



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 18 OF 2020 (O.S)

SIMON ESHITEMI.....APPLICANT

VERSUS

ABDULLAHI SHARIFF ABDIWAHAB.....1ST RESPONDENT

ABDULAHI ABDILATIF BASHIR.....2ND RESPONDENT

RULING

At all material times, all that parcel of land known as L.R No. 36/75/1 Nairobi (hereinafter referred to as “the suit property”) was registered in the names of the applicant and one, Jeremiah Odera Eshitemi as the proprietors thereof. The suit property was registered in the names of the applicant and the said Jeremiah Odera Eshitemi (hereinafter together referred to as “the original owners”) on 7th September, 1971. The original owners were brothers. Jeremiah Odera Eshitemi (hereinafter referred to as “the deceased”) died on 18th May, 2011. On 31st December, 2015, the suit property was registered in the name of one, Emily Judith Odera. The suit property was transferred to Emily Judith Odera pursuant to an indenture dated 24th November, 2015 said to have been executed by the original owners of the suit property in her favour. The original owners are said to have transferred the suit property to Emily Judith Odera at a consideration of Kshs. 10,000,000/-. Emily Judith Odera was the deceased’s wife (hereinafter referred to only as “the deceased’s wife”).

On 18th July, 2016, the suit property was registered in the names of the respondents as the proprietors thereof. The property was transferred to the respondents by the deceased’s wife pursuant to an indenture dated 15th July, 2016. According to the indenture, the respondents paid Kshs. 30,000,000/- to the deceased’s wife as purchase price for the suit property.

The applicant brought this suit on 29th January, 2020 by way of Originating Summons dated 28th January, 2020 seeking an order that the original owners of the suit property had been defrauded of the suit property and were entitled to have the suit property transferred back and registered in their names as tenants in common in equal shares. The applicant also sought an order that the applicant and the legal representative of the estate of the deceased are entitled to assume full ownership and title to the suit property.

The Originating Summons was supported by the affidavit of the applicant dated 28th January, 2020. In the affidavit, the applicant stated that the original owners purchased the suit property from one, Seva Singh Mandlal in August, 1971 at a consideration of Kshs. 53,000/-. The applicant averred that the original owners had never sold the suit property since they purchased the same. The applicant averred that the deceased died on 18th May, 2011 at the age of 80 and his estate was the subject of succession proceedings in the High Court at Kakamega.

The applicant averred that in 2018, he noticed that someone had commenced construction on the suit property which construction was still going on. The applicant stated that he sought assistance from various government agencies to stop the development to no avail. The applicant averred that the original owners had not authorized any person to carry out construction on the suit property. The applicant averred that upon carrying out investigations, he discovered that the suit property was purportedly transferred by the original owners to the deceased’s wife through an indenture dated 24th November, 2015. The applicant stated that he never executed the said indenture in favour of the deceased’s wife. The applicant stated that his purported signature in the document was a forgery. The applicant averred further that the original owners of the suit property were never paid the consideration of Kshs. 10,000,000/- mentioned in the indenture. The applicant stated that as at the date of the purported transfer of the suit property to the deceased’s wife, the deceased had already passed on and as such could not have signed the indenture.

The applicant stated that he discovered also that the deceased’s wife transferred the suit property to the respondents in 2016. The applicant stated that the suit property was transferred to the respondents fraudulently without the knowledge of the original owners. The applicant annexed to his affidavit in support of the Originating Summons various documents including; a copy of the death certificate for the deceased, photographs showing development being undertaken on the suit property by the respondents, copies of letters addressed to various government agencies seeking assistance, a copy of the indenture dated 24th November, 2015 and a copy of the indenture dated 15th July,

2016.

Together with the Originating Summons, the applicant filed a Notice of Motion application dated 28th January, 2020 seeking a temporary injunction restraining the respondents from trespassing, cultivating, subdividing, laying beacons, selling, transferring, wasting, developing and/or alienating the suit property pending the hearing and determination of the suit. The application was supported by the affidavit of the applicant dated 28th January, 2020 in which the applicant reiterated the contents of the affidavit filed in support of the Originating Summons the contents of which I have highlighted above. The applicant also relied on the same documents annexed to the affidavit in support of the Originating Summons. The applicant filed a supplementary affidavit sworn on 21st August, 2020.

The respondents opposed the application through a replying affidavit sworn by the 1st respondent on 22nd July, 2020. The respondents also filed a further affidavit sworn by the 1st respondent on 4th February, 2021. The respondents admitted that that they were the registered proprietors of the suit property. The respondents admitted further that they acquired the suit property from the deceased's wife. The respondents averred that before the suit property was transferred to them, the applicant had made a statutory declaration on 16th May, 2016 in which he confirmed that the deceased's wife was the owner of the suit property. The respondents stated that before purchasing the suit property they undertook due diligence and carried out a search at the Land Registry which confirmed that the suit property was registered in the name of the deceased's wife. The respondents averred that they acquired the suit property from the deceased's wife at a consideration of Kshs. 40,000,000/-. The respondents averred that the original owners of the suit property entered into an agreement with the deceased's wife for the sale of the suit property on 11th January, 2011 before the death of the deceased and that the applicant willingly transferred the suit property to the deceased's wife.

The respondents averred that they were bona fide purchasers of the suit property for value without notice of any defect in the title held by the deceased's wife. The respondents averred that they were not involved in any act of fraud in the acquisition of the suit property. The respondents averred that the applicant was well aware of the agreement that they entered into with the deceased's wife.

In the applicant's supplementary affidavit that was filed in response to the respondents' replying affidavit, the applicant reiterated the contents of his affidavit in support of the application. The applicant denied signing the indenture through which the suit property was transferred to the deceased's wife. The applicant also denied signing the statutory declaration dated 16th May, 2016 in which he allegedly confirmed the deceased's wife's ownership of the suit property and knowledge of the transaction between the deceased's wife and the respondents in respect of the suit property. The applicant contended that his purported signatures in both documents were forgeries. The applicant contended further that the photograph purported to be his in the indenture dated 24th November, 2015 did not belong to him.

In their further affidavit, in response to the applicant's supplementary affidavit, the respondents reiterated the contents of the 1st respondent's affidavit in reply to the application. The respondents reiterated that the applicant signed both the indenture transferring the suit property to the deceased's wife and the statutory declaration dated 16th May, 2016.

The application was argued by way of written submissions. The applicant filed his submissions on 17th September, 2020 while the respondents filed their submissions on 25th February, 2021. The applicant reiterated that the sale of the suit property to the respondents was tainted with fraud. They submitted that the conditions for the grant of the orders sought had been met. On their part, the respondents submitted that the applicant had not established the conditions for grant of a temporary injunction to warrant the grant of the orders sought.

I have considered the application together with the affidavits filed in support thereof. I have also considered the respondents' affidavits filed in opposition to the application and the written submissions by the advocates for the parties. The applicant has sought a temporary injunction pending the hearing of the suit. The principles upon which the court exercises its discretion in applications for interlocutory injunction are well settled. In Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

The following is my view on the application. I am satisfied that the applicant has established the conditions for grant of a temporary injunction. The applicant has established that he was a joint proprietor of the suit property with the deceased. The applicant has established that the deceased died on 18th May, 2011 and that the suit property was purportedly transferred to the deceased's wife by the applicant and the deceased on 31st December, 2015; 4 years after the death of the deceased. The applicant has denied signing the indenture dated 24th November, 2015 through which the suit property was transferred to the deceased's wife. The applicant has also denied receiving any part of the sum of Kshs. 10,000,000/- that was purportedly paid by the deceased's wife as a consideration for the suit property. I have no convincing evidence before the court that the applicant executed the indenture dated 24th November, 2015. There is also no evidence that the applicant received the purchase price of Kshs. 10,000,000/- allegedly paid by the deceased's wife or any part thereof. The respondents have contended that the indenture dated 24th November, 2015 was signed by the applicant and the deceased in 2011. No explanation has been given on how

the indenture dated 24th November, 2015 could have been signed in 2011 and if it was so signed, why it took the deceased's wife 4 years to stamp and register the indenture. I am satisfied that the applicant has demonstrated that he has a right over the suit property which should be protected by the court.

The applicant has also demonstrated that that right is threatened with violation unless the orders sought are granted. The respondents are now the registered proprietors of the suit property. The respondents are free to deal with the property in whatever manner they deem fit. They may lease, sell or charge the suit property unless restrained by the court. If the respondents sell the property, the same would be put beyond the reach of the applicant. I am satisfied that the applicant stands to suffer irreparable harm unless the orders sought are granted.

I have noted that as at the time the applicant came to court, the respondents were already in possession of the suit property and they had commenced construction on the same. The court did not stop the construction or the respondents' possession of the property pending the hearing and disposal of the present application. In the circumstances, I am of the view that it would not be appropriate to grant orders of injunction on the terms sought by the applicant. The order that commends itself to me is that which will maintain the status quo pending the hearing of the suit.

I wish to add that even if I was not convinced that the applicant has a prima facie case, I would still have made an order for the maintenance of status quo pending the hearing of the suit. In Ougo and Another v Otieno [1997] KLR 364, it was held that:

“the general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”

I am of the view that both parties have raised issues that require investigation at the trial. Whether the applicant sold his interest in the suit property to the deceased's wife, whether the deceased's wife gave consideration and whether the applicant was aware of the sale of the suit property to the respondents are all issues that can only be determined at the trial. Until then, it is necessary that the status quo be maintained to protect the rights of both parties in the suit property. It is for that reason that I will not grant the orders sought as prayed. The orders of the court will be limited only to the maintenance of status quo. In conclusion, I hereby make the following orders;

1. Pending the hearing and final determination of this suit or further orders by this court, there shall be an inhibition inhibiting the registration of any other or further dealings with all that parcel of land known as L.R No. 36/75/1. For the avoidance of doubt, the respondents are restrained from selling, transferring or charging the suit property pending further orders by the court.
2. The costs of the application shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF NOVEMBER, 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Applicant

Ms. Mohamed h/b for Mr. Lakicha for the Respondents

Ms. C. Nyokabi - Court Assistant