



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 36 'B' OF 2019

NOAH NEVIL OKOTH.....PLAINTIFF/APPLICANT

-VERSUS-

RAYOLA OCHIENG OLEL T/A

(E.A) ENTERPRISES LIMITED.....1ST DEFENDANT/RESPONDENT

REGISTRAR OF LANDS KISUMU COUNTY....2ND DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT

RULING

Noah Nevil Okoth hereinafter referred to as the applicant has come to court by way of Notice of Motion dated 18th November 2019 and filed on 21st November 2019 under certificate of urgency and premised on Sections 3 and 3A of the Civil Procedure Act, Order 40 Rule 1, 2 and 4 the Civil Procedure Rules 2010 and praying for orders that pending hearing and determination of this Suit, an injunction do issue restraining the Defendants/Respondents its servants and/or agents or otherwise howsoever be restrained from repossessing, selling, alienating, disposing or in any other way whatsoever dealing with the property known as KISUMU/KAPUONJA/679 hereinafter referred to as the property. Pending the hearing and determination of this Suit, an injunction do issue restraining the Defendants/Respondents their servants and/or agents or otherwise howsoever be compelled to halt any form of dealings on the said suit property known as KISUMU/KAPUONJA/679. That the Officer Commanding Maseno Police (OCS) be directed to enforce and ensure full compliance with the Court orders herein. The costs of this application be awarded to the Plaintiff/Applicant.

The application is supported by the plaintiff/applicant's affidavit sworn on 18th November 2019 and filed on 21st November 2019. The following grounds of the application can be deduced from the face of the application and the supporting affidavit;

- a. That the plaintiff/applicant is the legal and rightful purchaser and/owner of part of the suit property known as KISUMU/KAPUONJA/679.
- b. That the suit property belonged to ORINA OGALO (deceased) as per the copy of certificate of search marked NNO-2. The Plaintiff entered into a sale agreement with the deceased's only surviving sons, MARTIN ONYANGO and FELIX ONYANGO AWITI for the purchase of 0.18 Ha and later 0.2 Ha out of the 0.9 Ha of the suit property on 22nd May 2017 and 26th August 2017 respectively as per the annexed sale agreements marked NNO- 1a & 1b. The plaintiff further states that he paid all the payments as stipulated in the sale agreement, Kshs. 400,000/- to be specific and the sellers acknowledged the same.
- c. That the said vendors (deceased's sons) undertook to pursue legal rights to enable them to administer the deceased's estate but the firm of advocates they appointed, Messrs. B.F.O Advocates never initiated the administration process as instructed and thereby stalling the whole process including the registration of the purchased portion in favour of the plaintiff/applicant.
- d. That in 2018, when the plaintiff/applicant instructed a surveyor to commence subdivision process, it came to his attention that there existed a caution placed on the suit property by the 1st Respondent as per the annexed certificate of official search marked NNO-5.
- e. That the said caution (**annexed as NNO-6**) is irregular as when applying for the same, the 1st Respondent commissioned documents executed by him contrary to section 4 of the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya.

f. That having paid the full purchase price and executed the application form for consent at the land control board, the plaintiff legally acquired the portion of the suit property, but the failure by the advocate to ensure the process runs smoothly to its conclusion has paved way for illegal dealings by the Respondents thus exposing the suit property to danger.

g. That the Plaintiff/Applicant stands to suffer irreparable loss and damage if the orders sought are not granted.

1ST RESPONDENT'S CASE

The Application has been opposed by the 1st defendant vide his replying affidavit dated and filed on 25th March 2021. It is the 1st defendant/respondent's case that;

a. The Plaintiff has no locus to file this suit as he is not the owner of the suit parcel, neither is he an administrator to the estate of Orina Ogalo who is the registered owner of the suit parcel.

b. That if the order sought in prayer 3 are granted, there will be nothing left to be determined in the suit as the orders sought in the suit are similar.

c. That the 1st defendant is not in possession of the suit property nor does he intend to sell or dispose it off. That he also does not intend to take the whole of the suit property nor interfere in any manner with the Plaintiff.

d. That the 1st defendant had an agreement with Felix Onyango Awiti to buy a portion of the suit property and paid him Kshs. 90,000/- deposit but the said Felix Onyango Awiti proceeded to sell the said parcel to the Plaintiff herein as they were waiting for the vendor to file succession proceedings to his father's estate before proceeding further.

e. That the 1st defendant has told the Plaintiff to refund the Kshs. 90,000/- so that the defendant can withdraw the caution but he has refused to co-ordinate with the sellers to refund the same.

f. That they do not have any interest in the suit parcel apart from the Kshs. 90,000/- plus interest thereon from 2017 to date at 14% p.a and as such are fully justified in placing the restriction and it should not be removed.

g. That there is no need to litigate over this matter as the Plaintiff should only refund the 1st defendant's money and deduct it off what is due unpaid to the owners of the suit parcel.

When the matter came up before this Court on 04/02/2021, the Court directed that parties file submission in respect of the application and further gave an order restricting the parties from dealing with the property in the land registry and interfering with the status quo until the ruling is delivered. As at the time of writing this ruling, none of the parties had filed their submissions.

This court agrees with the 1st Respondent that if the order sought in prayer 3 is granted, there will be nothing left to be determined in the suit as the orders sought in the suit are similar and therefore delving into whether or not prayer 3 of the application should be granted will amount to going into the merits of the suit which is not proper at this point in time. This is because the main suit revolves around the caution and prayer a that requests this court to order that the 1st Defendant be compelled to remove the caution so as to pave way for the transfer to be executed and registered. It is therefore definite that the main issue for determination is whether the applicant has met the conditions required for the grant of a temporary injunction pending the hearing and determination of the suit being prayer 4 and 5 of the application.

Order 40 Rule 1 of the Civil Procedure Rules provides for conditions to be satisfied by an applicant before an order of injunction can be granted. It provides;

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

The applicant must also demonstrate the criteria set out in the case of *Giella vs Cassman Brown Ltd (1973) EA 358*. The criteria are;

a) The Applicant must establish that he has a prima facie case with probability of success.

b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.

c) When the Court is in doubt, to decide the case on a balance of convenience.

It is the applicant's case that the 1st Defendant /Respondent has threatened to have the whole suit property registered under the registered company's name despite the applicant having ownership interests and rights and that unless restrained by this Honourable Court, the Defendants/Respondents will interfere with the Plaintiff/Applicant's possession and occupation rights to the rightfully purchased portion of the said land.

The 1st Defendant/Respondent on the other hand has stated that he is not in possession of the suit property nor does he intend to sell or dispose it off and that he also does not intend to take the whole of the suit property nor interfere in any manner with the Plaintiff. This has not been challenged by the plaintiff/applicant in a supplementary affidavit. Further, the plaintiff/applicant has not brought any evidence before this Court to show that the 1st Defendant has threatened to have the property suit registered in the company's name.

It is the 1st defendant's case that the only interest he has with respect to the suit property is the deposit of Kshs. 90,000/- which he paid towards purchase of part of the suit property and that he is ready to lift the caution on condition that the amount of Ksh. 90,000/- plus accrued interest is refunded to him.

Based on the above, I am convinced and do find that the suit property is not in any danger of being tampered with by the 1st Defendant/Respondent. In any event, the certificate of official search dated 17th September 2019 (annexure NNO-5 to the Plaintiff's supporting affidavit) indicates that the property is still registered in the name of Orina Agalo (deceased) and it is unlikely that any transfer will be effected until after succession proceedings.

In **Mrao Ltd v. First American Bank of Kenya Ltd & 2 others (2003) KLR 125** (referred to in the case of **Wilfred Mutembei v Andrina Nkuene Njiru & 2 others [2020] eKLR**) the court described prima-facie case as follows; -

“In civil cases it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter’

The Court should however be careful not to decide the disputed issues in finality but only to determine whether the applicants are deserving of the injunctive orders sought based on the criteria laid down in the case of **Giella Vs Cassman Brown & Co. Ltd(supra)**. See the case of **Wilfred Mutembei v Andrina Nkuene Njiru & 2 others [2020] eKLR**.

It is the plaintiff/applicant's case that he is the legal and rightful purchaser and/owner of part of the suit property known as KISUMU/KAPUONJA/679. The plaintiff has annexed agreements for sale of land in respect of the suit property (*annexures NNO-1a & b*). Though the 1st respondent has averred that the plaintiff does not have locus to file this suit, I hold the view that that is an issue to be delved in at trial and not at this point in time.

The applicant has also demonstrated that a caution has been placed on the property by the 1st defendant, hence hindering the transfer of the property in his name. The legality and/or irregularity or not of the caution is a matter to be heard and determined by the Court. It is therefore my view that the applicant has established a prima facie case worthy of being heard and determined by this Court.

The centrality of substantial loss was discussed in the case of **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR** in the following terms;

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. ... “...Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

It is the Applicants case that the Plaintiff/Applicant will suffer irreparable loss and damage if the Defendants are not restrained from interfering with the Plaintiff's occupation and possession of the property, in that he will be unable to have the suit property transferred in his name. The 1st Defendant/Respondent has indicated that the only interest he has in respect of the suit property is the amount of Kshs. 90,000/- he paid as deposit towards purchase of the same and the interest accrued thereon. It is clear that the 1st defendant is not interested in the suit property anymore.

I therefore find it hard to find that the plaintiff/applicant will suffer any loss and/or damage as he is in possession and occupation of the suit property, which the defendant is not interested in anymore. The applicant is only fearful that he will be unable to have a transfer effected in his favour. As stated above, the property is still registered in the name of deceased and it is unlikely that the plaintiff/applicant will have the same transferred in his favour until after the succession proceedings. The applicant has not placed before the Court any evidence to show whether or not succession proceedings have been instituted and at what stage they are at, if any.

It is my finding that the balance of convenience tilts in favour serving justice to both parties, since both of them have demonstrated their interests in the suit property.

Based on the above, I conclude that it is in the interest of justice that the Court issues, and I do hereby issue an order restricting any of the parties and the County Land Registrar, Kisumu from dealing with the property in dispute at the land registry and from interfering with the status quo on the ground pending hearing and determination of the suit.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JULY, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE