



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 23 OF 2017

MOSES SANINGO NAIGURAN.....PLAINTIFF

-VERSUS-

GEOFFREY MAKANA ASANYO.....DEFENDANT

RULING

(Application for Injunction, Principles to be applied, suit Land purchased from a deceased of whom the Plaintiff is now the administrator, averment that the Respondent has invaded the suit land without any right).

The Application before me was commenced by way of a Notice of Motion dated 7th December, 2016. The Notice of Motion was brought under Order 40 Rule 1 and under order 51 Rule 1 of the Civil Procedure Rules. The Applicant sought an order of the injunction against the Defendant himself, his agents and/or employees for accessing, entering, remaining thereon, selling, disposing that property known as **TRANSMARA/INTONA/5** pending the hearing and determination of the suit he filed.

The Applicant in support of the application relied on the grounds that he is the personal representative of the estate of the Late John Lemuta Naiguran who was his father and that the deceased was the lawful owner of a portion measuring 240 acres of undivided parcel of land known as **TRANSMARA/INTONA/5** measuring approximately 400 having purchased the same in 1992.

That the entitlement of the deceased to the land was based on a Sale Agreement entered into with one Stanley Lemoiyo Nkoimo by the deceased and the Defendant and pursuant to the said agreement the deceased paid the sum of kshs. 1,200,000/- as consideration for the said land and that deceased and his family had been in occupation of the said parcel of land.

The said Application was further supported by the Supporting Affidavit of the Applicant sworn and dated the 7th December, 2016. Which in it's entirety was a duplication and an explanation of the grounds of the Application that I stated earlier. Annexed to the said Supporting Affidavit are five (5) annexures namely letter of grant of Administration, Sale Agreement dated 25th March, 1992 a letter showing payment of the sum of kshs. 1,200,000, photographs and a certificate of official search.

The Respondent opposed the said Application and filed a replying Affidavit sworn and dated 13th January, 2017.

The Respondent contend that the Application herein is founded on conscious and deliberate falsehoods and meant to mislead the court.

The Respondent has averred in the said Affidavit that he and one John Naiguran, now deceased had agreed to purchase a portion of what was previously **TRANSMARA/INTONA/3** which was registered in the name of Stanley Lemoiyo.

That the Respondent stated that they agreed to purchase the land together with the deceased for a consideration of Kshs. 2,000,000 which was to be shared by the co-purchasers in the ratio of 1,200,000 shillings and 850,000 shillings respectively and the respondent was to further pay legal /Land survey fees.

It is the Respondent contention that the Sale of the Agreement was to be formalized by the parties before one Wangui Kimani Advocate to which the Vendor had proposed as his Advocate to advise and Act for him on the transaction.

The Respondent sates that the deceased later informed of his inability to raise funds and he therefore proceeded to purchase the said land alone.

The Respondent had attached 5 annextures in support of his arguments which are the Sale Agreement, a letter from Wangui Kimani Advocate, receipts on payment of transfer fees, a letter from Tito and Associates advocates.

On the 17/2/17 the Notice of Motion proceeded to Hearing and learned counsel Kahiga for the Applicant and Mr. Ogotu for the Respondent argued the said Application and cited various authorities in support.

I have considered the submissions made by counsel and the Affidavits on record and hence the following issues arose for determination.

1. Whether the Plaintiff/Applicant had locus standi to commence this proceeding
2. Whether as per the Sale Agreement dated 25th March, 1992 the subject land was jointly purchased by the deceased and the Respondent.

To begin by dealing with the first issue, counsel for Respondent has questioned the authority of the Applicant to commence this suit, I have checked the annextures marked MSN '3' which is a copy of a grant of letters of Administration and by the dint of the existence of a letter of administration a party is authorized to commence proceedings, however, the Applicant has whether by Omission or sheer negligence failed to annex and/or show that he had the express authority and permission of his co-administrators to bring the current suit on his own behalf and that on their behalf this is contrary to the provision of orders 31 Rule (2) of the Civil Procedure Rules 2010. The Applicant was by law required to include each and every appointed administrator as a party to the suit and where he could not, show by way of a letter or any other means he had the express authority and/or permission to commence the suit, however in exercise of my discretion, I will not dismiss the application on this procedural oversight and failure as I am guided by the overriding principle of justice as enshrined under Article 159(1) of the Constitution of Kenya 2010, and therefore allow the Plaintiff/Applicant to amend his pleadings accordingly.

On the 2nd issue of the Sale Agreement. The parties are in agreement that indeed both the deceased and the respondent had entered into a Purchase Agreement with the owner of the land but differ on the question of who paid what and whether the land was purchased jointly by the parties.

I have perused the Sale Agreement and I note that the same was executed on the 25th day of March 1992. The parties herein were joint Purchasers and on this date the sum of kshs. 50,000/- was paid to W.K. Kimani Advocate as a stakeholder. From the Agreement it is not clear who indeed paid the same but for lack of clarity I assume the parties could have raised the sum jointly. The Agreement further proved 31st July 1992 as completion date for the transaction.

The Applicant contended that his father, the deceased had paid the sum of kshs. 1,200,000 to the Vendor

but he has not provided any proof of payment of the said amount and that the annexure he referred to as evidence of payment was merely a letter forwarding a copy of the Sale Agreement.

The Respondent has contended both in his replying affidavit and through submissions by counsel that after signing of the Sale Agreement it took time for the parties to raise the purchase price and it was at that time that the deceased had withdrawn from concluding the sale. This position was also fortified by the lawyer who handled the transaction through her affidavit in support of the respondents.

Having considered all the grounds for and against the Application and reading the annexed affidavits thereon and having listened to submissions by counsel and the authorities cited, for an application of this nature the court should satisfy itself whether the Applicant has met the standard as set out in the case of **GEILLA –VERSUS- CASSMAN BROWN & CO. LIMITED (1965)EA 352.**

The conditions for grant of the injunction was established in the above case as:-

- (a) Whether the Applicant has established a prima facie case with probability of success
- (b) Whether the harm occasioned cannot be compensated by damages
- (c) In whose favour does the balance of convenience tilts.

In answering the above questions I have read Sale Agreement through and the Applicants Supporting Affidavit and I must state that there was nothing to show that indeed the deceased had made payment of the sum of kshs. 1,200,000 as claimed by the Applicant and by that fact alone, the Applicant has failed to establish a prima facie case with probability of success.

The Applicant was at the time of commencement of the suit the administrator of the estate of his late father through grant of letters of Administration issued on 3/3/2011. The Applicant has even not shown that indeed the land in question was part of the estate of their late father that they were to administer.

The argument that the deceased had made payment was further extinguished by the Advocate who was acting for the deceased and the respondent to the effect that the deceased opted out of transaction.

On the balance of convenience I am persuaded that the balance of convenience in this case tilts in favour of the Respondent as he has title to the land and is in occupation.

The upshot of the above is that I dismiss the Application dated 7th December, 2016 with costs to the Respondent.

Orders accordingly.

Dated, SIGNED and DELIVERED in open court at **NAROK** on this **03rd** day of **March, 2017**

Mohammed Noor Kullow

Judge

In the presence of:-

Mr. Ogutu present for the Defendant/Respondent

Mr. Kiptoo holding brief for Kahiga for Plaintiff/Applicant

CA:Timothy

Mohammed Noor Kullow

Judge

3/3/17