



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 135 of 2005

GEOFFREY RUHARA MATHENGE.....PLAINTIFF/APPLICANT

VERSUS

HASSAN NANOK.....1ST DEFENDANT/RESPONDENT

DAVID WACHIRA WANJOHI.....2ND DEFENDANT/RESPONDENT

ESTHER WANJIRU WANJOHI.....3RD DEFENDANT/RESPONDENT

JULIUS GILBERT SAMOEI.....4TH DEFENDANT/RESPONDENT

RULING

The plaintiff/applicant brought a chamber summons under Order XXXIX Rules 1(a) 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act praying for orders to restrain the defendants by themselves, their agents, servants and/or employees from entering, remaining, trespassing, ploughing or in any other manner howsoever interfering with the plaintiff's use, possession, occupation, ownership and enjoyment of his parcel of land known as **LAIKIPIA/LARIAK/20** (hereinafter referred to as "**the suit premises**") or any portion thereof, pending the hearing and determination of this suit.

- (i) The applicant was the absolute proprietor of the suit premises since 31st December, 1991.***
- (ii) The respondents had encroached into the suit premises and commenced farming activities when they had no right to do so.***
- (iii) The respondent's unjustifiable actions were going to cause irreparable injury to the applicant.***
- (iv) The applicant's case had overwhelming chances of success, having been in occupation of the suit premises for the past 27 years.***

In his affidavit in support of the said application, the applicant deposed that he purchased the suit premises from one **RUBURAS LUCHUMI** (now deceased) and hereinafter referred to as "**the deceased**" on 20th September, 1978 and consent of the area Land Control Board was obtained on 3/12/1978.

All the dues that were owing to Agricultural Finance Corporation and the Settlement Fund Trustee by the deceased on account of the suit premises were duly paid by the applicant on their express understanding

that the deceased would waive the outstanding purchase price, having paid a deposit of Kshs.10,000/- upon signing of the sale agreement. The applicant further stated that after making all the payments in respect of the land he entered therein and started wheat and maize farming and also tried horticulture. However, in 2004 when he visited the suit premises with a view to conducting a survey for purposes of establishing a multi million horticultural enterprise he found that the respondents had encroached into the suit premises and started ploughing part of it.

The applicant deposed that he reported the matter to the police and the respondents were arrested and charged at the Nyahururu Law Courts with forcible detainer. He further stated that he was about to strike a deal with a development partner for the financing of an intensive commercial farming enterprise but the project could not be approved because of the respondent's encroachment and therefore he urged the court to remove the respondents by way of issue of a mandatory injunction.

The first respondent filed a replying affidavit and stated that he was a beneficiary of the estate of the deceased who died on 11th May, 1989. He further stated that the applicant was fraudulently registered as the owner of the suit premises because:- ***(a) The purported signature of the deceased on the sale agreement and the transfer in respect of the suit premises was a forgery, the two documents having been subjected to examination by a handwriting expert who confirmed that they were not signed by the deceased.***

(b) The consideration quoted in the sale agreement (Kshs.50,550.70) and that quoted in the transfer and the letter of consent (Kshs.10,000/-) were contradictory and were evidence of fraud.

(c) Other documents also allegedly signed by the deceased were forgery.

(d) The applicant's title deed was purportedly issued on 31st December 1991, two and a half years after the deceased had died and there was no explanation why it took him 13 years from the date of purported purchase to procure the same.

(e) No member of the deceased's family was involved in the purported transaction.

The first respondent further deposed that the family of the deceased had all along been in possession of the suit premises and had been using the same. He therefore urged the court to dismiss the plaintiff's application aforesaid.

The second, third and fourth respondents stated through an affidavit sworn by the second respondent that they cultivated the suit premises in the year 2004 pursuant to a lease agreement between themselves and the first respondent and they harvested their crops in December 2004 and they had no other interest thereon and neither were they in occupation any longer. They further stated that they had no interest in the suit premises and stated that they had been wrongfully sued and urged the court to dismiss with costs the suit against them.

In a supplementary affidavit sworn by the applicant, he refuted the first respondent's contention that he was a beneficiary of the deceased's estate, saying that he knew all the deceased's children. In any event, the applicant added, the first respondent did not produce any letters of administration in respect of the deceased's estate and therefore he could not purport to act for the estate of the deceased or to represent the deceased's family. The applicant stated that the sale agreement between himself and the deceased was executed before Ghadialy & Company Advocates of Nyeri on 20th September, 1978 and the transfer dated 26th September, 1978 was duly executed by both parties before J.G. Awino, an officer of the Settlement Fund Trustee.

The applicant dismissed the report by the handwriting expert saying that it was purposely procured by the first respondent for his benefit after he sought an adjournment for about one and a half months in Nyahururu Principal Magistrate Criminal Case No. 2719 of 2004 where he had been charged with forcible detainer. The applicant also produced several documents allegedly signed by the deceased to show that the deceased had at least two different signatures, a long one and a short one.

With regard to the consideration of Kshs.10,000/- shown in the transfer form, he stated that the Settlement Fund Trustee required that the amount already paid be reflected in the transfer and since by then the deposit that he had paid to the deceased as per the sale agreement was Kshs.10,000/- that amount was the one that was shown in the transfer form. He further stated that having concluded the sale agreement with the deceased he took possession of the entire parcel of land but he realised that there was an old woman who was occupying about a quarter of an acre thereof and instead of removing her forcefully, he resorted to the area chief who in turn summoned the deceased.

With regard to the time he took before he could obtain a title deed for the suit premises, the applicant stated that at the time of the agreement the land was charged to the Settlement Fund Trustees and a discharge thereof could not be prepared until all the outstanding charges had been paid and he did so in 1991.

The applicant further deposed that the family members of the deceased were not residing on the suit premises but were living in a parcel of land situated within Mahoa village, Mwenje Location, Ngarua Division within Laikipia. He therefore stated that the first applicant was a mere trespasser into the suit premises and urged the court to grant the orders as sought.

In light of the depositions by all the parties as I have summarised them hereinabove, it is clear that the second, third and fourth respondents wrongfully entered into the suit premises sometimes in 2004 but after they were charged in court with trespass, they realised that the suit premises did not belong to the first respondent who had leased portions thereof to them and they vacated the land in December, 2004 after they had harvested their crops. That was not denied by the applicant. It therefore means that they were not supposed to have been joined as defendants in this suit which was filed on 12th May, 2005. Consequently, I strike out the plaintiff's suit as against them but with no order as to costs since they had initially trespassed into the suit premises, though under mistaken belief that the property belonged to the first respondent.

Turning to the applicant's claim as against the first respondent (hereinafter referred to as "the respondent") the applicant is the registered absolute proprietor of the suit premises since 31st December, 1991. On the other hand, the respondent's interest in the suit premises cannot be ascertained because his only claim to the same is that of a beneficiary of the deceased's estate. However, he did not make any effort to substantiate that allegation. He did not allege that he was a son to the deceased neither did he show that he was related to him in any way. He did not produce any testamentary depositions made by the deceased declaring that he was a beneficiary of his estate. Despite the fact that he stated that the deceased died on 11th May, 1989, no letters of administration were produced by the respondent. The respondent's claim seemed to be hinged on the allegation that the deceased's family had been in possession of the suit premises all along yet there was no evidence to that effect and in any event the respondent did not state that he was a member of the deceased's family and even if he was, he had no capacity to speak on their behalf as he was not the administrator of the deceased's estate.

I have carefully perused all the documents relied upon by the respondent in support of his allegation that the applicant acquired the suit premises fraudulently. I have in particular considered the Report by the Forensic Document Examiner who compared the alleged signatures of the deceased on the sale agreement and the transfer form with other signatures also alleged to have been made by the deceased in some other documents. The Forensic Document Examiner gave an opinion as follows:-

“In my opinion I can find no agreement between the signatures.”

The probative value of the said Report is questionable in view of the fact that prima facie the deceased seemed to have had two different forms of signatures, a short one and a long one. The short form one is clearly visible in the copy of his identity card which was annexed to the respondents replying affidavit.

While courts of law must give proper respect to opinions of experts, such opinions are not binding upon the courts and more so in an interlocutory application as the one before the court where the expert has not been cross-examined.

In **ELIZABETH KAMENE NDOLO VS GEORGE MATATA NDOLO** Civil Appeal No. 128 of 1995, the Court of Appeal was considering inter alia a report by an expert which related to an alleged signature of a deceased person and it stated as follows:-

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other viable evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:-

‘Because this is the evidence of an expert, I believe it.....’

The respondent cannot therefore rely on the alleged fraud by the applicant to defeat the applicant’s rights over the suit premises as an absolute proprietor thereof. Such alleged fraud is yet to be proved and in the absence of any valid claim to the land by the respondent, the interests of a registered proprietor of a property must take priority over all others.

I am satisfied that the applicant has established a prima facie case with high prospects of success. The applicant has also shown that he is likely to suffer irreparable loss unless the orders sought as against the respondent are granted.

I do not agree with the respondent’s counsels that the applicant is guilty of laches and acquiescence because immediately he discovered that the respondents had unlawfully trespassed into his property he took action and made a formal complaint to the police whereupon all the respondents were arraigned in court as earlier stated.

I grant the orders as sought by the applicant as against the respondent. The respondent will also bear the costs of this application.

DATED at Nakuru this 6th day of July, 2005.

D. MUSINGA

JUDGE