



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE NO. 176 OF 2009

1. JUSTINE OTIPA OFISI }
2. AUGUSTINE M. OSUNDWA }..... PLAINTIFFS/APPLICANTS

VERSUS

1. JOSEPH OTIPA OSUNDWA }
2. MATIN MATINII OSUNDWA }.....DEFENDANTS/RESPONDENTS

RULING

1. In the Complaint dated 27.11.2009, the Plaintiffs aver that land title No. **East Wanga/Eluche/347** measuring approximately six Acres was family land registered in the names of the 1st Defendant and he was to hold it in trust for themselves amongst other family members. That sometime in the year 2009, the 1st Defendant in collusion with the 2nd Defendant fraudulently and without the consent of family members, sub-divided the said parcel of land and sold a portion measuring 0.52 hectares to the 2nd Defendant. The new title numbers issued were **East Wanga/Eluche/2286** and **2287**. The final orders sought in the Complaint are;

(a) Cancellation of title for the parcel of land known as **EAST WANGA/ELUCHE/2287** and **EAST WANGA/ELUCHE/87** and the same to revert back to its original number **E.Wanga/Eluche/347** and at the same time a permanent injunction be issued against the 2nd defendant restraining him from occupying land parcel **East Wanga/eluche/2287**.

(b) Costs of the suit.

(c) Interest on (b) above.

(d) Any other relief this court may deem fit to grant.

2. By a Chamber Summons dated 18.1.2010 and premised on the provisions of **Order XXXIX Rules 1, 2, 3 and 9** of the Civil Procedure Rules, the 1st Plaintiff sought orders of injunction to restrain the Defendants by themselves or anybody acting through them from cultivating, ploughing, disposing, constructing and/or surveying land parcel Nos. **East Wanga/Eluche/2286** and **East Wanga/Eluche/2287** which are sub-divisions of land parcel number East Wanga/Eluche/347 pending the hearing and determination of the suit herein.

3. I have seen the Supporting Affidavit sworn on 18.1.2010 and all that the Applicants state is that they were born and live on the said parcels of land and at paragraphs 4 and 5 thereof they depone as follows; **“4. Despite the cry of the family through we Applicants (sic) the Respondents have refused, neglected and or ignored to release the said piece of land to the family for cultivation and other Agricultural activities.**

5. That unless this court assists the family to stop the Respondents from tilling that land they are likely to suffer irreparable loss and damage.”

4. In response, the 2nd Defendant in a Replying Affidavit sworn on 5.7.2010 depones as follows;

“4. That my father WILSON KUSIMBA ASMAN

now deceased bought 1.3 acres of land from the 1st Defendant/Respondent, JOSEPH OTIPA OSUNDWA who is the father of the applicants in 1972 out of land parcel No.

E/WANGA/ELUCHE/347. Annexed hereto is a copy of the sale agreement marked “MMK-1”.

12. That the 1st Respondent together with the Applicants herein moved out of their portion of land E/WANGA/ELUCHE/2286 in 1976 while the applicants were still very young and the 1st Respondent demolished the houses himself and planted

sugarcane in the said land, whereas (sic) the portion E/WANGA/ELUCHE/2287 had no crop or buildings”.

5. In addition, the 2nd Defendant indicates that in Kakamega H.C.C.C. 64/2004 (O.S.), he had sued the 1st Defendant for recovery of 1.3 acres which he had sold to the 2nd Defendant’s father. In a consent judgment dated 9.8.2004, the orders were granted and specifically for transfer of 1.3 acres out of land parcel No. East Wanga/Eluche/347 to the 2nd Defendant. The orders were effected, the land parcel subdivided and title No. East Wanga/Eluche/2287 measuring 0.52 acres was created and registered in favour of the 1st Defendant on 4.11.2009

6. That therefore the orders sought against him should not be granted as he was an innocent beneficiary of the land through a claim by his deceased father who purchased the land in question.

7. To my mind, the claim against the 2nd Defendant cannot stand for reasons that he has advanced and which I have articulated above. He got the land registered in his names after pursuing lawful channels. He sued, got lawful orders, went to the Land Control Board with the registered proprietor of the original parcel of land, got his title and clearly, he occupies only 1.3 acres out of the 6 acres belonging to the 1st Defendant.

8. It is difficult to see with such a scenario obtaining, that the Plaintiffs have any *prima facie* case with a probability of success and they have shown no loss that they will suffer if the 2nd Defendant continues farming on title No. 2287.

9. As to the claim against the 1st Defendant, I note that he has chosen not to respond to the Application but I have perused his Statement of Defence dated 18.12.2009. I also note that in an Affidavit sworn on 16.5.2010, the 2nd Defendant stated that **“the 1st Respondent herein is the father to the Applicants.”**

10. In the Statement of Defence, he denied that he held the land in trust for any member of his family, the Plaintiffs included. Further, that he was the first registered proprietor of the land in question and he voluntarily sold the land to the father of the 2nd Defendant and later transferred title No.2287 to the Defendant as his father’s successor.

11. Only one issue arises therefore; whether the land was held by the 1st Defendant in trust and favour of himself and his sons and others. I cannot determine that question at this stage and had the Plaintiffs been so minded, they should have raised it in Kakamega H.C.C.C. 64.2004 (O.S.). I have already ruled that it would be wrong to restrain the 2nd Defendant from enjoying land that *prima facie* he acquired lawfully. However, as the Plaintiffs claim that they occupy their father’s land by fact of that relationship and beneficial trust, the only orders that I can issue at this stage and while I investigate orders, the sole issue of the alleged trust on the trial are;

i) let the *status quo* in respect of title No. East Wanga/2286 be maintained as between the Plaintiffs/Applicants and the 1st Defendant/ Respondent, who is their father;

ii) the Application dated 27.11.2009 as against the 2nd Defendant is dismissed.

iii) Each party shall bear their own costs.

12. Orders accordingly.

Delivered, Dated and Signed at Kakamega this 30th day of September, 2010.

**ISAAC LENAOLA
JUDGE**