REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 350 of 2008

FAROOQ ASIF BUTT……...…...…….……..…PLAINTIFF

VERSUS

WALTER AMBALA, JACOB AMBALA

(sued as the personal representatives of the Estate of)

OTIENO AMBALA JNR.)…….....……..…1st and 2nd DEFENDANT

ODUOR HAWI AMBALA …..…...…...……..…3RD DEFENDANT

ODHIAMBO TABU AMBALA ….……....…….4TH DEFENDANT

NYERERE OMONDI AMBALA...…….….5TH DEFENDANT

R U L I N G

The application under consideration is the one dated 27th June, 2008 and has been brought by the Plaintiff under the provisions of Order XXXIX rule 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks order:

3. That an order be and is hereby issued restraining the Defendants either through themselves, their agents, servants or anyone claiming under them or otherwise howsoever from offering for sale, advertising, selling, transferring, alienating or in any way disposing of or dealing with the property known as L.R. No. 1160/288, Title No. I.R 5312 (Karen, Nairobi) pending the hearing and determination of this suit.

The grounds for the application are cited on the face of the application namely:

1. That the Plaintiff purchased property known as L.R. No. 1160/288 and as such has a right in law and equity to possession thereof.

2. The Respondents are in the process of subdividing the said property with a view to offering it for sale to other third parties to the detriment of the Plaintiff purchaser, which may give rise to unnecessary multiplicity of litigation.

3. That the Respondents in total disregard of the Plaintiff's rights have refused, failed to deliver up

vacant possession of the suit property to the Applicant.

4. That the Respondents are in unlawful occupation of the suit premises and has as such denied the Plaintiff the gains/profits derived there from and hence huge losses to the Applicant.

5. That it is only just and fair that this court do issue an order requiring the Respondent to deliver up vacant possession of the suit property to the Applicant.

The application is also supported by the affidavit dated 27th June, 2008 and the supplementary affidavit dated 5th August, 2008 both sworn by the Plaintiff. I have considered the contents of these affidavits and annextures thereto.

The Plaintiff/Applicant filed a plaint simultaneously with the Chamber Summons herein for temporary injunctive relief under certificate of urgency on the 27th June, 2008. The plaint sought a permanent injunctive relief. The suit was initially against the 1st and 2nd Defendants as Administrators of the estate of Otieno Ambala Jnr. The Court granted the Plaintiff an interim injunction on 30th June, 2008 and directed him to serve the two Defendants in the suit with the said application for inter-parties hearing. After obtaining the interim injunction the Plaintiff amended their plaint. Paragraph three of the plaint was amended previously the Plaintiff averred:

"3. Sometimes in the year 2003 the Plaintiff entered into an agreement with OTIENO A. AMBALA JUNIOR for the sale of 1 (one acre) of the property known L.R No. 1160/288, Title No. 5312 (hereinafter referred to as the "the suit property") for an agreed consideration of Kshs.2,000,000/-.

After the amendment paragraph three of the plaint read as follows:

"3. Sometimes in the year 2003 the Plaintiff entered into an agreement with OTIENO A. AMBALA JUNIOR acting on behalf of the Estate of the Late Otieno Aggrey Ambala for the sale of 1 (one acre) of the property known L.R No.1160/288, Title No.5312 (hereinafter referred to as the "the suit property") for an agreed consideration of Kshs.2,000,000/=.

After the application was served the 1st and 2nd defendants through the 2nd Defendant filed a replying affidavit sworn on 7th July, 2008. Before the application for interlocutory injunction could be heard, the 3rd, 4th and 5th Defendants filed an application under certificate and successfully applied to be joined to the suit as Defendants. The three also filed another application dated 25th July 2008 in which they were seeking to have the interim order issued by this court on 30th June, 2008 varied. That application is yet to be heard.

The Plaintiffs filed this suit against the 1st and 2nd Defendant as administrators of the deceased for their failure to complete a contract for the sale of a parcel of land measuring one acre out of the 5 acre parcel namely L.R. No. 1160/288. The current application seeks to injunct the Defendants from disposing off or offering for sale or alienating or advertising the suit property pending the hearing of disposal of the instant suit.

Being an application for injunctive relief, the Applicant has to show that he has a *prima facie* case with a probability of success at the trial or that he is likely to suffer irreparable injury which cannot adequately be compensated by an award of damages. If the court is in doubt on the first two principles it should determine the application on a balance of convenience. See Giella vs. Cassman Brown Limited [1973] EA 358.

The application is opposed.

The 1st and 2nd Defendants have opposed the application on points of law. Mr. Gichamba argued this application of their behalf. The first ground argued is that under Order XXXVI rule 1 of the Civil

Procedure Rules, the Applicant ought to have moved the court by way of Originating Summons not through plaint. The second ground argued was that under Order IV rule 3 of the Civil Procedure Rules the plaint served upon the Respondents ought to have been accompanied by summons to enter appearance which was not done.

In response, Mr. Njoroge for the Plaintiff relied on the case of Central Bank of Kenya vs. Uhuru Highway Limited & 3 Others CA No. 75 of 1998 where the Court of Appeal held:

"*…Service of summons to enter appearance sets on the clock for counting the time within which to enter appearance and no more. If however, as happened in this case, a defendant became aware of a suit against him, otherwise than through formal service, there is nothing in our law to preclude him from filing a defence to the claim against him. Where he does so time within which to file a reply starts running against the Plaintiff and the proceedings are supposed to continue in the normal manner."*

On the issue raised of service of plaint simultaneously with the summons to enter appearance I believe that the above case of Central Bank supra adequately answers the 1st and 2nd Defendants and I need not add anything more.

In response to the issue that the suit ought to have been brought by way of Originating Summons, Mr. Njoroge for the Applicant submitted that the Plaintiff's suit could not have been brought by way of Originating Summons as the said procedure was not suitable. Counsel submitted that the Applicant was claiming as a purchaser and so had to file suit by way of a plaint. For this preposition counsel relied on the case of Kenya Commercial Bank vs. Osebe [1982] KLR where the Court of Appeal held:

"*1. The procedure of Originating Summons is intended for simple matters, and enables the court to settle them without the expense of bringing an action. The procedure is not intended for determination of matters that involve a serious question. The procedure should not be used for purpose of determining disputed questions of fact.*

2. The procedure of Originating Summons is designed for the summary or ad hoc determination of points of law, construction or certain specific facts or for obtaining of specific directions of the court such as trustees, administrators or the courts execution officers."

Counsel also submitted that Order XXXVI rule 1 did not apply to the application as the Plaintiff was enforcing his right as a purchaser

Order XXXVI rule 1 stipulates:

"*The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and the circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions –*

(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;

(b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;

(c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;

(d) the payment into court of any money in the hands of the executors, administrators or trustees;

(e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;

(f) the approval of a sale, purchase, compromise or other transaction;

(g) the determination of any question arising directly out of the administration of the estate or trust."

I will get back to this issue later

The 1st and 2nd Respondents have in addition argued that the prayers sought for specific performance cannot succeed as the completion date for the Agreement of sale was 30th December, 2004 which the applicant did not meet and further that there was no consent to sell and transfer within the time stipulated in law and hence the suit was time barred.

I do not see any merit in the issue raised. If the completion date was 2004, being a contract, time would not lapse until after 6 years. In any event, that is an issue for determination at the trial.

The other issue raised by these two respondents is that the Applicant has no *prima facie* case since Otieno Ambala Jnr. who signed the agreement, 'FAB1', did so in his own capacity and not that of the estate of Aggrey Otieno Ambala the deceased and registered owner of the property. Furthermore, Mr. Gichamba submitted that the payment made by the Plaintiff was to the deceased Otieno Ambala Jnr. and not to the estate of his deceased father.

In reply to the issue of whether the Applicant has a *prima facie* case, Mr. Njoroge for the Applicant submitted that the Applicant had demonstrated that Otieno Ambala Jnr. was an administrator of the deceased Otieno Aggrey Ambala and that therefore at the time of the signing of the Agreement for sale, Otieno Ambala Jnr. was acting on behalf of the estate. Mr. Njoroge continued to submit that the Applicant had proved that indeed the agreement of sale was signed by Otieno Ambala Jnr. and that the Applicant paid 1.2 million to him and that therefore he had fulfilled his part of the bargain. Counsel relied on the case of Hewson v. Shelley [1914] 2 Chancery Reports 13 for the preposition that a person clothed by the court of probate with the character of legal personal representative is the legal personal representative unless and until the grant of administration is revoked or has determined. Counsel also cited section 80, 92 and 93 of the Law of Succession Act which he says provide that the validity of a transfer cannot be affected by revocation or variation of grant and that the property of a deceased person vests on the personal representative. Counsel also relies on the case of Winding Up Cause No. 23 of 2002 in the estate of Kahawa Sukari Limited (unreported) where Ringera, J. as he then was, states that under section 2 of the Succession Act, a personal representative is defined as the executor or the administrator of a deceased person. Mr. Njoroge concluded that the Otieno Ambala Jnr. was in all ways the visible administrator of the estate of Otieno Aggrey Ambala and that his actions conferred an interest in the property and that that interest is not invalidated by the subsequent appointment of the 1st and the 2nd Defendant as Administrators.

The 3rd, 4th and 5th Defendants have in their written submissions raised two points of law. The first issue is whether the Plaintiff's application is competent. It is their submission that the Applicant swore a supplementary affidavit which changed the entire supporting affidavit upon which the instant application was based. It is their submission that the application should fail on that basis alone since no application can be supported by a supplementary affidavit.

The second issue raised by the 3rd to 5th defendants is that the Plaintiff did not have an arguable case with a probability of success. The basis for this argument was that the sale agreement was entered between the Plaintiff and one Otieno Ambala Jnr. now deceased, and payments were made to him (deceased) and not to the estate of Aggrey Otieno Ambala. That the deceased had no title to pass to the Applicant, a matter the Applicant could have discovered had he conducted a search at the Lands office. The second basis for this argument was is that the sale agreement 'FAB1' was signed long after the vendor was paid by three

cheques a total of Kshs.1.2 million. Yet the payments were not reflected in the sale agreement. Counsel argued that the dealing between the Plaintiff and Otieno Ambala Jnr. was suspect and that the respondents had reported that matter to the police and is under investigation.

I have considered the rival arguments by the Advocates to the parties in this suit together with all the cases the cited. This is an application for an injunction in which the Applicant seeks to injunct the 1st and 2nd Respondents who are the administrators of the estate of Otieno Aggrey Ambala and the 2nd, 3rd and 4th Defendants who are the children of the deceased from selling, alienating, offering for sale, transferring or dealing with the suit property until the current suit is heard and determined. There is no dispute that the Applicant has filed this suit as a purchaser of a portion of land L.R. No. 1160/288 which he says was offered to him for sale by Otieno Ambala Jnr. as per the Agreement 'FAB1'. It is not in dispute that both parties have executed the said agreement in the presence of V. Sharma Advocate. The Plaintiff's contention is that at the time of the execution of that Agreement, Otieno Ambala Jnr. was an administrator of the Estate of the late Otieno Aggrey Ambala. That contention has been disputed by the 3rd, 4th and 5th defendants the three defendants have annexed OHA2 which is a court order made in succession Cause No. 68 of 1996 in the matter of the Estate of Otieno Aggrey Ambala. The order is dated 20th May, 2004. Justice B. K. Tanui, to this case ordered:

1. Due to urgency of the matter the Administrator of the Estate of OTIENO AGGREY AMBALA, BRUPEN M. SHAH do cease from acting as Administrator of the said Estate and that he ceases from receiving and paying moneys on the estate account.

2. Opiyo Ambala and Oduor Ambala do operate the estate account with authority to receive and disburse money.

This was followed by another order made on 3rd December, 2004 and issued on 30th August, 2005 marked, OHA5 by Justice B. K. Tanui where the learned judge ordered as follows:

1. That Walter Ambala and Alfred Jacob Ambala are authorized by this court to execute and/or sign any legal documents necessary for purposes of effecting the distribution of the estate as stated above. Al the beneficiaries hereinabove specified be ordered to account for all the monies they have received or may have received from the late estate and that these accounts be audited by an independent auditor who will verify their correctness which accounts are to be reconciled with the accounts to be given by Bhupen Shah, who will produce his accounts during his term as the administrator of the estate.

2. There are escrow account to be operated by Walter Ambala and Alfred Ambala which account shall be used for collecting other rents, proceeds for sale of shares and/or any income due to the estate and pending finalization on administration of the accounts.

Mr. Mungu for the 3rd. 4th and 5th defendants in his written submissions contented that there have been various administrators of the estate of Otieno Aggrey Ambala, it was his submissions that after the death of the said Agrrey Otieno Ambala, letters of administration intestate were taken out by Nancy Otieno Ambala Jnr., Barrack Wilson Odhiambo Ambala and Joseph Odhiambo Amabala as referred to as OHA3 and entries No.41 and 44 in the title I.R 5312. Counsel also referred to entry No.46 of the same title which shows that Barrack Wilson Ambala was eventually removed as an administrator of the said estate and in September, 1999 one Bhupen Shah was appointed the administrator of the Estate. He also referred to entry No.49 which shows that the appointment of Bhupen Shah as revoked on 21st May, 2005 as per entry No.52 of the same title. Counsel also referred to the Court Order OHA2 issued by the Kisumu court where it is shown that the Administrators of the Estate were Walter Ambala and Jacob Ambala for purposes of the execution of documents and collecting money and other income due to the estate.

The question which arises is two-fold, whether Otieno Ambala Jnr. in the absence of and without the knowledge and consent of co-administrators and/or administrators of the estate had the capacity to enter into the sale Agreement to dispose of the suit land which was still registered in the name of his late father, Otieno Aggrey Ambala. The second issue is whether Otieno Ambala Jnr. could transfer any interest in

the suit land. The applicant has invoked the provisions of Section 79, 80, 90 and 92 of the Law of Succession Act. In support of his contention that Otieno Ambala Jnr. was acting on behalf of the estate of the deceased Otieno Aggrey Ambala at the time he executed the sale agreement. Before this provisions can be of any assistance to the Plaintiff it must be shown that Otieno Ambala Jnr. was the administrator of the estate of the deceased at the time he executed the sale agreement on 28th May, 2004.

The Agreement of sale executed by Otieno Ambala Jnr is FAB1 in the Applicant's supporting affidavit. That agreement does not show that Otieno Ambala Jnr. executed the sale agreement for and on behalf of the estate of the deceased and this is because in the recitals of the agreement he is not shown to have been acting as administrator of his father. He was in fact signing in his personal capacity and was described in the agreement as the vendor. There is therefore no evidence placed before this court to show that Otieno Ambala was acting as an administrator of the estate of the Estate Otieno Aggrey Ambala at the time of signing the agreement. OHA2 and OHA5 are conclusive proof that Otieno Ambala Jnr. was not the administrator of the estate of the deceased person in 2004 when the sale agreement was executed. OHA3 the title to land I.R 5312 shows that the grant of letters of administration on the deceased Otieno Aggrey Amabala were issued to Nancy Ambala, Otieno Amabala, Joseph Odhiambo Ambala, Barrack Wilson Odhiambo Ambala on the 7th March 1999 i.e as per entry No.44. Entry No.49 shows the new grant issued to Bhupen Shah on the 3rd September 1999 before it was revoked on the 21st May, 2004. After 21st May. 2004 the administrators of the estate of Otieno Aggrey Ambala were 1st and 2nd Defendants. The 1st and 2nd defendants have in their replying affidavits deponed that they resigned from being the administrators of the said estate in 2008.

I do find that there is no evidence before this court that Otieno Ambala Jnr. was administrator of the estate of his deceased father or that he executed the agreement of the sale with the Applicant in his capacity of a representative or an administrator of the estate. In upshot it cannot be those of an administrator because there is no evidence to show he was granted any representation as an executor or administrator of the estate of the deceased. I am not satisfied that there is any evidence to show that the said Otieno Ambala Jnr. had no duties or powers to either collect the estate of the deceased or receive payments on behalf of the estate of the deceased or distribute or sell the estate of the deceased person.

Section 40 of the Law of Succession Act operates against transactions of the nature of the instant application. Since an intestate estate has in the first instance to be gathered before being divided amongst the dependants. Even if Otieno Ambala Jnr., was an administrator of the deceased estate, he could not have stood in the position of heirs. As an administrator, not having been declared heir of the suit property, Otieno Ambala Jnr. was selling what he did not have. It is trite that a person who has not proprietary title to property cannot transfer any interest to that property to any person. I am guided by the Court of Appeal decision of Simiyu vs. Watambala [1985] KLR at page 852.

Regarding the manner in which the Applicant could approach the court, order XXXVI rule 1 stipulates that persons claiming to be interested in any relief as a creditor of a deceased person, may take out as of course, an originating summons for the determination of any question affecting his right or interest as a creditor, among others, or for the approval of a sale, purchase, compromise or other transaction or for the determination of any question arising directly out of the administration of the estate. A purchaser is a creditor. The Applicant in this case is a creditor within the meaning of Order XXXVI rule 1 and therefore if he desired to have any question determined or relief regarding any question affecting his right or interest as a creditor resolved, he should have approached the court through originating summons as provided. The order is not mandatory and thus the word '*may take out as of course, an originating summons'*. This is because the law recognizes that a person claiming a right or interest in the estate of a deceased person may also approach the court by way of plaint for purposes of seeking certain remedies.

I think that if the Applicant desired to have a determination of his interest in the estate of the deceased person he should have filed an Originating Summons raising those issued in order to enable the court determine that question fully. I think that by choosing to file a plaint the remedies that the Applicant could seek as against the estate of the deceased by way of a plaint lay in damages. Having filed a plaint, given the circumstances of this case, it is my view that an injunction cannot lie as against the suit

property. The applicant's interest in the suit property could only be raised in an originating summons to enable the court resolve that question. Besides the sale Agreement the Applicant has relied upon does not aid the Applicant to injunct the administrators and beneficiaries of the estate of the deceased from dealing with the estate, and in particular, the suit land which is a portion larger than the one that the Applicant is claiming.

I do not think that the Applicant has demonstrated that he has a prima facie case with a probability of success for the reasons that I have given. It is my view that damages would be an adequate remedy to the Applicant and therefore, the order of injunction cannot lie. Even on a balance of probabilities, I believe that convenience tilts in favour of the administrators and beneficiaries of the estate of the deceased. In addition to what I have stated herein above I find that it would be unfair to grant an injunction against the defendant for 5 acres of land when the interest the Plaintiff can claim is only one acre of the suit property.

Having come to this conclusion, I find that the Plaintiff's application dated 27th June, 2008 lacks in merit and is hereby dismissed with costs of the application to the Respondents.

Dated at Nairobi, this 28th day of November, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Njoroge for the Applicant

Mr. Mungu h/b for Mr. Gichamba for the 1st and 2nd Defendants

Mr. Mungu for 3rd and 5th Defendants

LESIIT, J.

JUDGE

Mr. Njoroge:

I apply for leave to appeal

LESIIT, J.

JUDGE

Court**:** The applicant has automatic right of appeal

LESIIT, J.

JUDGE