



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO. 79 OF 2018 (O.S)

JULIUS CHERUIYOT CHIRCHIR.....APPLICANT

VERSUS

DAVID KIPKEMOI RONO.....RESPONDENT

RULING

Introduction

1. What is before me is the Applicant's Notice of motion dated 7th December 2018 in which the Applicant seeks a temporary order of injunction to restrain the Respondent by himself, his agents, family members, servants, employees and/or any other person acting on his behalf from trespassing into, interfering with, dealing with, disposing of transferring, leasing, intermeddling and/or wasting a portion of land measuring one acre out of the land parcel known as L.R No. KERICHO/KIPSONOI/1848 being part of the estate of the KIPRONO NGENO –Deceased pending the hearing and determination of the Originating Summons herein.

2. The application is supported by the Applicant's affidavit sworn on the 7th December 2018. It is opposed by the Respondent through his Replying Affidavit sworn on the 15th January 2019.

Applicant's case

3. In the said affidavit, he deposes that on 23.10.2000 he purchased a portion of land measuring one acre from KIPRONO NGENO – Deceased who is the Respondent's father. He subsequently took possession of the suit land which he used until the year 2010 when he sold it to JOHN KIPKEMBOI TOO.

4. He further deposes that he learnt that after the demise of his father, the Respondent transferred the suit land to himself without filing Succession proceedings. The Respondent subsequently sub-divided the suit land into 4 portions namely KERICHO/KIPSONOI/ 3092, 3093, 3094 and 3095 respectively. He then transferred parcels number KERICHO/KIPSONOI 3092,3093,3094 to different people while he remained with parcel number KERICHO/KIPSONOI/3095. He has annexed copies of the mutation forms and certificates of official search as his evidence. The Applicant contends that the portion registered in the Respondent's name belongs to the Applicant.

Respondent's case

5. In his Replying affidavit the Respondent admits that he is the son of the late KIPRONO NGENO but denies that the Applicant is a beneficiary of the estate of the deceased. He further deposes that whatever agreement the Applicant may have entered into with the deceased was void as no consent of the Land Control Board was obtained. He states that his late father signed the relevant transfer documents to him and he was duly registered as the proprietor of L.R No. KERICHO/KIPSONOI/1848 in 2006. He later sub-divided the same into 4 portions. He denies the Applicant has ever occupied the suit land so as to be entitled to it by adverse possession.

6. The application was canvassed by way of written submissions and both counsel filed their submissions which I have considered.

Issues for determination

7. The following issues arise for determination:

- i. Whether the agreement for sale of one acre of L.R No. KERICHO/KIPSONOI/1848 between the applicant and KIPRONO NGENO –Deceased is valid.
- ii. Whether the Applicant is entitled to an order of temporary injunction.

Analysis and determination

8. Counsel for the Respondent has submitted that the agreement between the Applicant and the deceased is void as consent of the Land Control Board was not obtained within 6months of the sale agreement as required by the provisions of section 6 of the Land Control Act.

9. Section 6(1) of the Land Control Act provides as follows:

“Each of the following transactions_

a. The sale, transfer, lease, mortgage, exchange partition or other disposal of or dealing with any agricultural land which is situated within a land controlled area;

b. The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

c. The use, sale, transfer lease, mortgage exchange, partition or other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act”

10. The position that the Courts have consistently taken with regard to the above provision is found in the case of **David Sironga ole Tukai versus Francis Arap Muge & 2 others, Nairobi Civil Appeal number 76 of 2014** where the judges of Court of Appeal relied on the case of **Hirani Ngaite Githire versus Wanjiku Munge (1979)KLR 50**, stated that;

“the position is simple and clear. Section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The Court cannot do that; for it is not for us to legislate but to interpret what Parliament has legislated. So in this case that agreement between the parties having been entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and, since no consent had been obtained within that time, nothing can revise or resurrect such agreement. Failure to obtain the necessary to obtain Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land in a control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes”

11. In the instant case, it is not in dispute that no consent of the Land Control Board was obtained by the Applicant. The Applicant alleges that the deceased put him in possession of the suit land and that he utilized it until the year 2010 when he sold it to a third party. This makes his claim even more remote as he has no further interest in the suit property. Furthermore, the allegation that he took possession of the suit property is refuted by the Respondent. In the circumstances it is my finding that the sale between the Applicant and the deceased is void for lack of consent of the Land Control Board.

12. The second issue is if the Applicant is entitled to injunctive relief.

13. In order for the court to exercise its discretion in granting injunctive relief the applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

14. Having failed to prove that there is a valid sale agreement between him and the late KIPRONO NGENO, and moreover acknowledging that he sold the suit land to a third party the applicant has failed to prove that he has a prima facie case with a probability of success. I therefore need not consider the other grounds for the grant of a temporary injunction.

15. In view of the foregoing the application lacks merit and is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Kericho this 26th day of March 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Bii for the Applicant

2. Mr. Mwita for Mr. J.K.Rono for the Respondent

3. Court assistant - Rotich