



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

O.S. SUIT NO. 2 OF 2010

IN THE MATTER OF LAND PARCEL NO.NYAKI/THUURA/624

AND

IN THE MATTER OF REGISTRATION OF TITLE TO LAND UNDER S.38 OF LIMITATION OF ACTIONS ACT CAP.22

AND

IN THE MATTER OF ADVERSE POSSESSION TO LAND REGISTERED UNDER THE REGISTERED LAND ACT CAP.300

ANGELO M'IKIAO.....PLAINTIFF

VERSUS

JOHN M'RUKARIA M'IMATHIU.....DEFENDANT

R U L I N G

An application dated 5th April, 2011 by plaintiff/Applicant Mr. Angelo M'Ikiaio seeks an order of injunction under Order 40 Rule 1(1) of Civil Procedure Rules 2010.

I have to point out before I proceed further the alleged Order 40 Rule 1(1) of Civil Procedure Rules do not exist. The application is supported by Supporting Affidavit sworn by the Applicant on 5th April, 2011. It is further supported by grounds listed in the Chamber Summons.

The application is opposed on grounds in the respondent's Replying Affidavit and Notice of Preliminary Objection.

The facts leading to this litigation show that the plaintiff petitioned for grant of letters of administration in HCSC 113 of 2000 at Meru in the matter of Estate of John Mathiu Irware Alias M'Imathiu M'rwire(deceased) in 2000; over suit premises Nyaki/Thuura/624. He filed Death Certificate No.570147 indicating the deceased died on 17th July, 1993. The Applicant did not disclose his relationship to the deceased nor did he disclose the list of the deceased surviving beneficiaries.

A grant dated 31st July, 2000 was issued and confirmed on Applicant's application on 28th June, 2001 whereby Nyaki/Thuura/624 was awarded to the Applicant. The deceased beneficiaries were not aware of the Applicant's move. That when deceased beneficiaries became aware of the Applicant's activities, an application of revocation and/or annulment of grant was filed. The respondent filed Death Certificate showing the deceased died on 10th July, 1991 as per Death Certificate No.678387. Respondent averred that the Applicant was not related to the respondent or the deceased.

The discovery of Applicant's registration came to be known to respondent when he wanted to file Succession Cause. The application for revocation was heard by way of *viva voce* evidence.

The Applicant at the time of hearing averred that the deceased had sold that parcel to someone called Kinoti who in turn sold the parcel of land to him. He admitted the land was still in the name of the deceased at the time of alleged purchase. He claimed to have continued to be in occupation from the time he allegedly purchased the land. The said Kinoti was said to have been sued by the deceased during his life time and court ordered the removal of the said Kinoti from the land.

The court in HCSC 113 of 2000 found that the Applicant was unable to provide credible evidence before court that there was a purchase between the deceased and Kinoti and that there was further sale between Kinoti and himself. The court found the argument that Applicant had obtained a right over the land by way of prescription and/or adverse possession without any basis in law.

The court found Applicant had obtained grant fraudulently by making false statement and used a death certificate which the beneficiaries of the deceased estate claimed to be forged. The court found Applicant had no right to inherit the deceased land. The grant issued to Applicant and confirmed was revoked, and court ordered grant be issued to the respondent, and transfer of suit premises Nyaki/Thuura/624 be cancelled and reverted to the name of Imathiu Irware, deceased.

The Applicant filed Chamber Summons dated 16th November, 2010 in HCSC 113 of 2000 seeking that stay of court's judgment delivered on 17th December, 2009 and for an injunction order in which the Applicant's application stated:-

“ That an order of temporary injunction be issued restraining the objector/respondent or any other person acting under his behest from mutating, trespassing, alienating, entering, or in any way dealing with land parcel No.Nyaki/Thuura/624 pending the hearing and determination of Meru High Court(O.S) No.2 of 2010.

The court in its ruling observed and noted as follows:-

“ The instant application was filed 8 days after the confirmation of the grant to the objector. It is my view that this an abuse of the court process. The Applicant was aware of the application by the objector to have grant issued to him confirmed by the court in good time. He took no steps to have that process stopped as provided under The Law of Succession Act and the Probate and Administration Rules. Instead the Applicant filed a suit by way of Originating Summons which he has annexed to this application.

The Originating Summons was filed on 12th January, 2010. No applications were made in that suit in the form of an injunction touching on suit property. The Applicant has waited ten months down the line to seek stay of execution and temporary injunction over the property.....”

The court further noted the Applicant had not appealed against the decision of the learned Judge in view of the adverse findings made against the Applicant. The court went on to the observe as follows:-

“ Filing the Originating Summons cannot assist the Applicant's claim over the suit property since the learned Judge in this Succession Cause has found that the Applicant has no right whatsoever to inherit the suit land, the subject matter of the Estate of the deceased. The Judge also made specific findings that the Applicant's attempt to take over and have registered in his name the suit land was fraudulent. Unless these findings are reversed or set aside they are binding on the Applicant and consequently he can lay no claim over the suit property”

The application for injunction was consequently dismissed. It was argued on behalf of the Applicant that the Applicant has exclusively been in occupation of Nyaki/Thuura/624 and claims the land under adverse possession. It was admitted the land has moved to the respondent by virtue of court's decision dated 17th December, 2010 pursuant to HCSC.No.113 of 2000. It was argued Applicant has been in occupation since 1978 and filed an application for injunction in Succession Cause and not in this case. The issue in this matter is said to be for determination whether Applicant has acquired the land through adverse possession and not through Succession Cause. It was argued possession could not be determined in Succession Cause. It was argued further this suit is not *res judicata*.

The respondent argued that the Applicant has not demonstrated that he has a *prima facie* case to warrant orders sought for three reasons:-

1. **The court in HCSC 113 of 2000 as per Applicant's annexure “AMI” court found the Applicant had no right to inherit the deceased land.**
2. **Court found the Applicant to be fraudster who forged the deceased death certificate and applies for administration of the deceased estate.**
3. **No prima facie case has been established and no appeal has been filed against court's finding in HCSC 113 of 2000.**

It was further argued Applicant filed similar application seeking stay of court's judgment dated 17th December, 2009 and temporary injunction which were rejected. That the court's finding were not challenged and bind the Applicant. The present application was argued *is res judicata* as similar applications to present one was filed in HCSC 113 of 2000 and determined on 17th February, 2011. The application was argued offended Section 7 of Civil Procedure Act which provides:-

“ No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”.

It was finally argued that the principles of granting an injunction have not been satisfied and application should be dismissed. The principles on which injunction can be granted are well settled. The Applicant must show he has a *prima facie* case with likelihood of success. Secondly, that in the event that injunction be refused he stands to suffer loss or damage of such nature and magnitude that damages will not adequately compensate him. Thirdly, that the comparative mischief likely to result to him should the injunction be refused out ways that which results to opposite party should it be granted.

As can be observed from summary of facts leading to this litigation, the deceased father to the respondent was the original registered proprietor. The respondent's case is that the deceased never sold land in question to the Applicant. The Applicant obtained forged death certificate and proceeded secretly to get grant of Letters of Administration of deceased estate; which was confirmed.

On respondent's application the grant was revoked, Applicant declared fraudster and court found that he is not entitled to inherit from the deceased estate. The court further held that Applicant cannot lay claim over the suit property. The courts order has not been appealed against. The Applicant who claimed to have purchased land has no evidence in support. The Applicant is bound by the judgment in HCSC 113 of 2000 including injunction of similar application for injunction.

The present application is similar to the application dated 16th November, 2010. The present application was directly and substantially in issue in HCSC 113 of 2000 between the same parties, litigating under the same title, in a court competent to try such subsequent suit and the same has been heard and finally decided by such court.

In view of the foregoing, I agree with the submissions of the Counsel for the respondent . The Notice of Motion dated 5th April, 2011 is *res judicata* by virtue of the summons dated 16th November, 2010 filed in Meru H.C.Succession No.113 of 2000 which summons were determined on 17th February, 2011.

In view of the foregoing the Applicant is not likely to succeed and I note that no *prima facie* case has been established with probability to succeed.

On damages, the Applicant's suit being based on adverse possession and title having been cancelled and passed to deceased beneficiaries by virtue of court's judgment, then what he can expect is damages; which the respondents can pay as the respondent now has title to the land. I do not see any reason to say that he would be unable to adequately compensate the Applicant should his suit succeed.

On convenience, it should be noted the respondent was successful in getting grant fraudulently obtained by Applicant revoked. The grant of the injunction would deny him the fruits of the judgment that is the land and its use of what has already been cleared his declared his.

On the other hand the Applicant did not bother to appeal against court's decision is bound by the same and will have to obey court's order as his application for stay of execution was rejected and has not appealed against it. The balance of convenience is therefore against the granting of the injunction.

In view of the foregoing, I find that the Applicant has not made out a case for injunction.

I therefore dismiss the application with costs.

DATED AND DELIVERED AT MERU THIS 22ND DAY OF NOVEMBER, 2011

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:-

1. Kaumbi for Applicant
2. Mwirigi for respondent

J. A. MAKAU
JUDGE