



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 18 of 2011

IBRAHIM MWENY KOTIT.....PLAINTIFF.

VERSUS

ALEMUSIA KOTIT.....DEFENDANT.

R U L I N G.

The application dated 6th July, 2011 made by the plaintiff seeks **firstly**, a temporary injunction order to restrain the defendant, his agents/servants from interfering with parcel No. **West Pokot/Chepareria/756** and maintain “status-quo” pending hearing and determination of this suit, **secondly**, an order that the title respecting the said suit property be deposited in court pending hearing and determination of the suit, **thirdly**; an order that there be a stay of decree and/or judgment in case No. CMCC No. 94 of 2003 pending hearing and determination of the suit.

From the pleadings it is disclosed that the suit property known as **West Pokot/Chepareria/756 (herein, plot No. 756)** previously belonged to the late father of the plaintiff/applicant and the defendant/respondent who are blood brothers. There is a third brother by name Samson Kotit. It is alleged by the plaintiff that their late father left behind plot No. 756 together with plots No. 724 and 725 each to be shared between the three brothers but only plot No. 756 remains undivided to date.

The plaintiff also alleges that the said plot No. 756 remained registered in his name upto 24th May, 2002 when it was transferred into the name of the defendant to the exclusion of the plaintiff and their brother Samson Kotit contrary to a previous approval by the elders to have the plot sub-divided into three portions with the title being in the name of the plaintiff.

It is the plaintiff's contention that the said transfer of the plot into the name of the defendant was fraudulently undertaken. For these reasons, the plaintiff filed this suit praying for sub-division of plot No. 756 into three portions for the plaintiff, the defendant and their brother Samson Kotit.

The plaintiff also prays for the cancellation for the title issued in the name of the defendant for having been obtained fraudulently while it was previously held by the plaintiff in trust for himself, the defendant and Samson Kotit.

The plaintiff further prays for the setting aside or striking out of case No. Kitale CMCC No. 94 of 2003 involving the same parties and to have it declared null and void “ab-initio.”

On his part the defendant alleges that their late father had three parcels of land viz plots No. 724, 725 and 756 and that during the adjudication process, plot No. 725 was registered in the name of the plaintiff while plot No. 724 was registered in the name of Samuel Kotit. And, because the defendant was

away from home at the material time, plot No. 756 was registered in the name of the plaintiff to hold in trust for the defendant.

The defendant alleges that in the year 2002, the plaintiff without intimidation, coercion or fraud signed the relevant transfer forms and had plot No. 756 transferred to the defendant with the knowledge that the plot was the defendant's share of the parcels of land belonging to their late father.

The defendant denies the allegations of fraud made against him by the plaintiff and contends that the plaintiff has compelled one of his sons to reside on the said plot No. 756 and this was the case of Kitale CMCC No. 94 of 2003 in which the defendant sued the plaintiff's son and others and about an eviction decree against them but which decree is yet to be executed.

Both the affidavit in support of this application dated 6th July, 2011 and the replying affidavit by the defendant dated 11th July, 2011 are more or less a reproduction of the averments contained in the respective pleadings with additions in the form of supporting annexures.

A careful consideration of the pleadings and the annexure reveals to this court that the suit property is registered in the name of the defendant as the absolute proprietor. Being the absolute proprietor the defendant enjoys more rights and privileges over the property than the plaintiff. In the circumstances, the plaintiff cannot seek orders which would restrain the defendant from using his own property and more so at an interlocutory stage.

Allegations have been made by the plaintiff that the defendant obtained title by fraud. If indeed this was so, proof of the fact must be established and the only way to effectively do so would be by way of full hearing of the suit on the merits and not by way of interlocutory proceedings.

It has also been revealed herein that the suit property is currently in occupation by the defendant. In the circumstances, it would not be in the interest of justice to issue injunctive orders against the defendant at this stage.

Besides, it is doubtful whether, on the basis of the facts contained in the pleadings and the supporting affidavits, the plaintiff has indeed demonstrated that he has against the defendant a prima-facie case with probability of success. Neither, has the plaintiff demonstrated that he stands to suffer irreparable damage if an injunction is not granted against the defendants at this stage. With regard to prayer four of the application, the annexures exhibited herein have shown that the plaintiff was never a party in Civil suit No. 94 of 2003. He cannot therefore seek to have a stay of the decree and/or judgment of a suit in which he had no "locus standi".

In any event, parties to the said suit had the liberty to file appeals if they felt aggrieved by the decision issued by the court.

It is a gross abuse of the court process for the plaintiff to attempt to litigate on behalf of others in this matter. Prayer **four** of the application and the pleadings in support thereof are indeed an attempt by the plaintiff to litigate on behalf of persons not party to this suit.

A party guilty of abuse of the court process would not be deserving of equitable orders from this court.

In sum, this application is devoid of merit. What the plaintiff should be thinking about is to have this suit heard on merits without depriving the defendant rights that he lawfully enjoys over the suit property at this juncture. The application is thus dismissed with costs to the defendant.

Ordered accordingly.

[Read and signed this 16th day of October, 2012.]

[In the presence of the Mr. Gatune h/b for Mr. Chemwok for plaintiff.]

J.R. KARANJA.

JUDGE.