



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCCC NO.47 OF 2011

J.P.P suing thro'P.N.P.....APPLICANT

VERSUS

S.K.P.& OTHERS.....RESPONDENT

RULING

(1) J.P.P.(the Plaintiff) is a minor suing through the next friend and guardian, P.N.P., his grandmother (*the next friend*). He filed this suit on the 21st February, 2011 against (1) S.K.P., (2)David Gitau Kamuyu, (3)Peter Ngugi Mbugua and Jackson Njoroge (*the Defendants*) seeking a permanent injunction to restrain the Defendants from trespassing the pieces or parcels of land comprised in Title Nos. Kajiado/Olchoro – Onyore/9950, 9951 and 9952 (*the suit properties*). In the Plaint dated the 21st February, 2011, the Plaintiff avers that the first Defendant was the registered proprietor of the piece or parcel of land comprised in title No. Kajiado/Olchoro – Onyore/9331 measuring about twenty (20) acres of which five (5) acres thereof was held by the first Defendant in trust for the Plaintiff. The Plaintiff further avers that after selling the entire parcel known as Plot No. Kajiado/Olchoro – Onyore/9331, the first Defendant fraudulently transferred the five (5) acres therein held in trust for the Plaintiff to the second and fourth Defendants respectively who were informed by the next friend of the implied trust but nonetheless proceeded to purchase the Plaintiff's five (5) acres of land discretely and fraudulently.

(2) With the filing of his Plaint, the Plaintiff also took out a Notice of Motion under order 40 rules 1, 3 and 4 of the Civil Procedure Rules seeking a temporary injunction in terms of the final orders sought in the Plaint pending the hearing and determination of the suit. The application is supported by the affidavit and further affidavit of the next friend made on the 21st February, 2011 and the 6th April, 2011 respectively. She says that when her husband, J.A.P. died, she was appointed co-administrator of his estate and inherited the piece or parcel of land known as Title No.Kajiado/Olchoro-Onyore/6406 which she divided equally among her seven (7) sons including the first Defendant who became the registered owner of Plot No. Kajiado/Olchoro-Onyore/9931 as averred to in the Plaint. She allocated the first Defendant fifteen (15) acres as his absolute inheritance but because he had a son (the Plaintiff), she allocated the first Defendant an additional five (5) acres to hold in trust for the Plaintiff. The next friend avers that the first Defendant, who failed to process the title to the Plaintiff's five (5) acres separately as a trust, became alcoholic and irresponsible and sold the same to the second and fourth Defendants respectively whom she told that the land did not belong to the first Defendant and they should not try to purchase it. The next friend also attempted to register a caution against the suit properties and also instituted proceedings in the Kajiado North Land Disputes Tribunal (case No.TC/232/11/2010) which were stayed by the High Court by an order given in Machakos High Court Civil Misc. Case No.280 of 2010.

(3) In his replying affidavit in opposition to the application sworn and filed on the 1st April, 2011, the first Defendant admits that he was one of the beneficiaries of the estate of his late father and upon the sub-division of Plot No.Kajiado/Ochoro-Onyore/6406 he became the absolute proprietor of Plot No. Kajiado/Olchoro-Onyore/9331 measuring twenty (20) acres or thereabouts. He denies that his son, the Plaintiff, was a beneficiary of the estate and also that there was any trust that he should give five (5) acres to his son as alleged or at all.

In paragraphs 7 – 12 of his affidavit, the first Defendant states as follows:-

“7. That I was registered the absolute proprietor of Parcel No.9331 as there existed no trust that I was to give 5 acres to my son.

8. That if there had been any trust as alleged by the applicant, nothing could have prevented the applicant as the administrator in charge of the distribution of the estate from ensuring that the said trust was reflected on registration.

9. That in any event, the applicant has not demonstrated how any trust came into existence.

10. That in reply to Paragraph 5 of the applicant’s affidavit I wish to state that I was entitled to 20 acres of land as was transferred to me. There were no two transfers for 15 acres and 5 acres as alleged by the applicant.

11. That in reply to paragraph 6 of the applicant’s affidavit, I wish to state that I am in full control of my faculties and I am not irresponsible as I do take care of my son.

12. That in reply to paragraph 8, 9, 10 and 11, I wish to state that there has never been any demarcation of 5 acres out of my parcel of land and that I sold distinctive portions of land to the other defendants in contractual transactions that were done above board and openly.”

(4) The second Defendant also filed a replying affidavit dated the 1st April, 2011 on his own behalf and also on behalf of the other Defendants. He says in paragraph 4 of his affidavit that-

“4. I and the other respondents separately and individually bought portion of land out of Land Parcel No.Kajiado/Olchoro - Onyore/9331 from the 1st Respondent which were registered in our names as follows:-

(a) Kajiado/Olchoro-Onyore/9950 – Jackson Njoroge

(b) Kajiado/Olchoro-Onyore/9952 – Anthony Peter Ngugi Mbugua

(c) Kajiado/Olchoro-Onyore/9331 – David Gitau Kamuyu

(5) He denies that he and or the third and fourth Defendants were ever informed either by the Plaintiff or the first Defendant about the existence of a trust in favour of the Plaintiff in respect of Land parcel Plot No. Kajiado/Olchoro-Onyore/9931 and that he and the third and fourth Defendants were therefore, bona fide purchasers for valuable consideration without notice of any trust, if at all there was any. The second, third and fourth Defendants contend that their sale transactions with the first were open and above board and that they separately duly obtained in defeasible titles in absolute proprietorships with all the rights and privileges thereof.

(6) I have considered the application and the evidence as well as the submissions made on behalf of the parties by their learned counsel and have come to the conclusion that the application must fail for a number of reasons.

Firstly, under the terms of the Certification of confirmation of the Grant of Representation dated the 26th October, 2009, plot No.Kajiado/Olchoro-Onyore/6406 was to be registered in the names of the Administrators, namely the next friend and one Gideon Sane, to hold in trust for themselves and all the beneficiaries in equal shares. Though the next friend says that she allocated to first Defendant fifteen (15) acres as his absolute inheritance and additional five (5) acres to hold in trust for the Plaintiff, no evidence of such trust has been placed before the court. The Administrators failed to register the first Defendant’s position of twenty (20) acres subject to such trust and to have the Plaintiff’s interest noted in the Register or, in the alternative, to retain the Plaintiff’s position of five (5) acres in the names of the Administrators in trust for him until he attained the age of majority.

(7) The next friend says that when the first Defendant told her that he had sold her his parcel of land including the Plaintiff’s five (5) acres, she immediately wrote to the Kajiado District Land Registrar requesting him not register mutation forms.

Subsequently, on the 22nd November, 2010 the next friend submitted applications for registration of cautions in respect of the suit properties. By this time however, the second, third and fourth Defendants had already been registered as the proprietors of the suit properties and individual title deeds issued to each of them on the 2nd November, 2010. The Plaintiff was therefore seeking to bolt the stable long after the horse had galloped away. In the absence of any evidence that the second, third or fourth Defendants were duly notified of the alleged trust either verbally or in writing or by way of a notification in the Register of the

Plaintiff interest, the Plaintiff has failed to demonstrate that the said Defendants were not *bona fide* purchasers for valuable consideration without notice. The Plaintiff has not established a prima facie case with a probability of success and the balance of convenience lies with the Defendants. It is also to be noted that the Plaintiff has not sought in his plaint a declaration that he is entitled to the suit properties and an order that the same be transferred to him.

(8) In the result, and for the reason I have given, the plaintiff's application in the Notice of Motion dated and filed on the 21st December 2011 cannot succeed and it is dismissed with costs.

So ordered.

Dated and delivered at Machakos this 30th day of **June**, 2011.

P. Kihara Kariuki
Judge