



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 12 OF 2021

LABAN OGERO OPANDE.....PLAINTIFF

VERSUS

CHRISTOPHER NYAMBANE NYAMWEYA.....DEFENDANT

RULING

The Application

1. The application dated **10/3/2021** and filed in court on **17/3/2021**, has been brought under **Section 3A** and **63** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 40 Rule 1** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The plaintiff seeks the following orders:-

(1) ...spent

(2) ...spent

(3) This honourable court be pleased to grant temporary injunction, with a penal order, to the defendant/respondent by himself and or his agents and or servants and or employees and or any other persons claiming under the defendant/respondent from disposing of or in any manner whatsoever, selling, changing, alienating, managing, letting or otherwise dealing in Land Reference No. 4388/41 and or the suit land as described in the plaint relevant to this case.

(4) That an interlocutory injunction be and is hereby issued compelling the defendant/respondent to, forthwith upon service of this order, deposit with the court the original documents of title to the LR No. 4388/41 and the same to remain in the custody of this court throughout pending the hearing and determination of this case and the order to carry penal effect.

(5) That an order by way of temporary injunction, forbidding the Registrar of Titles of any dealings with LR No. 4388/41 unless the dealing is expressed to be subject to the claim of the plaintiff/applicant, pending the hearing and determination of this application or suit.

(6) That the prayers of this application are hereby granted in the first instance pending hearing and determination of this application.

(7) That costs of this application be provided for.

2. The application is supported by the affidavit sworn on **10/3/2021** by **Sam Opande**, the brother to the plaintiff who expresses himself to be duly authorized by the plaintiff. The grounds on the face of the application are that the plaintiff has a purchaser's interest in the suit land and he has established a prima facie case against the defendant and that he has been displaced from the suit land despite having paid the purchase price to the defendant.

The Response

3. The defendant filed grounds of opposition on **12/4/2021** and raised the following grounds:

(1) The application is not meritorious.

(2) The application is non-starter.

(3) The prayers sought are fanciful and unwarranted.

(4) The application is not legally tenable but is an abuse of court process.

4. The defendant also filed a preliminary objection on **12/4/2021** and raised the following grounds:

(1) That the suit application is fatally defective and an abuse of the court process.

(2) The application is frivolous, vexatious and abuse of court process.

(3) That the application is a duplicitous and offends the set Rules

(4) That the application has no *locus standi* to bring the application to court.

The Response

5. The defendant filed a replying affidavit sworn on **16/4/2021**. He deposes that he entered into an agreement with the defendant on **4/6/2019** in respect of the land known as **LR 4380/41** and paid the sum of **Kshs. 2,000,000/=** leaving a balance of **Ksh 6,000,000/=**. He further stated that the agreement stated that the sum of **Kshs. 3,000,000/=** would be paid by **31/12/2019** and a further **Kshs. 3000, 000/=** by **30/6/2020**; that the plaintiff failed to pay the first and second instalments as agreed and the agreement became voidable; that the plaintiff is not in possession of the suit land the defendant having repossessed it for default; that the plaintiff is only entitled to the refund.

6. In response to the defendant's replying affidavit, the plaintiff filed a supplementary affidavit sworn by one *Sam Opande* his brother on **29/4/2021** stating that plaintiff asked him to represent him in a transaction for purchase of **10 acres** out of **Land Reference 4380/41**; that the agreement states that **the Ksh 3000,000/=** would be paid on or before **31/12/2019** or upon the purchaser taking actual possession of the land whichever came *later*. That the agreement also provided for the plaintiff's taking of possession after the maize on the suit land was harvested; that it was necessary to wait for the harvesting of the maize; that that was the only time that the survey of the portion could be done; that the survey was done on **22/1/2020** and the plaintiff took vacant possession immediately thereafter; that the defendant was paid the sum of **Kshs. 3,000,0200** through RTGS between august **2019** and January **2020**; that the defendant began to prematurely demand the balance through the agreement stated that wit would be paid upon transfer, that the defendant invaded the land and hived off **6.25 acres** for himself and gave the plaintiff the remainder as the purported equivalent of the purchase price paid. Later he fenced off the remainder.

Determination

7. I have considered this application and the response. The issue that arises in the instant application is whether a temporary injunction should issue against the defendant restraining him from interfering with or disposing of the suit land, and whether a mandatory injunction should issue compelling him to deposit the original; title documents in respect of the suit land with the court.

8. It is noteworthy that the defendant and the plaintiff both agree that the land belongs to a deceased person; the plaintiff appears to admit that the sale was to be concluded after the conclusion of the succession cause. However the existence of the agreement is not denied.

9. I find that there is evidence that the plaintiff knew that he was dealing with property that was not yet registered in the name of the seller, the defendant. However I do not find that the plaintiff has enjoined the defendant in this suit in his capacity as the administrator of the estate of the deceased and in my view it would be inappropriate to issue any orders while that has not been done.

10. So far this court can not tell from the pleadings who is the administrator of the estate of the deceased. The vendor is only referred to as a "*beneficiary*" in the agreement and the land he sells is said to be part of his "*entitlement*" in the estate.

11. In the defence the defendant avers that the suit land is still in the deceased's name and the estate has not been distributed and that the families of both plaintiff and the defendant have frustrated the sale, and that he is not in possession of most of the completion documents set out in the agreement, and that subdivision would amount to intermeddling.

12. In this court's view the application herein for deposit of title of a deceased person and injunction of any transactions with the title while it is not his administrators who sold the land has no basis as the court would be deemed to be cleansing the defendant's *possible intermeddling* with the estate. I use the words "*possible intermeddling*" conscious that this is just the inchoate stage of the processing of the dispute and there is much that can not be known from the application and the response.

13. Consequently I find that the plaintiff has not established a *prima facie* case and though in this court's view he would suffer colossal damage if I decline the orders sought, the application dated **10/3/2021** lacks merit and the same is dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 11TH DAY OF MAY, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.