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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE NO.71 OF 2011

1. NICHOLAS MAYIANI PARDIYIO
2. JACKSON PARDIYIO KARONCHO
3. KARONCHO PARDIYIO

4. SOPILAL ENE PARDIYIO (Suing in the capacity as the administrators of the
estate of PARDIYIO OLE LEISANKA SHUNGEA (DECEASED)).....PLAINTIFFS

VERSUS

PETER KANYORO WAINANA.....RESPONDENT

RULING

On 24th March, 2011, the Plaintiffs moved to this court under certificate of urgency seeking in the main the following order by way of Notice of Motion;

“A temporary injunction do issue restraining the defendant whether by himself or by his servants, agents, or employees from transferring, selling, charging, alienating or in any way whatsoever dealing with the parcel of land known as L.R. Kajidao/Mailua/57 pending the full hearing and determination of this suit .

The basis of the prayer as can be gathered from the plaint, the application itself, the supporting affidavit and the annexures thereto is that the plaintiffs are the administrators of the estate of **Pardiyio ole Leisanka Shungea**-deceased. Infact they are sons and widows respectively of the deceased. Prior to 1978, the deceased was the registered owner of the parcel of land known as **Kajidao/Mailua/57** measuring 8.8Ha, hereinafter “*the suit premises.*” In the year 1978, the deceased offered to sell and the defendant agreed to buy 2.2Ha to be excised from the suit premises at a consideration of Kshs. 16,000/=. The transaction was successfully concluded when **Porka Divisional Land Control** gave its consent to the transaction. However unknown to the deceased, the defendant without any colour of right illegally and fraudulently transferred the entire suit premises to himself. To correct the anomaly, the

plaintiffs lodged this suit claiming a permanent injunction to restrain the defendant from transferring, selling, charging, alienating or in any way whatsoever dealing with the suit premises, a declaration that the defendant purchased only 2.2 Ha out of the suit premises and an order of revocation of the defendant's title and for a transfer of 6.6 Ha out of the suit premises to the plaintiffs in their capacity as the administrators of the estate of the deceased. Contemporaneously with the filing of the suit, the Plaintiffs lodged the instant application.

In response, the defendant in his replying affidavit depones that he purchased from the deceased, the entire suit premises and not 2.2 Ha as claimed by the applicants at a consideration of Kshs. 16,000/=. The deceased and the defendant then jointly applied to **Porka Divisional Land Control Board** for its consent to transfer of the whole suit premises which consent was duly given. The consent given clearly indicated that the nature of transaction was the sale of the suit entire premises. Following that consent the entire suit premises were transferred and registered in his name. The deceased and the defendant executed documents for transfer for the suit premises in the presence of the **Land Registrar**, which was witnessed by their mutual friend, **Councillor Moses Ntari Ole Ketukei**. Soon thereafter he took possession and had since 1978 enjoyed quiet and uninterrupted possession during the deceased's lifetime and even after his death until sometime in February, 2011 when he received a letter from the Plaintiffs' advocates alleging that he had acquired the suit premises fraudulently.

When the application came before **Kihara Kariuki, J** for inter-partes hearing on 31st May, 2011 he directed that the same be canvassed by way of written submissions. Subsequently, respective parties filed and exchanged written submissions alongside cited authorities. However, before the judge could craft and deliver the ruling, he left the station on transfer. The matter then came before me for directions on the way forward. Parties agreed that I should proceed and craft the ruling on the basis of the pleadings and written submissions on record.

I have carefully read and considered the written submissions as well as the authorities cited. This is an application for interlocutory injunction. As far as I am concerned, the grant of such an injunction being discretionary, a party seeking it must come to court with clean hands. It is granted on reasons and not gratuitously. See **Euro Bank Ltd v Dr. Julius Gikonyo Kiano, Civil Appeal No. 125 of 1998 [UR]**. Further in an interlocutory injunction application, the court is not required to determine the very issue which will be canvassed at the full trial with finality. All that the court is entitled to consider at this stage is whether the applicant is entitled to such an injunction on the usual criteria of whether or not he has made out a prima facie case with probability of success at the trial and if he has, whether or not he has shown that he is likely to suffer any injury which cannot be adequately compensated by an award of damages if the injunction is refused. It is only after the court is in doubt as to the existence or otherwise of a prima facie case with probability of success and or irreparable loss that the matter should be decided on a balance of convenience. See generally **Giella v Cassman Brown [1973] E.A. 314 and Edwin Kamau Muniu v Barclays Bank of Kenya Ltd, Milimani HCCC No. 1118 of 2002 [UR]**.

Applying all the foregoing to the circumstances obtained in this case, I have reached a determination that the plaintiffs scores nil on each of the above grounds.

With regard to credibility of the applicants, I do not think that they are being candid with the court. They are breathing hot and cold over some issues at the same time. For instance, in the suit as well as the affidavit in support of the application, they concede that the defendant allegedly bought 2.2 Ha out of the suit premises. Yet in their affidavit or statutory declaration in support of their application for a caution to be registered on the suit premises annexed to their supporting affidavit, they are categorical that; ***“that our father never sold his land to anyone and we wonder what happened for his land to be transferred to the said person.”*** Again whereas in their affidavit they claim that the deceased applied to the Land Control Board to sell 2.2 Ha from the suit premises, the same is not borne out by their own annexures to wit; the application for the Land Control Board consent and the letter of consent. A perusal of those documents shows that in the application for consent the nature of transaction is indicated as ***“transfer of the whole plot.”*** On the other hand the letter of consent refers to the entire suit premises and the nature of transaction is given as ***“sale”*** from the deceased to the defendant.

With regard to whether the plaintiffs on the pleadings on record have established a prima facie case with a probability of success, I entertain very serious doubts. It is common ground that the defendant is the registered proprietor of the suit premises. Before the transfer and subsequent transfer of the suit premises in the name of the defendant, parties went through the necessary legal process. An application was made to the relevant Land Control Board for its consent. The deceased and defendant appeared before the same. If indeed the deceased was selling 2.2Ha out of the suit premises, it would have been self-evident before the board. The application before the board indicated that the consent sought was to transfer the whole parcel of land comprised in the title. On 9th August, 1978, **Porka Land Control Board** gave its consent to the transaction which clearly indicated the nature of transaction as sale of the suit premises. Had the nature of the transaction been “**subdivision**” because this would have been the case if the defendant only bought 2.2Ha out of the suit premises as the Plaintiffs wants this court to believe, I would imagine that the said document would have indicated the nature of the transaction to be so and not sale.

Further, the deceased and defendant executed the transfer of land document in the presence of the Land Registrar Kajiado, and was witnessed by a councillor. If the deceased’s intention was to sell 2.2Ha as opposed to the entire suit premises, such anomaly would have been discovered at this stage.

There is no dispute that the defendant has since 1978 enjoyed quiet and uninterrupted possession of the suit premises during the deceased’s lifetime and after his death. The applicants acknowledged this fact. According to the grant of letters of administration intestate, annexed to the plaintiffs’ affidavit in support of the application, the deceased passed away on **3rd January, 1992**. Surely, if he had sold to the defendant 2.2Ha as opposed to the whole suit premises, couldn’t he had known the anomaly between 1978 when he sold the suit premises to the defendant and 3rd January, 1992 when he died. This is a period of well over 14 years. I do not think that he would have lived in such ignorance all these years.

The value of the suit premises can easily be quantified. There is no evidence that the defendant intends to transfer, sell, charge and or alienate the suit premises. But again if he was to do so, the plaintiffs can adequately be compensated by an award of damages. In other words the plaintiffs have not demonstrated that they would suffer irreparable injury, which cannot be adequately compensated by an award of damages.

Finally, the balance of convenience tilts in favour of the defendant. The suit premises are registered in his name. That registration comes with benefits conferred by sections 27 and 28 respectively of the Registered Land Act. Secondly, he has since 1978 enjoyed quiet and uninterrupted possession of the suit premises. I do not think that possession should be disrupted for now by an order of interlocutory injunction.

The application is dismissed with costs to the defendant.

DATED and DELIVERED at MACHAKOS this 15TH day of NOVEMBER 2011.

ASIKE - MAKHANDIA
JUDGE