

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

Civil Suit 117 of 2006

DICKSON CHERUIYOT CHEPKWONYAPPLICANT

VERSUS

DANIEL KIPKOECH MARITIM.....1ST RESPONDENT

NATIONAL BANK OF KENYA.....2ND RESPONDENT

RULING

The applicant, Dickson Cheruiyot Chepkwony has filed this suit as an administrator of the estate of Chemarus Chepkorir Maina- deceased (*hereinafter referred to as the deceased*). The applicant was issued limited grant of Letters of Administration *ad litem* on the 11th December, 2006 by this court authorizing him to file suit on behalf of the estate of the deceased. The applicant has filed an originating summons seeking several orders of this court all related to a parcel of land known as Kericho/Kebeneti/276 (*herein after referred to as the suit land*). Contemporaneous with filing the originating summons, the applicant filed an application for the interim orders of injunction under Order XXXIX Rule 1 of the Civil Procedure Rules. The applicant has sought to restrain the 2nd respondent from dealing in any manner whatsoever with the suit land pending the hearing and determination of the suit. The grounds in support of the application are basically that the 1st respondent had himself fraudulently registered as the owner of the suit land and thereafter charged the same to the 2nd respondent without the consent of the applicant or the deceased. The applicant contended that if the suit land is sold by the 2nd respondent in exercise of its statutory powers of sale as a chargee, the beneficiaries of the estate of the deceased would suffer irreparable harm as they only source of livelihood for the said beneficiaries of the deceased estate is the suit land. The application is supported by the annexed affidavit of the applicant. The applicant swore a supplementary affidavit in further support of his application.

The application is opposed. The 2nd respondent filed grounds in opposition to the application. Samwel O. Odiyo, the 2nd respondent's branch manager at Nakuru swore a replying affidavit in opposition to the application. The thrust of the opposition by the 2nd respondent is that the suit land was charged to it by the 1st respondent in 1993. The said property was charged by the 1st respondent to secure a sum of Kshs. 200,000/= which sum was not repaid by the 1st respondent. The 1st respondent had defaulted in repaying the said sum advance thus necessitating the 2nd respondent to invoke its statutory power of sale of the suit land to recover the said amount advanced. The 2nd respondent stated that it had no knowledge of any defect in the title of the suit land until the suit was filed. The 2nd respondent stated that as at the 23rd February, 2006 the debt owing was Kshs. 1,973,450.457= . It was the 2nd respondent's case that the applicant had filed the suit and the application purposely to frustrate the 2nd respondent from realizing its security. The 2nd respondent urged this court to dismiss the applicant's application for injunction with costs.

At the hearing of the application, I heard the submissions made by Mr. Motanya on behalf of the applicant and by Mr. Kiburi on behalf of the respondent. I have carefully considered the said rival submission made. I have also read the pleadings filed by the parties in support of their respective positions including the authorities which were referred to this court. The principles to be considered by this court in determining the plaintiffs application for temporary injunction are well settled. For the applicant to succeed in his application, he must establish that he has a prima facie case with a high

probability of success. He must also establish that he would suffer irreparable loss which would unlikely be compensated by an award of damages. If this court is in doubt, it would decide the application on a balance of convenience, (see Giella vs. Cassman Brown [1973] EA 358).

In the present application, the applicant has made allegations that the 1st respondent had fraudulently registered himself as the owner of the suit land. The applicant annexed court proceedings in respect of Kericho Principal Magistrate's court criminal case NO. 3181 of 2004 Republic vs. Daniel Kipkoech Maritim. I have read the said proceedings of the subordinate court whereby the 1st respondent was charged with two counts fraudulently procuring the issuance of two title deeds in respect of parcels No. Kericho/Kebeneti/276 (*the suit land*) and 277, contrary to Section 155 (a) of the Registered Land Act. The 1st respondent was found guilty and was convicted and sentenced to pay a fine of Kshs. 20,000/= on each of the two counts, or in default thereof, the 1st respondent was to serve a two years imprisonment. In the said proceedings, the applicant testified as a complainant. Of particular significance to this case was the evidence of the Deputy District Land Registrar, Kericho who confirmed that there was no evidence that the suit land had been legally transferred to the 1st respondent before he charged it to the 2nd respondent. There was no evidence that the consent of the Land Control Board had been obtained to enable the suit land to be transferred from the deceased to the 1st respondent. It is therefore, *prima facie*, clear that the 1st respondent had himself fraudulently registered as the owner of the suit land.

Having evaluated the facts of this case, and especially the said proceedings of the subordinate court, it is clear to this court that the ownership of the suit land is disputed. The applicant, on behalf of the estate of the deceased has established that the 1st respondent had himself fraudulently registered as the owner of the suit land. It is the further finding of this court that the 1st respondent charged the suit land to the 2nd respondent so as to defeat any claim that could have been made by the deceased or her successors. The 2nd respondent appears to have been duped by the 1st respondent. Although there is nothing to suggest that the 2nd respondent was aware of the fraudulent transfer of the suit land to the 1st respondent, the circumstances of this case dictates that status quo in respect of the suit land be maintained pending the hearing and determination of the suit.

The upshot of the above reasons is that the applicant has established a *prima facie* case which has a likelihood of success during the hearing of the main suit. The applicant's application for the interlocutory orders of injunction is hereby allowed. The 2nd respondent is hereby restrained from dealing with the suit land, including exercising its statutory power of sale as a chargee, pending the hearing and determination of the originating summons filed by the applicant. The applicant shall have the cost of the application.

DATED at Kericho this 22nd day of March, 2007

L. KIMARU

JUDGE