



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT KERICHO
CIVIL SUIT NO. 50 OF 2014

KIPLANGAT ARAP BARTAA.....PLAINTIFF

VERSUS

JAMES KIPTOO A. CHEPKWONY.....1ST DEFENDANT

LANGAT K. GEOFFREY.....2ND DEFENDANT

DAVIS KIPNGENO KORIR.....3RD DEFENDANT

KIPRONO ARAP MARITIM.....4TH DEFENDANT

AND

BHAVIN ASHWIN GUDKA.....INTERESTED PARTY

RULING

(Application to enjoin interested party and for injunction; interested party having purchased one of the properties in dispute and now being registered owner; proper designation is to have him as defendant and not interested party; order that he be enjoined as defendant ; orders preserving the titles in issue given; status quo be maintained pending hearing of the suit)

This suit was commenced by way of plaint filed on **19 September 2014**. The suit as filed, is against 4 defendants namely, James Kiptoo Chepkwony, Langat K. Geoffrey, Davis Kipngeno Korir and Kiprono arap Maritim. It is pleaded that on **24 April 1989**, the plaintiff became registered as proprietor of the **land parcel Kericho/Mogogosiek/655** measuring about 4.4 hectares. In the year 1990, one Catherine Tabutany (now deceased) and mother to the 1st defendant, filed a dispute against the plaintiff with the Konoin Division panel of elders. On **21 March 1990**, the panel of elders rendered a decision vide which they awarded the deceased 3 acres of the mentioned land. On **3 February 1990**, the award was adopted as a judgment of the court through the suit Kericho Misc. Application No. 12 of 1990. Dissatisfied the plaintiff applied to appeal to the High Court out of time through Kericho High Court Misc. Application No. 6 of 1991. It is pleaded that the plaintiff was granted leave to appeal and stay of execution, and that the Judge observed that the panel of elders did not have jurisdiction. It is averred that the plaintiff has all along been in occupation of 6 acres of the **land parcel No. 655** and the family of the deceased in occupation of 3 acres. It is pleaded that without the knowledge and consent of the plaintiff, the deceased purportedly on the strength of the decree in Kericho Magistrate's Misc. Case No. 12 of 1990, but against the order of stay granted in Kericho High Court Misc. Application No. 6 of 1990, registered herself as the

sole proprietor of the **land parcel No. 655**. Upon her death, the 1st defendant filed a Succession Cause being Kericho High Court Succession Cause no. 67 of 2003 and on **15 May 2013**, he got himself registered as beneficiary of the **land parcel No. 655**. On **30 May 2013**, the 1st defendant subdivided the land into the **parcel numbers Kericho/Mogogosiek/ 2202, 2203, 2204, 2205, 2206, and 2207**. He later transferred the land **parcel numbers 2202, 2205 and 2207** to himself, and the **parcel numbers 2203, 2204, and 2206** to the 2nd, 3rd, and 4th defendants respectively.

It is the contention of the plaintiff that all this was done by way of fraud so as to defeat the plaintiff's proprietary interest. The following particulars of fraud are pleaded.

- a. The dispute before the panel of elders was filed and heard irregularly and contrary to the law.
- b. The purported decree in Kericho Principal Magistrate's Court Misc. Application No. 12 of 1990 did not award to the deceased ownership of the whole land known as **Kericho/Mogogosiek/655**.
- c. The deceased conspired with the land registry officials to have all the said title transferred to the deceased contrary to the said decree.
- d. The deceased caused to be transferred to herself land ownership when she was not entitled to.

It is further averred that the 2nd, 3rd and 4th defendants were not innocent purchasers for value and that they knew or ought to have known that the plaintiff is in occupation of 6 acres of the land.

In the plaint, the plaintiff has asked for orders of declaration that the transfer of the **parcel No. 655** to the deceased and subsequent transfer to the defendants was unlawful and fraudulent; cancellation of the **title numbers 2202, 2203, 2204, 2205, 2206 and 2207**, and 4.4 hectares of the original **parcel No. 655** be registered in the name of the plaintiff and 3 acres in the names of the defendant.

A statement of defence was filed vide which the defendants refuted the claims of the plaintiff.

Through an application dated **23 June 2015**, which was later amended on **24 June 2015**, the plaintiff filed an application which essentially seeks the following orders :-

- i. A joinder of one Bhavin Ashwin Gudka as interested party.
- ii. Leave to amend the plaint.
- iii. Restriction orders against the parcel numbers **2202, 2203, 2204, 2205, 2206, and 2207**.
- iv. Injunctive orders against Bhavin Ashwin Gudka to restrain him from entering, developing, clearing, leasing, charging or in any other manner carrying out dealings in the **land parcel No. 2202** until the hearing and determination of the suit.

What has prompted the application is apparent from the grounds and the supporting affidavit of the plaintiff. There were proceedings being Kericho CMCC No. 62 of 2011 between one Jonathan Rugut (not a party in this suit) and James Kiptoo Chepkwony (the 1st defendant in this matter). A decree was issued in favour of Jonathan Rugut which led to the sale by public auction of the **land parcel No. 2202** on **3 October 2014**. The purchaser was Bhavin Ashwin Gudka whom the plaintiff now wants enjoined as interested party. The plaintiff in his draft amended plaint, wishes to plead that the said Mr. Gudka is not an innocent purchaser since at the time of sale by auction, there was a restriction lodged on the property.

Bhavin Ashwin Gudka filed a replying affidavit to oppose the application. He has averred inter alia that the plaintiff was not the registered proprietor prior to the sale by public auction. He has deposed that he saw the property advertised for sale and he purchased it. He has denied that the plaintiff is in occupation of the suit property. It is his view that the plaintiff has not demonstrated a prima facie case with a probability of success.

I directed counsels to file submissions and they did so. I have considered these submissions alongside the annexed authorities relied upon by both Mr. Koske for the applicant and Mr. Oguttu Mboya for the intended interested party. The defendants did not participate in the application.

The application before me is two fold. First, it seeks leave to amend the plaint to introduce Bhavin Ashwin Gudka as an interested party; secondly, it seeks for orders of injunction and restriction orders on the titles in issue.

It is apparent to me that the plaintiff in this suit, seeks the restoration of the **parcel Kericho/Mogogosiek/655**. With regard to this, he seeks cancellation of the **title numbers 2202 - 2207** that were derived after subdivision of the parent title. With regard to the **parcel No. 2202**, he has averred that there was a restriction in the title at the time the auction sale proceeded. I have seen the official search which appears to show that a restriction was registered on **16 July 2013**. The sale was undertaken on **3 October 2013** after the restriction. There may be some substance in the arguments of the plaintiff that this sale, in view of the restriction, may have been irregular. But this can only be decided after a trial. Be as it may, Bhavin Gudka is now proprietor of one of the land parcels in dispute and for which the plaintiff seeks cancellation of title. I am of the view that Bhavin Gudka is a necessary party to these proceedings. However, I do not think that he ought to be enjoined to these proceedings as interested party. Since the plaintiff also seeks to recover land that is registered in his name, Bhavin Gudka needs to be a substantive defendant.

I will allow the application to enjoin Bhavin Gudka, but as a defendant, and not interested party. The plaint may be amended to accommodate this position.

On the injunction, I think it is best that the properties be preserved, so that in the event that the plaintiff succeeds, his victory will not be rendered worthless. I therefore order that there be no sale, charge, lease or any dealings over the properties **Kericho/Mogogosiek/ 2202, 2203, 2204, 2205, 2206 and 2207** pending hearing and determination of this suit. Possession and occupation shall however remain in the manner that is currently prevailing. In other words, status quo be maintained pending hearing and determination of this suit.

The costs of this application shall be costs in the cause.

It is so ordered.

Dated, Signed and delivered on this 29th day of April, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Mr. Joshua Mutai present for Mr. Koskei for plaintiff/applicant

Mr. Bii present for 1st and 3rd defendants

2nd defendant present acting in person

4th defendant acting in person – Absent

Mr. Koko holding brief for Mr. Oguttu Mboya for intended interested party.

Court Assistant: Mr. Kenei