REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Suit 20 of 2010

SAMMY KANYINGI MUGEREKI
suing as Administrator and Colligenda Bona for the Estate of
KAHUKI KARANJA(DECEASED).....PLAINTIFF

-VERSUS-

JOSEPH MWAURA MUROKI
PAUL CHOMBA.....DEFENDANTS

RULING

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The Chamber Summons application dated 16th March 2010 is made under Order XXXIX rule 1 (a) and 2 A of the Civil Procedure Rules, seeking for the grant of temporary injunction restraining the 1st and 2nd defendant respondent from wasting, damaging or alienating from their possession and/or dealing in any way whatsoever with the property known as plot No.Lamu/Lake Kenyatta/1460 belonging to the estate of the Late Katuku Karanja(deceased) pending hearing of this suit.

It is based on grounds that;-

(a) The applicant is the administration ad colligenda bona to the estate of deceased Kahuki Karanja, among which falls the property under reference which is currently being managed, wasted and/or about to be alienated by the 1st and/or 2nd respondents to the detriment of the said estate.

(b) After the death of the said Kahuki Karanja, the defendant moved back into the land aforesaid and purported to deal with it as if it belonged to him and pursuant thereto has purported to sell the land to the 2nd defendant/respondent who has purported to make alterations to the house built by the deceased in spite of the fact that the land was occupied by the deceased after it was sold to him by the 1st respondent for a period of over 14 years that is from 1998 until his death in 2003.

(c) That unless the 1st and 2nddefendant/respondents are stopped by way of an injunction the estate of the late Kahuki Karanja is likely to suffer harm which cannot be compensated in monetary terms in that the 2nd defendant is destroying the house built by the deceased Kahuki Karanja and exploiting the land to the detriment and prejudice of the deceased's estate.

(d) The applicant has a prima facie case with a probability of success.

(e) The 1st and 2nd defendant/respondent are not prejudiced in any way whatsoever if the orders of injunction are granted.

The application is supported by an affidavit sworn by the applicant in which he states that before his death, the deceased was staying on his farm at Lake Kenyatta Settlement Scheme on parcel Lamu/Lake Kenyatta/1460 which he had built a house and made substantial developments. The deceased had lived in the aforesaid land and exploited it for 14 years but had yet to transfer the same to his name after purchasing the same from the 1st defendant Joseph Mwaura Muroki(the 1st defendant) gave to the deceased, a letter written to the settlement fund trustees at Nairobi, in which the defendant gave an irrevocable authority to transfer the said land to the deceased Kahuki Karanja which authority was signed by the defendant in the presence of an advocate N.P Vohra Esq as per annexture SMK III.

The 1st Defendant also gave the deceased all documents relating to the farm from the settlement fund trustees as per the document marked SKM IV.

In addition the deceased prepared an application for the letters of consent for Land Control Board, which the 1st defendant refused to sign and at the time of the deceased death, remained unsigned the same is marked as SKMV.

After the death of the said Karanja, the defendant had purported to deal with land as if it belonged to him, and has purported to sell the land to Paul Chomba (the 2nd defendant) who has purported to make alterations to the house built by the late Kahuki Karanja, to the detriment of his estate.

Since October 2008, the 2nd defendant has carried out ploughing of the land using tractor and cut down several trees on the land and is now harvesting mangoes and other fruits on the land as if he owns the land. Since there was no administrator to the estate of the deceased, it was not possible to obtain order to stop the 1st and 2nd defendant from working the land because it had not yet been transferred to the name of the deceased Kahuki Karanja and the land remains registered in the name of 1st defendant up to this minute.

At the time of his death, the late Kahuki Karanja had lived on the farm and exploited it for over 14 years and therefore the title in the 1st defendant had been extinguished by adverse possession and/or forfeited. It is therefore absurd that after the death of Kahuki Karanja the 1st defendant would act like a renegade and purport to take back what he had sold to the deceased and sell the same to the 2nd defendant.

That the estate of the late Kahuki Karanja is likely to suffer harm which cannot be compensated in monetary terms in that the 2nd defendant is destroying the house built by the deceased and exploiting the land to the detriment and prejudice of the deceased estate.

The applicant is willing to give security for the performance of this injunction. The application is opposed, and in the replying affidavit, he states that deceased only stayed on the land for two years, got sick, and was transferred to Kiambu Hospital where he was admitted. The respondent had employed workers, planted crops and built a house and insists he is the one who had developed the property and the deceased was there as a caretaker and not the owner. Respondent denies selling the parcel of land to the deceased at any time as alleged since he had allowed the deceased as his father in-law to stay there temporary and also caretaker and there was nothing about selling the house to deceased.

He denies giving a letter of irrevocable authority and points out that the names referred to are different from his own names. He further points out that despite all claims that there was a sale agreement, the caveat states that the same was a gift, and this just shows another attempt by the applicant to get what he does not legally deserve or own.

He also points out that applicant is guilty of perjury since if deceased lived for 20 years on the parcel from 1998, then that would mean he lived upto 2018. It is the Respondent's contention that the applicant has not demonstrated that he deserves equity, since he never helped the deceased in farming when the deceased was still alive, but now pretends to be concerned with the estate of the deceased because he wants Respondent's parcel of land which belongs to him.

Further the deceased's family members are adults who have never stayed on the said parcel of land, they are married and have families and have never complained or insisted on staying on the said parcel of land and therefore there is no harm which would be suffered whatsoever but is the applicant who has forced himself to be the administrator of the estate.

In a further affidavit, the applicant insists that the certificate of official search marked PC2B clearly shows that at the time of purported sale the land was under a restriction and upon notice of the said notice, through a search, the 2nd defendant/respondent ought to have known better than to buy the land because the restriction was a notice to him. The restriction is a red flag in the register and he would have inquired from the Registrar why it had been imposed and if he did not, his conduct must be deemed as reckless and cannot claim to perch on the high branch of a bona fide purchaser for value without notice of defect in the vendor's title.

Further that the Title Deed was issued on 16th October 2002 at a time when the deceased was still alive yet Respondent never took steps to stop the said registration. It is his contention that before the death of the deceased, the 1st defendant handed over to the deceased all the original documents relating to the land and it is the deceased who paid all the charges where they were properly due, that is the name of the 1st defendant and retained the receipts.

During the lifetime of the deceased, he had such a cordial relationship with the 1st defendant that he had no reason to doubt that Respondent would go against him because he was his son in law and if at all the 1st defendant obtained a Title Deed, it was done surreptitiously without the knowledge of the deceased. It is further pointed out that the difference in names was a typing error as the identification card number remains the same.

At the hearing, Mr Okuto for the applicant submitted that if the restraining orders are not granted, irreparable loss will result because 1st Respondent has already moved onto the land which he sold to 2nd Respondent. The 2nd Respondent is now making alterations to the house which stands on the land and which is said to have been built by the deceased – also 2nd respondent is already utilizing and exploiting the land, harvesting mangoes from the land.

He urges the court to consider the documents which 1st defendant gave to deceased as a demonstration of transferring the land to deceased and that the court ought to consider the difference in summons as a typing error in the light of the identity card number which remains the same. He also submits that 2nd respondent has not demonstrated that he was a bona fide purchaser for value as he has not shown that he had obtained consent as provided under section 6 of the Land Control Act and so the subsequent transaction is void.

The period that deceased is said to have been in occupation is contested but the applicant wishes to use that to build up on the doctrine of adverse possession.

In response Mr. Bitana for the respondents submits that applicant has not demonstrated a prima facie case with probability of success because all that happened is that the 1st Respondent was allowed to stay on the land as a caretaker and there was no intention of sale. It is his contention that 1st Respondent was issued with a Title Deed in 2002 which

was a first registration and is absolute and indefeasible.

He pokes holes at the documents applicant seeks to rely on, saying despite all this, there is no sale agreement to inform an intention to sell and the letter dated 04/05/90 cannot constitute a sale agreement as it has not been signed by either party and so the application fails the test set out in **Giella V Cassim Brown case.**

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Mr. Bitana further submits that if there is a genuine claim of sale, then why is it that applicant shifts position to allege adverse possession in the same breath. Further, that no prejudice or inconvenience will be suffered since the deceased's family has never been in occupation of the land and infact it is 2nd respondent who is occupying the land with his entire family and he should not be victimized as he paid for the same. Any damage or loss likely to be suffered can be adequately compensated by way of damages, is the argument put forth by Mr. Bitana.

From what has been presented, it would appear the applicant is on a wild goose chase, hitting out wildly in the hope of pursuing one credible argument. First he says there was irrevocable authority given to deceased to transfer the land – there was not a single document to demonstrate actual sale – the purported sale agreement written in Kikuyu language is not signed by either party, all the receipts issued are in the name of the 1st defendant, the Title remains in the name of 1st defendant, the attempt to obtain consent from Land Control Board never took off. A late as 2002 which is more than ten years after the purported intended sale – the Tile is in the name of the 1st defendant.

Surely if deceased had been given, the authority to transfer and the process had not been finalized, should not he, have lodged a caution on the land? There are receipts of sums deposited at KCB and a writing on the reverse indicating that the sums were for sale of ten acres of land under reference. However, at the risk of repeating myself, as at the time deceased died in 2003, no transfer had been effected and the Title remained firmly in the 1st Respondent's name. At best the deceased's estate could only sue for breach of contract.

Then as though sensing that the argument about a sale may not hold water, the applicant now grasps at the doctrine of adverse possession, to argue that deceased's period of occupation on the land gave him rights over that land – how then does the argument about a sale fit in with the claim about adverse possession? _ could it be that applicant was just a caretaker, as claimed to by the 1st Respondent – which would explain why even after purportedly moving payments of the purchase price in 1989, more than ten years later Title was still issued in 1st Respondent's name and that Deceased only had the receipts in his possession as an errands, man/caretaker? Is there malafides? The 1st defendant has already alienated the land by selling it? My findings is that applicant has not demonstrated a prima facie case with probabilities of success.

2. The applicant says 2nd respondent is now in occupation of the land and is exploiting it since that land has been sold to 2nd defendant for value – there is a monetary value to it, which can be assessed and computed. It is said that Respondent is cutting down trees, that he is harvesting fruits and ploughing the land and this would be detrimental to the estate of the deceased. The 2nd respondent is also making alterations on the house and this would be a permanent feature which may not be compensated.

I think picking from the earlier part of my ruling, the most appropriate direction I would give is that the 2nd Respondent be restrained from further cutting down any trees or many further alterations on the house until the suit is heard and determined. This is on condition that if there are building materials which 2nd Respondent has already bought and placed on site, which are likely to go to waste, then an inventory must be presented to this court within 14 days, so as to enable me make appropriate orders as regards an undertaking in monetary terms, by the applicant, failure to do so means the order would automatically lapse.

As for ploughing and harvesting, I think these can easily be computed under the head of mesne profits and/or loss of use. The 2nd respondent should not further alienate the land by either sub-dividing or selling it. I think in all fairness, the balance of convenience tilts in favour of the 2nd Respondent who has not only purchased the land from 1st Respondent bona fide, but is in current occupation with his family – this is not denied. Each party will bear its own costs.

Delivered and dated this 15th day of September 2010 at Malindi

H A OMONDI
JUDGE

Mr. Mtana for Respondents
Mr. Otara holding brief for Mr. Okuto for applicant