



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Civil Case 84 of 2011**

WERE ODHUL.....PLAINTIFF

**VERSUS**

SHEM OWUOR OTHINA..... DEFENDANT

**RULING**

1. The Plaintiff who is acting in-person brought this suit on 4<sup>th</sup> May, 2011 by way of a plaint dated 11<sup>th</sup> April, 2011. The plaintiff has sought two (2) prayers against the defendant namely, a declaration that the defendant is holding the parcel of land known as **L.R No.Kanyamwa/K/K/Kadwet/1469** (hereinafter referred to as “**the suit property**”) in trust for the Plaintiff and an order cancelling the title documents for the suit property in the name of the defendant and the conveyance of the same to the Plaintiff. The Plaintiff is the administrator of the estate of one, Rosalina Kaumba Aran pursuant to a special limited grant of letters of administration that was issued to the Plaintiff at the Resident Magistrate’s Court, Homa-Bay on 27<sup>th</sup> April, 2011. The Plaintiff’s claim against the defendant is brought on the grounds that the suit property originated from a parcel of land known as **Kanyamwa/K/K/Kanyadwet/339** and was at all material times registered in the name of the said, **ROSALINA KAUMBA ARAN deceased** (hereinafter referred to only as “**Rosalina**”). The Plaintiff claims that after the demise of Rosalina, the Plaintiff without following the laid down procedure for administering the estate of a deceased person caused the suit property to be fraudulently transferred into his name on 17<sup>th</sup> August, 2007 in collusion and with the assistance of the officers at the lands registry. The particulars of fraud are set out in paragraph 6 of the Plaint. In his statement of defence dated 30<sup>th</sup> June, 2011 that was filed in Court on 1<sup>st</sup> July, 2011 in person, the defendant denied the Plaintiff’s claim in its entirety and prayed that the same be dismissed with costs. The defendant denied that the Plaintiff is the administrator of the estate of Rosalina and challenged the Plaintiff’s *locus standi* in these proceedings. The defendant contended further that, the suit property was transferred to the defendant by Rosalina on 15<sup>th</sup> May, 2007 during Rosalina’s lifetime and as such it was not necessary for the defendant to obtain the necessary grant of letters of administration under the provisions of the **Succession Act, Cap.160, Laws of Kenya** before dealing with the suit property. The defendant therefore denied the allegations of fraud leveled against him by the Plaintiff and put the Plaintiff to strict proof thereof. The defendant contended further that the Plaintiff’s suit is bad in law and is an abuse of the process of the court.

2. On 27<sup>th</sup> June, 2012, the Plaintiff brought an application by way of Notice of Motion dated 29<sup>th</sup> February, 2012 under certificate of urgency seeking an order of temporary injunction to restrain the

defendant from alienating, selling, disposing of or transferring or from whatsoever dealing with the suit property. The Plaintiff's application for injunction was brought on the grounds that the suit property was at all material times registered in the name of Rosalina who the Plaintiff claims to have been his mother and that after the demise of Rosalina, the defendant without waiting for the estate of Rosalina to be administered in accordance with the law proceeded to have the suit property fraudulently transferred to his name. The Plaintiff claimed that the defendant was in the process of disposing the suit property to a third party so as to defeat the Plaintiff's interest in the suit property. It was the Plaintiff's contention that he had shown a prima facie case against the defendant and that unless the orders sought are granted, he stands to suffer irreparable loss. The Plaintiff contended further that in the circumstances of this case, it is only fair that the suit property be preserved pending the hearing and determination of this suit. In response to the Plaintiff's application, the defendant filed a notice of preliminary objection and grounds of opposition through the firm of **Oyoo & Company Advocates**. The preliminary objection raised against the Plaintiff's application was that the Plaintiff who had not sought an injunction against the Plaintiff in the Plaintiff was not entitled to an interlocutory injunction. The application in the circumstances is incompetent and fatally defective. In the grounds of opposition, the application was objected to on various grounds. It was the defendant's contention that the application is incurably defective for offending the provisions of **Order 2 Rule 6(1)** of the **Civil Procedure Rules** and for being supported by an affidavit which is bad in law. The application was also opposed on the ground that the Plaintiff has no *locus standi* to bring this suit and likewise the application. The other ground on which the application was opposed is that, the application did not meet the threshold for granting the orders sought. Without leave of the Court, the Plaintiff purported to file in court on 16<sup>th</sup> August, 2012 an affidavit sworn on a date which is not indicated in reply to the said notice of preliminary objection and grounds of opposition by the defendant.

3. On 15<sup>th</sup> January, 2003 when the Plaintiff's application came up for hearing, only the Plaintiff appeared in Court. The defendant did not appear in person or through counsel. After satisfying myself through the affidavit of Service of one, **Isaiah Miruka**, a court process server of this court sworn on 11<sup>th</sup> January, 2013 that the defendant's advocates were duly served with a hearing notice, I allowed the Plaintiff to argue the application in the absence of the defendant. The Plaintiff in his submission relied entirely on his affidavit in support of the application and urged the court to grant the prayers sought.

4. I have considered the Plaintiff's application and the affidavit in support thereof. I have also considered the notice of preliminary objection and grounds of opposition filed by the defendant in opposition to the same. I have also perused the pleadings, witness statements and bundle of documents filed by both parties. As was stated in the case of **Giella –vs- Cassman Brown & Company Limited [1973] E.A. 358**, an applicant for a temporary injunction must satisfy the court that he has a prima facie case with a probability of success and that unless, the orders sought are granted, he will suffer irreparable loss that cannot be compensated in damages. If the court is in doubt as to the above, the court will determine the matter on a balance of convenience. In the circumstances, the Plaintiff had a duty to satisfy this court on a prima facie basis that he has a case against the defendant for fraudulent acquisition of the suit property from Rosalina. The Plaintiff has claimed that he is the son of Rosalina (deceased) and also the administrator of her estate. This is the basis of the Plaintiff's claim against the defendant. As I had stated at the beginning, the plaintiff claims that the suit property was transferred to the name of the defendant after the death of Rosalina without following the laid down procedure of administering the estate of a deceased person. According to the Plaintiff, the said transfer was fraudulent and ought to be cancelled. The Plaintiff has not provided any material in his affidavit in support of the application to support these allegations. The said affidavit has no annexure. It is therefore not clear from the said affidavit as to, when Rosalina died, when the Plaintiff obtained letters of administration with respect to her estate and when suit property was transferred to the defendant. These are material facts on which the Plaintiff's case either stands or falls. In the absence of any evidence in proof of these facts, there arises serious doubt as to the arguability of the Plaintiff's case against the defendant. The situation is not helped by the defendant who also chose not to swear any affidavit in response to the application. I am of course not blaming the defendant at all. The defendant chose to defend the application in one of the ways permitted under the Civil Procedure Rules, 2012. I have noted however from the bundle of documents filed in Court by the parties that Rosalina died on 15<sup>th</sup> July, 2007 aged 84 years old and that a special grant of letters of administration of her estate was issued to the Plaintiff by the Senior Resident Magistrate's Court at Homa

Bay on 27<sup>th</sup> April, 2011. I have also noted from the said bundle of documents that the suit property was transferred to the defendant on 15<sup>th</sup> May, 2007 which is the same day when Rosalina died. The suit property was transferred to the defendant pursuant to a document of transfer dated 14<sup>th</sup> May, 2007 in which the space indicated for the transferor's signature is in blank and the consideration for the transfer is not indicated. The Land Control Board Consent for the transaction was given at a meeting of the Board that was held on 21st September, 2006 although the consent is dated 1<sup>st</sup> September, 2006 and was for a transfer that was executed seven (7) months after the said consent. What is before me is an interlocutory application for injunction. In interlocutory applications for injunction, the Court normally receives evidence through sworn affidavits although applicants are at liberty produce evidence in any other manner allowed by law (**see order 40 rule 1 of the Civil Procedure Rules 2010**). It is not open to the court to treat bundle of documents submitted to Court by the parties for use at the trial as evidence in support of or in opposition to an interlocutory application for injunction. Evidence in support of an application of this nature must be produced in court either through affidavit or where it is permitted, through oral testimony. Sometimes, when what is to be produced in evidence is a document, the same can be produced in evidence by consent of the parties. Bundle of documents that I have referred to hereinabove does not fall in any of these categories. It follows therefore that, what I have just referred to does not form part the evidence that was placed before me for the purposes of the present application. The foregoing notwithstanding, the aim of the court must always be to do justice to the parties before it. In this endeavor, the court's power to search for the truth must remain unfettered. The provisions of **Section 1A and 3A of the Civil Procedure Act, Cap.21 Laws of Kenya** and **Article 159(2)(d) of the Constitution of Kenya, 2010** were meant to ensure this freedom on the part of the court is achieved. It follows that, when this court is presented with facts which do not clearly shed light on the issues before the court for determination, this court in discharge of its primary function of doing justice cannot close its eyes to any other material placed before it by the parties for whatsoever purpose if such material would provide some answer to the issues before the court and its consideration would not occasion any prejudice or cause miscarriage of justice to any of the parties. Due the foregoing, I am not going hesitate to take into account the information that I have gathered from the bundle of documents filed by the parties herein which I have referred to herein above. Going back to the issue as to whether, the Plaintiff has shown a prima facie case against the defendant with a probability of success, I must from my analysis of the Plaintiff's case as presented express my doubt on this issue. What of the issue of irreparable loss? I am equally in doubt also on this issue. The Plaintiff who has not come out very clearly on his interest in the suit property has not convinced this court that he stands to suffer irreparable harm unless the orders sought are granted. In the circumstances, this application falls for consideration on a balance of convenience.

5. From the bundle of documents filed by the parties herein that I had referred to herein earlier, there is evidence that the defendant is the registered proprietor of the suit property. There is also evidence that before the suit property was registered in the name of the defendant, it was registered in the name of Rosalina as the absolute proprietor thereof. There is further evidence that the suit property was registered in the name of the defendant on the same day Rosalina died and that the Plaintiff has been issued with a grant of letters of administration with respect to the estate of Rosalina. The documents placed before this court by the parties raises several issues that require further investigation and interrogation by the Court. This is an exercise which this court cannot undertake at this stage. If the orders sought are not granted and the defendant proceeds to dispose of the suit property and it turns out at the trial that he had acquired the suit property fraudulently, the Plaintiff would have suffered serious prejudice and injustice. On the other hand, it would be unjust to unnecessarily keep the defendant who is the registered proprietor of the suit property from enjoying the rights attached to his proprietorship of the suit. In the circumstances, balancing the interests of the Plaintiff against those of the defendant, the order that commends itself to me is to preserve the suit property pending the hearing and determination of this suit.

6. Due to the foregoing, I am not inclined to grant the prayers sought in the Plaintiff's application dated 29<sup>th</sup> February, 2012. In place thereof, I order that pending the hearing and determination of this suit the defendant by himself or through his servants, employees or agents shall not sub-divide, sell, transfer, or assign all that parcel of land known as **KANYAMWA/KAJWANG/**

**KACHOLA/KADWET/1469.** For the avoidance of doubt this order shall not bar the defendant from occupying or using the suit property if he had been using it or occupying it prior to the date of this order. Since the Plaintiff has not succeeded wholly in the application, the cost of the application shall be in the cause.

**Signed, dated and delivered at Kisii this 8<sup>th</sup> day of March, 2013.**

**S. OKONG'O,  
JUDGE.**

**In the presence of:-**

The Plaintiff in person.

No appearance for the defendant.

Mobisa the Court Clerk.

**S. OKONG'O,  
JUDGE.**

**HCCC.NO.84 OF 2011**