



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT NO. 165 OF 2010

AFYA AWUOR OWINOPLAINTIFF

VERSUS

WALTER OTIENO SAJI1ST DEFENDANT
ERKA ADHIAMBO OKUDO2ND DEFENDANT
NELSON SHIKUKU3RD DEFENDANT

RULING

The plaintiff / applicant moved to this court by way of a plaint dated 25th day of October 2010, and filed on the 26th October 2010. It is her claim that she purchased half of land parcel number **KISUMU / KORANDO / 4642** from one late **SAJI JOSHUA OKUDO**. As at the time of purchase, the land was registered into the joint names of the deceased and the first defendant. In furtherance of the said sale transaction, the plaintiff was handed the title deed to the land in order to facilitate the transfer but this was not effected before the death of the deceased **SAJI JOSHUA OKUDO** .

The reason for moving to court is because the plaintiff has encountered difficulty in securing the realization of the said agreement necessitating the plaintiff to move to this court and seek “**a permanent injunction restraining the defendants from interfering with the half portion of land parcel number KISUMU / KORANDO / 4642, A mandatory injunction to prevent the defendants from putting up structures on the half of portion of the land purchased by the plaintiff, a declaration that the defendants are trespassing onto the land, a declaration that the defendants specifically perform their part of the contract to assist in having the portion purchased by the plaintiff transferred to her, general damages for trespass and interest thereon. In the alternative compensation to the plaintiff at the current market value of the land**”.

On the plaint is auctioned an interim application by way of Chamber summons brought under Order XXXIX Rule 1, 2 and 3 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act. The relief sought in prayer 2 and 3 thereof the applicant is seeking a restraint order **to restrain the defendants/ respondents by themselves, their agents, servants or any other party whatsoever claiming rights and/or under them from trespassing onto or continuing to trespass or continuing to build or in any way interfering with a half portion of land parcel number KISUMU / KORANDO / 4642 pending the hearing and determination of the application as per prayer 2, and pending the hearing and the determination of the suit vide prayer 3.**

The grounds in support are set out in the body of the application and supporting affidavit and in a summary form these are a reiteration of the content of the plaint but for purposes of the record only are

that:-

- **The plaintiff / applicant purchased the said land and fully paid for the same.**
- **That transfer has not yet been effected in her favour.**
- **There is a move to construct structures despite being aware of the sale hence knowledge of the purchase.**
- **That she intends to develop the said parcel of land which developments will be frustrated if the land is sold to a 3rd party.**
- **That there is a threat to sale to 3rd parties.**
- **That the first defendant as a joint proprietary owner and the 2nd defendant as widow of the deceased have failed to take out letters of administration in order to effect transfer into the name of the plaintiff.**
- **Reliance has also been placed on documentary exhibits being the sale agreement between the deceased and the plaintiff, title deed in the joint names of the deceased and first defendant, and search certificate and subdivision documents**
- **The applicant also relies on a further affidavit which has annexed consent to subdivision the land.**

The Respondents had earlier on filed ground, before entering appearance which were withdrawn and replaced with those filed after entry of appearance. The affidavit of the first defendant and the 2nd defendant deny any knowledge of any sale of the said land to the plaintiff and assert that the title deed was not handed over to the plaintiff but it was stolen and in their submission counsel for the applicant reiterated the content of the depositions and then stressed the following:-

- **That the suit land is situated near the airport, it is of great value and compensation will not be adequate.**
- **Maintains that the land was sold, purchase price fully paid but transfer was not effected because one of the proprietors passed on.**
- **Preservative orders are required to safeguard the interests of the plaintiff / applicant as the defendants are in the process of disposing off the land in question which will defect the suit. The applicant also contends that it is not true that the wife of the deceased was not aware of the sale of the property as that was the only property the family had. As for the case of the title, this allegation was made in 2010 after a caution had been placed on the title.**

In response counsel for the defendant / respondent stated that it is evident from the documentation exhibited that there was no consent obtained within six (6) months of the sale transaction and for this reason, the transaction is void and it cannot be protected.

- **The only application traced in the file is for subdivision and there was no consent for transfer and as such the transaction is not be protected.**
- **In the absence of a letter of Grant of representation to the estate of the deceased, the wife of the deceased cannot be sued as she was not a joint owner or a signatory to the said agreement. They contend that the ingredients for earning the relief sought has not been established and all that the applicant is entitled to is a relief of refund of the purchase price.**

This court has given due consideration to the afore set out rival Arguments and in its opinion the following are own framed questions for determination in the disposal of this application:-

- (i) **What relief is being sought by the applicant?**
- (ii) **What ingredients are required to be satisfied before one can earn the said relief?**
- (iii) **Has the applicant satisfied the said ingredients?**
- (iv) **What final orders are to be granted herein in the disposal of this matter?.**

In response to own framed questions, it is clear that the applicant herein seeks an injunctive relief in the manner sought.

The ingredients required to be established before one can earn such a relief are those set out in the famous case of Giella vs= Cassman Brown [1973] EA 358 which are:-

- (i) The applicant must demonstrate the existence of a prima facie case with a probability of success**
 - (ii) There has to be demonstration that damages will not be an adequate compensation**
 - (iii) If the court will be in doubt about (i) and (ii)**
- Above, the court will decide the issue on a balance of convenience.**

In response to question 3, in order to determine whether the applicant has brought herself within the ambit of the afore set out ingredients or not, all that this court is required to do is to apply the afore set out ingredients to the facts of the case herein and when this is done this court is of the opinion that the applicant has not brought herself within the ambit of the afore set out ingredients because of the following reasons:-

- (a) It is evident that the sale transaction was between the applicant and the deceased husband of the 2nd defendant / respondent**
- (b) That the deceased husband of the 2nd defendant / respondent was a joint owner of the suit property with the first defendant. It is evident that the 1st defendant did not sell his portion meaning that the applicant can only pursue her rights against the estate of the deceased husband of the 2nd defendant / respondent**
- (c) It is evidently clear from the documentation on the record that consent to subdivide the land appears to have been obtained but not consent to transfer**
- (d) That in the absence of the deceased seller, the applicant can only pursue her rights against the estate of the deceased husband of the 2nd defendant / respondent.**
- (e) In order for the said 2nd defendant / applicant to have locus standi to sue or be sued she has to be clothed with that locus standi in terms of the provisions of Section 45 (i) and 82 of the law of Succession Act Cap 160 laws of Kenya. These read:
“Section 45 (i) except so far as expressly authorized by this Act or by any other written law, or by a grant of representation under this Act, no person shall for any purposes take possession or dispose of or otherwise inter meddle with any free property of a deceased person.
Section 82 - a personal representatives shall subject only to any limitation imposed by their grant have the following powers
(a)To enforce, by suit or otherwise all causes of action which by virtue of any law survive the deceased or arise out of his death for his estate.
(b)To sell or otherwise to turn to account so far as seems necessary or desirable on the execution of their duties all or any part of the assets vested in them as they think best.....”**

Applying these provisions to the rival arguments herein, it is clear that in the absence of the 2nd defendant / respondent being vested with the grant of representation to the estate of her deceased husband, she has no locus standi to deal with the property of the deceased inclusive of a right to effect a transfer in favour of the applicant on behalf of the deceased husband .

For the reason given in the assessment the applicants application dated 25th day of October 2010 and filed on the 26th October 2010 stands faulted for the following reasons:-

- (1) The property a portion of which was allegedly sold by the deceased husband of the 2nd defendant / respondent was jointly owned by the deceased and the first defendant**
 - (i) the first defendant did not sell his portion**
 - (2) it is evidently clear that there was only consent to subdivide the land with an intention to sell but the deceased husband of the 2nd defendant / respondent died before both consent to transfer and transfer had been effected or obtained**
- (3) By reason of the deceased husband of the 2nd defendant / respondent passing on before effecting transfer in favour of the plaintiff / applicant , that duty now fell on the personal**

representative of the said deceased.

(4) In the absence of a grant of letters of representation to her late husband's estate the 2nd defendant / respondent cannot be compelled to receive and obey orders affecting property forming the free property of her late husband's estate

(5) Likewise in the absence of the surviving proprietor having sold his property or being a share holder or an owner in the property sold he cannot be compelled to honour any injunctive orders an account of the said property

(6) By reason of what has been stated above, the applicants application dated 25th October 2010 and filed on the 26th October 2010 be and is hereby dismissed with costs to both respondents.

Dated, signed and delivered at Kisumu this 8th day of July 2011.

R. N. NAMBUYE
JUDGE