



REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 20 of 2007

1. DANIEL KIPCHIRCHIR SANG

2. ELIUD KIEMLI KEIYO (suing as administrators

of the Estate of

DINA TONGOI KIPTOO-Deceased).....PLAINTIFFS

VERSUS

PAUL BARABARA SONGOK.....DEFENDANT

RULING:

By Chamber Summons Application dated 8th February 2007 brought under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act and Section 45 of the Law of Succession Act, the Plaintiff prays for the following orders:

3. THAT a temporary injunction do issue, restraining the Respondent whether by himself or assigns, or agents, or anybody whosoever, whatsoever from further entering onto, staying, bringing onto, placing anything, planting anything, erecting anything, leasing, charging, mortgaging, offering as security, transferring and/or in any manner whatsoever interfering with the deceased parcel being all that land situate in Eldoret Municipality, Kimumu area, referred to as Uasin Gishu/ Kamumu/1314, pending hearing and determination of the main suit.

The Application is premised on the grounds that the Respondent has threatened to trespass land parcel no. Uasin Gishu/ Kamumu/1314 which land at all material times was the property of Dina Tongoi Kiptoo, deceased. That the trespass will likely occasion the Estate of the deceased irreparable injury, loss and damage. That the Respondent does not have any color of right in law and equity over the suit property. That whilst the deceased died on the 14.3.1997 the Respondent procured a title on 16.9.2003 over the deceased's land 6 years after her death through a fraudulent transfer.

There is an affidavit in support of the Application sworn by Daniel Kipchirchir Sang a personal representative to the Estate of Dina Tongoi Kiptoo. He states that the deceased was his mother and was the registered owner of Uasin Gishu/ Kamumu/1314. That this title was listed as one of the properties of the deceased to be shared among the beneficiaries of the estate. That on 20.7.2005 the Applicants discovered that the Respondent had obtained a title to the aforesaid land. That they were shocked by this development and the Respondent objected in the Succession Cause the inclusion of the property amongst the assets of the deceased. That the Defendant never entered into any sale agreement and the deceased

never executed any transfer during her lifetime. That the transfer was obtained by fraud. That the Respondent has always threatened to take possession of the subject property unless injunctive orders are issued the Respondent may charge or otherwise interfere with the property and the estate stands to suffer irreparable loss.

When this matter came before the court under certificate of urgency on the 12.2.2007 the court granted interim injunction orders which still subsists. The Applicants claim that the Defendant has intermeddled with the Estate of the deceased within the meaning of section 45 of the Law of Succession Act.

The Application is opposed. The Defendant has filed a replying affidavit dated 23.3.2007. He states that in 1989 the deceased approached him and told him that she wanted to sell part of her land known as Uasin Gishu/ Kimumu/96 to pay school fees for her son P K L. They he agreed with the deceased that he pays the school fees in exchange for a portion of the land Uasin Gishu/ Kamumu/96. That in August 1990 the deceased informed him that she wanted to purchase land in Nyalibei, Ziwa measuring 6 acres. That on the 22.8.1990 the deceased requested a sum of kshs. 40,000 to be used in purchasing the said land. That he constructed a semi-permanent house at Nyablibei at a cost of kshs. 27,000 and dug a well and a latrine. In consideration of the money advanced the deceased gave him a portion of 2 acres of land in Uasin Gishu/ Kimumu/96. That prior to her death in 1996 they went to the chief's office in the company of her son P K L where the deceased informed the chief that she sold 2 acres in Uasin Gishu/ Kamumu/96 to him. That the deceased then commenced subdivision of Uasin Gishu/ Kamumu/96 into five portions namely 1313;1314;1315;1316 and 1317. That on the 3.2.1997 the deceased applied for consent to the land control board to transfer parcel no. Uasin Gishu/ Kimumu/1314 to him. That they attended the land control board meeting on 6.12.1997 and consent was given. That the deceased and himself signed the transfer on the 14.2.1997 before k.k Arap Sego Advocate in the presence of the advocate and her daughter Leah Jemesunde Keiyo. That the deceased handed him the transfer and consent duly signed but he had no money to pay stamp duty and in 2003 he registered the transfer and title was issued in his name.

The Plaintiff Applicant filed a supplementary affidavit, and a further supplementary affidavit to reply to the affidavit of the Defendant and the Defendant has in turn filed a further affidavit.

The parties' advocates presented their oral submissions before the Court.

Learned counsel for the Applicant Mr. Kuloba submitted that they seek injunctive orders in terms of prayer 3 of the Application. That the Applicants are the Administrators of the Estate of Dina Tongoi Kiptoo who died on the 14.3.1997. That at 15.9.2003 the suit land was registered in the name of the deceased. That on 16.9.2003 the Defendant was registered as owner 6 years after the death of the deceased. That the property is subject of Succession Proceedings No. 40 of 2002. That they seek temporary injunction orders pending hearing and determination of the suit. That the Applicant contends that there was no sale or agreement for sale. That the deceased did not execute the documents before the advocates; she was sickly and was at home. That the deceased did not go to the land control board. That the Applicant's case has high chances of success. Counsel submits that the Defendant is not in possession.

Learned counsel for the Defendant, Mr. Ngala opposed the Application. He submitted that he relies on the replying affidavit. That the title Uasin Gishu/ Kimumu/1314 was as a result of subdivision of Uasin Gishu/ Kimumu/96. That the subdivision was at the instance of the deceased. That title No. Uasin Gishu/ Kimumu/1314 is registered in the name of the Defendant and as first registered owner his title is indefeasible. That there are minutes of the land control board const. that the Applicants have to prove there was fraud. That they have not sued the Land Registrar. That the property has passed to the purchaser at the time consent was issued and transfer was signed. That there was a consideration of Kshs. 120,000. That the Defendant had no duty of care to notify the Estate.

Counsel further argued that the Defendant is in actual possession since 1994. That the Applicant wants to use this Application to evict him. That power and rights of proprietor cannot be defeated under the provisions of the law. That temporary injunction will defeat the provisions of section 27 and 28 of RLA. He prayed that the Application be dismissed with costs.

Counsel for the Applicants in reply submitted that this was not a first registration and the first registration was Uasin Gishu/ Kimumu/96 if at all. That evidence of forgery can be produced at trial and not at this stage. That at the death of the deceased the personal representatives had equitable interest under section 119 RLA. Counsel argued that the Applicants are in possession and referred to the court to photographs exhibited.

There is no doubt from the many affidavits filed that this is a highly contentious land case. This is a dispute between the administrators of the estate of the deceased who was the owner of land registration no. Uasin Gishu/ Kimumu/1314 and the Defendant who is currently registered as the owner of the said land. The only thing that is not in contention is the Defendant acquired title to the land in 2003 after the death of the registered owner. The Defendant has tried to explain the circumstances that resulted in the late registration of the title. This is a matter that will call for viva voce evidence and the court will be able to make a determination of the issues after full trial.

From the further supplementary affidavit of the Plaintiff dated 25.5.2007 the Plaintiff admits in paragraph 7 that the Defendant is not a trespasser but was in the suit land as a lessee since 1990 but states that he was not an owner. I will not go into analyzing the issues and the documents submitted at this stage.

The Application is brought under Order XXXIX rule 1, 2, 3 and 9 of the civil procedure rules (now order 40).

The principles for the granting injunction orders are provided in the celebrated case of **Giella vs. Cassman Brown & Co ltd (1973) E.A.**

That the Applicant must show he has a prima facie case with probability of success; interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately compensated by an award of damages ; if the court is in doubt it would decide an Application on balance on of convenience.

The purpose of temporary injunction order is to preserve the subject matter from wastage and alienation pending the determination of the suit.

I am satisfied this is such a case where the court should exercise its discretion in granting injunction orders to preserve the suit property pending determination of the case. However there is fear raised by the Defendant that the Plaintiffs want to use the court orders to evict the Defendant from the suit property. Both parties claim that they are in possession. The court cannot verify this position at this interlocutory stage.

I therefore make the following orders:

1. That injunction order is hereby issued restraining the Defendant by himself, his agents, or whosoever, from charging, mortgaging or selling plot no Uasin Gishu/ Kamumu/1314 pending hearing and determination of this suit.
2. THAT the costs of this Application shall be in the cause.

DATED AND SIGNED AT NAIROBI ON THIS 8TH DAY OF AUGUST 2012

M. K. IBRAHIM
JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 31ST DAY OF OCTOBER 2012

F. AZANGALALA
JUDGE

In the presence of: Mr. Sitiny h/b for Mr. Ngala for Respondent