measuring about 30 acres, including the deceased`s claimed portion, to the Defendant.

4. It is alleged that the entire parcel was fraudulently registered in the name of the defendant. Through his

replying affidavit the defendant confirms that he purchased the suit property from JOHNSON SAMUEL KENGA, now deceased, in 1999. The said vendor was then the registered owner of the suit land. He was subsequently registered as the registered owner and issued with a title documents. He stated that he was not aware of the suit involving the vendor and the deceased at the time of the sale.

5. The application was disposed off by way of written submissions, which I have considered alongside the respective affidavits sworn by the parties. The guiding authority with regard to the grant of interlocutory injunction is the case of Giella Vs Cassman Brown & Co. Ltd (1973) EA 358 wherein the following principles were formulated;-

An applicant must show:

1. (a) prima facie case with a probability of success

   (b) that he stands to suffer irreparable injury of the orders sought are not grant

2. If the court is in doubt, it will determine the matter on a balance of convenience.

6. Upon considering all the material before me, I take the following view. There is no dispute that the entire 30 acres of land which includes the suit property measuring about 20 acres was originally owned by the late JOHNSON SAMUEL KENGA who sold it to two different parties; the deceased in 1974 and the defendant in 1999. The defendant is currently the registered owner since 1999. There is no dispute that in 1992 the deceased had obtained an order of specific performance against the vendor who had shown reluctance in the completion of the first agreement.

7. But, the defendant denies that he was aware of the transaction involving the deceased at the time he bought the land. Two key questions have arisen, namely whether the deceased became the beneficial owner of the suit land by virtue of the original agreement and whether the defendant is a bona fide purchaser for value, without notice of the first transaction. These are obviously weighty questions that can only be determined through evidence.

8. However, according to the plaintiffs the deceased took possession of the suit property in 1976 and obtained an order of specific performance in his favour in 1992. That the deceased was indeed in possession of the suit land appears to be confirmed by annexture PMK3 dated 19/6/94 and attached to the Replying affidavit. This letter written by the late KENGA refers to judgment in civil suit 461 of 1992, the deceased`s continued use of the land even while warning him that there was “no future for you since you do not have title for the farm”. On the other hand the Defendant says he was not aware of the suit, a fact challenged by the plaintiffs on the basis that he had custody of the annextures PMK 2 & 3.

9. While the defendant has stated that he conducted a search before purchasing the property, it is not specifically stated that he also visited the suit property. This is relevant in light of the alleged possession of the same, by the deceased, and continued by the plaintiff since 1976. The defendants title is protected by Statute (Section 23 Registered Titles Act) except where there is fraud or misrepresentation. The plaintiffs allege fraud. This is not ascertainable at this stage of the proceedings being a matter for evidence I think, that in the words of the Court of Appeal in Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others(2003) KLR 125, the plaintiffs have shown a “genuine and arguable case”. In that case the court defined a prima facie case as follows;-

“A prima facie case in a civil application includes but is not confirmed to a “genuine and arguable” case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation of rebuttal from the latter”.

At this stage the court is not required to make any definite conclusions on facts or points of law.

10. On the question of damages, it is noteworthy that the subject matter is land which the deceased

appears to have been in occupation of for many years, and currently his representatives who say they have developed their homes thereon. If the orders sought are not granted so that the current registered owner is free to transact in the land, there is could be real danger of alienation. Such a development would render it difficult if not impossible for the plaintiff to gather the estate of the deceased, more so with the complications posed by any new parties to this matter, such as fresh purchasers.

11.Secondly, the plaintiffs would no doubt be exposed to the trauma of being uprooted from what they claim to be their home for many years. For all the above reasons, I think it is in the interest of justice to grant the plaintiffs prayer no. 3 in the Notice of motion filed on 30/8/11. Costs will be in the cause.

Read and delivered at Malindi this 11th day of May, 2012 in the presence of:

C. W. MEOLI
JUDGE