



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO**

Civil Suit 116 of 2007

1. Land Law
2. Civil Practice and Procedure – Injunction
3. Subject of main suit
 - a) LR Mogirango/Boisanga/3499
LR Mogirango/Boisanga/862
 - b) fraud
 - i) Both parcels of land belonged originally to 1st defendant.
 - ii) 1st defendant sold two portion of land form LR Mogirango/Boisanga/3499 to Plaintiffs 1 and 2.
 - iii) His son defendant No. 2 was given LR Mogirango/Boisanga/862.
 - iv) Both parcels were registered in name of the 2nd defendant
 - v) Two defendants sued by plaintiff 1st and 2nd and allege fraud.
 - vi) Preliminary Objection to suit raised by 2nd defendant to suit and overruled.

4. Application for injunction 15th May, 2008

- a) To restrain respondent ... from interfering ...

dealing with the suit parcel North Mogirango/Boisanga/3499 contrary to applicants interest. 2nd defendants occupation are illegal.

- b) Development begun. Irreparable loss may be suffered.
- c) In reply – 1st defendant original owner admits 2nd defendant son fraudulently transferred portion of land to himself.
- d) In reply 2nd defendant sale agreement null and void as there being no sale agreement. No Land Control Board.

5. **Held**

a) Injunction to issue.

6. **Case Law** – by 2nd respondent

a) **Wasike v Swala**

CA at Nakuru CA 6/1983(1985) KLR 425

b) **Onyango & Another v Luwayi**

CA.KS (1986) KLR 513

7. **Advocates**

A.K. Oange advocate instructed by the firm of M/S Oange & Co. advocates for the Plaintiff – present

G.M. Nyambati advocate instructed by the firm of M/S Nyambati & Co. advocates for the 2nd defendant

1st defendant in person

CHARLES MOMANYI ONTUBI 1ST PLAINTIFF

NAFTAL ABASI ONDIEKI2ND PLAINTIFF

VERSUS

DANIEL NYANARO MOKUA1ST DEFENDANT

JASPER GETANGE NYANARO 2ND DEFENDANT

RULING NO. 2

Application for injunction

I: Background

1. On finalizing a Preliminary Objection raised by the 2nd defendant herein, the main application dated 15th may, 2008 seeks for order on injunction from this court against the 1st and 2nd Defendant/Respondents, restraining them both from

*“interfering ... dealing with the suit parcel of land known as **North Mogirango/Boisanga/ 3499** contrary to the applicant’s interest”.*

2. The subject of the main suit is land. The 1st Defendant/Respondent and the 2nd Defendant/Respondent are related to each other as father and son respectively. The 1st defendant was the

absolute proprietor to two parcels of land. He gave one parcel to the 2nd defendant but retained a 2nd parcel of land being the property in question herein. Unknown to him the said parcel was transferred to the 2nd defendant yet the 1st defendant had sold two portions within the said land to plaintiff 1st and 2nd sometime in the year 1996.

3. The two applicants and plaintiffs herein, who claim to be purchasers, sued the two defendants for fraud.
4. The evidence of the main suit will nonetheless be subject to the case to be made out by parties. Meanwhile while the dispute as to whether the property was fraudulently transferred to the 2nd defendant or not, what status should be maintained on the suit land?

II: Application for injunction

15th May, 2008

5. The applicants claim that there should be no dealing with the said property till the finalization of the main suit. Namely, there be an injunction issued to the said property.
6. The two applicants showed sale agreements and transaction that they were both purchasers for value of portion of the property.

III: In reply

7. The 1st defendant surprisingly admitted that the land did belong to him. That he gave his son another portion of land but remained with the land in dispute. That his son and 2nd Defendant/Respondent herein did fraudulently with another not before court transferred the property to himself.
8. The 2nd respondents advocate relied on the Case Law of **Onyango and Another v Luwayi, CA 1986 KLR 513** dealing with the issue of Land Control Board.
9. There was a sale agreement between the parties yet no Land Control Board consent had been given. This means that the said land could never have belonged to the two Plaintiff/Applicants. No prima facie case has in fact been made out against the said respondent.

IV: Opinion

10. The issue of the land control board is a matter of evidence in the main suit. This situation would have been different if in effect the land was still in the name of the 1st defendant/respondent and specific performance claim had been made together with the issue of injunction. A defence of there being no Land Control Board and thus no transaction could have taken effect and would have been good grounds for not granting an injunction.
11. The situation in this matter is different. The property has moved to the name of the 2nd defendant mysteriously. The only explanation is perhaps this was as a result of fraud. To determine this, parties require to go to trial and be heard but in the meantime the property ought to be preserved pending the determination of the main suit.

V: Findings

12. I find that a prima facie case has been made out with a probability of success. An injunction is accordingly issued till the determination of the main suit whereby

“the respondents either by themselves, agents, servants or employees are restrained from interfering ,

trespassing demarcating disposing off transferring and or dealing with the suit parcel of land North Mugirago/Boisang/3499 in any manner contrary to the applicants interest as the purchaser for value”.

13. I award costs to the 1st and 2nd plaintiff to be paid by the 2nd defendant only. There will be no costs against 1st defendant having supported the application.

DATED this 19th day of May, 2009 at **KERICHO**

M.A. ANG’AWA

JUDGE

Advocates

A.K. Oange advocate instructed by the firm of M/S Oange & Co. advocates for the Plaintiff – present

G.M. Nyambati advocate instructed by the firm of M/S Nyambati & Co. advocates for the 2nd defendant

1st defendant in person