



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

ENVIRONMENT AND LAND COURT CASE NO. 129 OF 2014.

ROBINSON CHESIRO NGEIYWA & ANOTHER :::::::::::::::::::::PLAINTIFF.

VERSUS

HON. BERNARD SHINALI :::::::::::::::::::::DEFENDANT.

R U L I N G.

1. The applicants are administrators of the estate of the late John Ndara Kones. They filed a notice of motion dated 4/8/2014 in which they seek an injunction against the respondent restraining him from interfering with LR. No. Trans Nzoia/Kipsoen/11 (suit land). The applicants contend that the suit land belongs to them. They have annexed a copy of the first page of title deed which shows that the registered owner of the suit land is their father who is now deceased.
2. The applicants contend that the respondent has commenced the process of evicting them without a court order. In their statement of claim, the applicants are seeking a declaratory order that they are the proprietors and or beneficial owners of the suit land.
3. The application is opposed by the respondent through replying affidavit sworn on 21/8/2014 and filed in court on 22/8/2014. The respondent contends that the suit land belongs to him. He contends that the suit land had been registered in the name of one Benson Nicodemus Omambia Mogaka who secured a loan from Agricultural Finance Corporation using its title as security. When he failed to repay the loan, the land was taken by the Agricultural Finance Corporation who sold it to him by private treaty.
4. The respondent contends that the applicants obtained ex-parte orders of injunction based on concealment of material facts. The respondent contends that the title which was exhibited by the applicants was closed in the 1990s when the property changed hands from the applicant's father to Benson Nicodemus Omambia Mogaka. He contends that the applicants obtained injunction by concealing the other two pages of the title deed.
5. I have carefully gone through the applicants' application together with the supporting affidavit as well as the supplementary affidavit and the replying affidavit of the respondent as well as the annexures thereto. The principles for grant of interlocutory injunction are now well settled.

First, an applicant must demonstrate that he has prima facie case with probability of success.

Secondly, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which may not be adequately be compensated in an award of damages.

Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

6. In the present case the applicants obtained the ex-parte injunction based on material concealment of the true facts. They exhibited only one page of the title deed. This was deliberate because they knew that the title they were exhibiting had long been closed and that the property was not in the name of their father. Infact the judge at Eldoret who gave the applicants an injunction noticed that the applicants had only annexed one page of the title deed but he nevertheless decided to grant an ex-parte injunction giving the applicants benefit of doubt.

7. It has now turned out that the property was transferred to Benson Nicodemis Omambia Mogaka who secured a loan from Agricultural Finance Corporation using the title. When he failed to repay the loan the Agricultural Finance Corporation took the property which they sold to the respondent. The respondent has annexed a title which is in his name. He has also annexed a copy of the green card showing the history of the suit land. It is therefore clear that the applicants have not demonstrated that they have a prima facie case with probability of success. The applicants cannot seek to be declared as owners of the suit land when the property has changed hands to the respondent.

8. It is averred by the respondent that the applicants have already been evicted. This has not been denied by the applicants in their supplementary affidavit. The applicants claim that they have put up permanent buildings on the suit property yet they have only exhibited photographs of mud houses which are partly demolished. The applicants obtained ex-parte orders on the pretext that the suit property is still registered in the name of their late father.

I do not have to consider the other principles for grant of injunction. I find that the applicants' application lacks merit. The Same is hereby dismissed with costs to the respondent. The injunction orders given on 8/8/2014 and subsequently extended are hereby discharged.

It is so ordered.

[Dated, signed and delivered at Kitale on this 15th day of September, 2014.]

E. OBAGA.

JUDGE.

Delivered in the presence of Mr. Wafula for respondent and applicant. Court Clerk – Kassachoon.

E. OBAGA.

JUDGE.

15/9/2014.