



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 198 OF 2009

ZABLON KAMAU NYORO

**(Suing as the legal representative of the Estate of the late JOHN NYORO
NGIGI).....PLAINTIFF**

VERSUS

LASON MAYODI

OMBISA1ST DEFENDANT

NIXON KESEKWA

LUSENO.....2ND DEFENDANT

PETER

**MUNGAI3RD
DEFENDANT**

RULING

The Chamber Summons dated 7th December, 2009 seeks two substantive orders viz;-

1. That, the defendants, their agents/servants be restrained by way of temporary injunction from entering, trespassing, selling or disposing off, cultivating, constructing or any other way dealing with the parcel of land known as Kakamega/Sergoit/965 measuring 20.9 hectares pending the hearing of this application inter parties and final determination of this suit.
2. That the first defendant be punished by way of imprisonment or as the court deems fit for interfering with the plaintiff's constitutional rights to life, own property and freedom of movement.

The application is made under the old Order 39 Rules 1, 2, 3 and 9 of the Civil Procedure Rules which is now Order 40. It provides for temporary injunction and interlocutory orders. Prayer (2) of the application is therefore a misconception and must hereby be dismissed instantly.

With regard to prayer (1), the conditions for the grant of a temporary injunction were set in the case of **Giella v.s. Cassman Brown & Co. Ltd. (1973)EA 358**. These are;

- (a) An applicant must show a prima facie case with a probability of success.**
- (b) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.**
- (c) When the court is in doubt it will decide the application on the balance of convenience.**

With regard to the first condition, the pleadings indicate that the applicant/plaintiff is the legal representative of the Estate of the deceased John Nyoro Ngigi who was the sole registered proprietor of the material parcel of land known as Kakamega/Sergoit/965 measuring about 20.9 Hectares, situated within Soy township Lugari District. However, the appropriate title document is not exhibited in the applicant's supporting affidavit. Nonetheless, a copy of the Grant of Letters of administration dated 26th November, 2009 is annexed. It is not certain whether or not the grant has been confirmed since no certificate of confirmation is annexed. In the circumstances, it is doubtful whether the applicant had the necessary capacity to instruct the surveyor (2nd respondent) to sub-divide the suit property and dispose off some portions thereof.

Be that as it may, annexures marked "KU 2 and "ZKN 3" in the applicant's supporting affidavit confirmed that the surveyor acting as an agent of the deceased (not the applicant) sold 4 acres of the land to the first respondent and 0.8 hectares to the third respondent.

"ZKN 3" indicates that the surveyor was the vendor rather than an agent of the vendor.

In his replying affidavit, the first respondent contends that he is a purchaser for value without any notice of any defect to the title. He exhibited a letter of authority marked LMO 1 showing that the surveyor was authorized to dispose off the suit property. However, the letter of authority dated 16th April, 2008 indicates that the authority emanated from the deceased John Nyoro Ngigi and not the applicant herein. This is puzzling as the deceased as per the grant of the letters of administration died on 2nd March, 2001, he could not have authorized the sale of his land while dead. However, the first respondent's annexures marked "LMO 2' shows that the applicant received a sum of Kshs.170,000/- being part of the purchase price of part of the suit property. The money was received from the surveyor.

From all the foregoing facts, it is apparent that the transaction pertaining to the suit property involving all the parties herein was shrouded in mystery such that it is impossible to say at this juncture whether or not it was a clean transaction. However, the fact that there is nothing to show that the grant issued in favour of the applicant was actually confirmed and the fact that the alleged vendor or the authorizing vendor had

already passed away at the time of the material transaction clearly points to a transaction which may have been unlawful and/or fraudulent. To that extent, it may safely be said that the facts herein have established a 'prima facie' case with a probability of success. Short of that, the balance of convenience tilts more in favour of the applicant rather than the respondents by dint of the grant issued in his favour on the 26th March, 2009.

In the end result, the present applicant is allowed in terms of prayer (3). The applicant shall have the costs of the application.

J.R. KARANJA

JUDGE

(Read and signed this 24th day of February, 2011 in the presence of M/S Chumba for applicants).