



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Case 88 of 2007

JOB OKUNA OYUGI.....1ST PLAINTIFF

JOSHUA ONYANGO OYUGI & OTHERS.....2ND PLAINTIFF

VERSUS

DOREEN ARIBETA OYUGI.....1ST DEFENDANT

EPHRAHIM LIKUYI ANGACHI.....2ND DEFENDANT

RULING

The chamber summons dated 17th July 2008 is expressed to have been brought under section 3A of the Civil Procedure Act and Order 6 Rule 13 (1) (b) (c) (d) of the Civil Procedure Rules and seeks the following orders:-

- (i) That the honourable court be pleased to strike out and/or dismiss the plaintiffs/respondents claim against the 2nd defendant/applicant.
- (ii) That the honourable court be pleased to lift the restrictions lodged in respect of land parcels Nos. Kisumu/Konya/5578, 5579, 5580, 5581, 5582, 5583, 5584, 5585 and 5586.
- (iii) That costs of the application be provided for.

The grounds for the application are contained in the body of the Chamber Summons and are supported by the facts contained in the supporting affidavit deponed by the applicant/2nd defendant dated 17th July 2008.

The applicant contends that he purchased land parcel No.Kisumu/Konya/2869 in 1996 from the first defendant. He exhibited a copy of the title deed in the name of the first defendant (i.e. Annexure marked "ELA-1") and further contended that the first defendant assured home to transfer the parcel of land into his own names. A copy of the pay order dated 6th February 1996 for Kshs. 250,000/= in favour of the first defendant is annexed to the supporting affidavit and marked "ELA 2".

The applicant went on to contend that the parcel of land was registered in his names and a title deed issued on 6th February 1996. The said title deed is annexure marked "ELA 3 (a)" accompanied by a copy of the green card marked "ELA 3 (b)".

Entry No. 7 in the green card shows that the original title No. 2869 was closed on sub-division paving way for new numbers 5578 to 5586.

The applicant contends that he is a bona-fide purchaser for value without notice of any alleged irregularities by the plaintiffs/respondents to which he was not a party. He also contends that the first defendant was given the suit parcel of land by her late husband thereby bringing it out of the purview of the estate of her deceased husband. He further contends that any dealings in the suit parcel have been hindered by the plaintiff's action of registering restrictions thereon.

Consequently, the applicants urge this court to strike out the suit against himself and have the restrictions removed to enable him exercise proprietary rights over the suit property.

The learned counsel for the applicant, Mr. Kimanga, argued that the suit against the applicant is vexatious and scandalous and that the plaintiffs have no *locus standi* to institute it as they only possess a temporary grant of the letters of administration which has been objected to in proceedings pending in court for determination.

By a replying affidavit filed herein on the 29th June 2009, the first defendant states that she is one of the widows of the late Hezekiah Nelson Oyugi and that the suit parcel was sold by her to the applicant. She also states that the suit parcel is not part of the estate of her husband as it was a gift to her by her late husband prior to his demise. She is in support of the applicant's application and contends that the plaintiffs obtained a temporary grant fraudulently and the same has been objected to and subject of a pending case. She further contends that the plaintiffs have no *locus – standi* to sue in respect of the estate of her late husband.

In opposing the application, the plaintiffs/respondents through the 3rd respondent contend and imply that the first defendant did not have the capacity to sell the suit parcel and confer good title to the applicant.

They further contend that the first defendant could only confer good title to the applicant if she was an administrator of the estate of her late husband which she was not thereby rendering any transaction with the applicant "*void ab-initio*" and fraudulent in nature.

The respondents' learned counsel, Mr. Anyul, contended that the issues raised by the plaintiffs are triable and more so considering whether there was capacity on the party of the first defendant to confer good title to the applicant when she was not the administrator of the material estate and considering that a pending succession cause is yet to be resolved.

Mr. Anyul also contended that the aspect of the suit parcel being a gift to the applicant is another triable issue.

Considering the foregoing rival contentions and the averments contained in the plaint which averments places the ownership of the suit parcel of land on the late Hezekiah Nelson Oyugi and raised the issue of fraudulent transfer of the property to the first defendant and eventually the applicant, it may not be said that this is a straight forward suit which is vexatious, frivolous, malicious and scandalous against the applicant or that it is an abuse of the court process.

The issues raised in the pleadings are highly triable and may only be resolved by way of a full hearing of the case rather than by way of summary procedure.

Order 6 Rule 13 (1) of the Civil Procedure Rules is only to be acted upon in plain and obvious cases and with extreme caution.

The principles enumerated in the case of **D.T. Dobie Co. (k) Ltd –VS- Muchina [1982] KLR 1** would apply to this case although the Court of Appeal was then dealing with Rule 13 (1) (a) of Order 6.

In that case, the following was stated:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable course of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a course of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

On the other hand, if there is a point of law which merits a serious discussion, the court should be asked to proceed under Order XIV Rule 2”.

This present application is without merit and is hereby dismissed with costs to the plaintiff/respondents.

[Read and Signed at Kisumu this 9th day of July 2009].

[In the presence of Mr. Odunga h/b for Mr. Kimanga]

J.R.Karanja

JUDGE

JRK/va