



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL CASE NO. 178 OF 2010

DAVID KIRWA KOSKEI.....PLAINTIFF

VERSUS

JOSEPH CHERONO.....DEFENDANT

R U L I N G

The application is dated 14th December, 2010 and is essentially for the issuance of a temporary injunction order against the defendant restraining him, his agents/servants, employees and/or any other party acting on his behalf from trespassing on, entering into and/or interfering with the plaintiff's use of and/or in any way whatsoever dealing with parcel No. **Kiplombe/Emkwen Block 3(Buheba)41** pending the hearing and determination of this suit.

The grounds for the application are contained in the body of the appropriate chamber summons and are supported by the facts contained in a supporting affidavit dated 14th December, 2010 and a further affidavit dated 1st February, 2011 both deponed by the plaintiff. The application is opposed by the defendant on the basis of the facts contained in his replying affidavit deponed on the 12th January, 2011 and a further affidavit deponed on 15th February, 2011.

The contents of all the aforementioned affidavits were highlighted and argued on behalf of the plaintiff by the learned counsel, **Mr. Lel** and on behalf of the defendant by the learned counsel **Mr. Mwinamo**. Having heard the rival submissions by the two counsel, this court is first and foremost required to consider whether the plaintiff has shown a prima facie case with a probability of success.

In that regard, it is apparent that the dispute revolves around the ownership of part of the material parcel

of land and the defendant's right (if any) to use or occupy the same.

A copy of the title deed dated 11th June, 1997 marked as exhibit "TP 1" and annexed to the plaintiff's supporting affidavit confirms that the suit property is registered in the name of the plaintiff. This is also confirmed by the certificate of official search dated 24th September, 2009 annexed to the defendant's replying affidavit which shows that the defendant is laying a claim to the property on the basis of having purchased a portion thereof from one John Kibungei Rotich (now deceased) who had purchased it from the plaintiff at a cost of Kshs.305,000/-. The alleged handwritten agreement is marked exhibit "JC1" and annexed to the defendant's replying affidavit.

The defendant has exhibited a copy of a death certificate (marked exhibit No. "JC2") to show that the aforementioned John Kibungei Rotich died on 18th February, 2002. Also exhibited is a grant of letters of administration (marked exhibit "JC 3") to show that on the 18th February, 2002, the deceased's widow Divina Chepkoech Rop was appointed as the administrator of the estate of her late husband. The grant is dated 26th January, 2004.

A sale agreement marked exhibit "JC 4" indicates that the defendant purchased a portion of the suit property from the said Divina Chepkoech and two others for a purchase price of Kshs.337,500/-.

The sale agreement was made on 12th August, 2003. In actual sence the defendant purchased the property from the widow of the deceased and others rather than from the deceased himself and after the death of the deceased.

The plaintiff contends that he has never sold or leased any part of the suit property to the applicant and that the applicant without lawful authority is in the habit of entering into and ploughing the land every year on the pretext of settling a non existent debt.

The defendant contends that the suit property was sold to him by Divina Chepkoech as the administrator of the estate of her deceased husband and that the sale agreement between the plaintiff and the deceased was never cancelled and/or revoked. He further contends that the plaintiff failed to disclose that he sold part of the suit property and received the purchase price. Therefore, the plaintiff comes to equity with unclean hands. The defendant also contends that it was not possible to obtain the consent of Land Control Board since the suit property had been charged to the Agricultural Finance Corporation.

From the all foregoing, it emerges that the plaintiff has shown a prima facie case with a probability of success on account of his being registered as the absolute proprietor of the suit property and having not entered into any sale agreement with the defendant.

The sale agreement was between the defendant and third parties. It is not in any way linked to the plaintiff even on account of the grant of letters of administration issued to Divina Chepkoech Rop. This is because the grant was issued on 26th January, 2004 whereas the agreement was made on 12th August 2003. Consequently, the deceased's widow had not yet acquired legal capacity to deal with the estate of her late husband. This application is therefore granted in terms of prayer (3) of the chamber summons dated 14th December, 2010.

Ordered accordingly.

J.R. KARANJA

JUDGE

(Read and signed this 24th day February, 2011 in the presence of Mr. Kwambai for Mr. Lel for applicant)