



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 18 OF 2015

FESTUS KIPTOO.....PLAINTIFF

VERSUS

EVANS M. OMWENGA.....1ST DEFENDANT

THE REGISTRAR OF LANDS, UASIN GISHU COUNTY.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

By application dated 20.1.2015 and filed on 21.1.2015, Festus Kiptoo (*herein referred to as the applicant*) sought orders that the 1st defendant/respondent, his agents, employees, servants and/or any other third parties be and are hereby stopped, prevented and/or reprimanded from entering into, accessing, selling, transferring ownership, disposing off, alienating, leasing, constructing, developing and/or in any other way dealing or interfering with the parcel of land described as **ELDORET MUNICIPALITY BLOCK 14/783**, thereafter the inter-partes hearing of this application and the hearing and determination of this suit. The applicant further prays that the OCS, Langas Police Station to ensure full compliance with this order.

The application was based on grounds that the late Paul Kibor Kemboi is the legitimate registered owner of the suit land and yet the 1st defendant/respondent has unlawfully and/or unprocedurally registered himself as the proprietor of the suit land. The Plaintiff/Applicant has instituted this suit on behalf of the estate of the deceased and on behalf of the beneficiaries of the estate of the deceased who are likely to suffer substantial losses and damages.

The application is supported by the affidavit of *Festus Kiptoo* who states that he properly obtained a Grant of Letters of Administration Ad Litem authorizing him to institute this suit on behalf of the estate of the late Paul Kibor Kemboi (the deceased) who was his biological father who died intestate on 17.10.2013 and that he is aware that the deceased is the legitimate registered proprietor of the property known as **ELDORET MUNICIPALITY BLOCK 14/783**, situated within Uasin Gishu County (the suit land), the same having been properly allocated to him by the Eldoret Lands Office and a Lease document prepared in his favour in the year 1987. That to the best of his knowledge, the estate and the beneficiaries of the deceased, the deceased, on 22.07.2004 intended and purported to sell the suit land to one Daniel C. Chebet but however, he is profoundly informed by his Advocates on record that the respective Sale Agreement was not enforceable in law pursuant to the mandatory provisions of the Law of Contract Act.

The applicant contends that according to the estate of the deceased, at no point in time did the deceased ever sell, dispose off and/or transfer ownership of the suit land to a Mr. Joseph Ongoro and/or any other third parties and that he is aware that the 1st defendant/respondent illegally and/or un-procedurally obtained a Certificate of Lease in and over the suit land, after allegedly procuring the same from the said Joseph Ongoro. That further to paragraph 7 hereinabove, he is aware that the 1st defendant was charged before Chief Magistrate's Court at Eldoret with the offence(s) forgery of a document of title and conspiracy to defraud.

That he is aware that the 1st defendant/respondent filed a suit against the said Daniel C. Chebet before the Environment and Land Court in Eldoret claiming ownership of the suit land, whose decree has been appealed against by the latter. That he is also aware that from the records at the Eldoret Lands Offices, there is no documentation or record evidencing a sale and/or transfer of the suit land from the deceased to the said Joseph Ongoro and/or the 1st defendant and that the presiding District Registrar of Lands confirmed and/or attested to the fact that the respective signature(s) exhibited in the Certificate of Lease held by the 1st defendant/respondent and the said Mr. Joseph Ongoro were neither his,(a fact that was well established by the Forensic Document Examiner, nor did he ever authorize or sanction the issuance of the said title documents.

That he is informed by his Advocates on record that on the basis of the evidence tendered, the said Joseph Ongoro did not possess the requisite legal right, capacity and/or title to transfer proprietary interests in the suit land to the 1st defendant/respondent. That he is aware that upon instigating the charges stated in paragraph (8) herein above, by the 1st defendant, it is evident that he is acting in bad faith and the facts before the court warrant grant of the orders sought so as to enable the Court to hear and determine this suit on merit.

He claims that he is aware that that the 2nd defendant/respondent unlawfully and fraudulently purported to issue the title document in favour of the 1st defendant/respondent without official transfer documents to convey the purported proprietary interest in the suit land to the said Mr. Joseph Ongoro. That he is informed by his Advocate on record that from the evidence and the circumstances obtaining herein, the Certificate of Lease issued to the 1st defendant/respondent is illegally and/or was un-procedurally issued, hence the need to grant the orders sought. He contends that in the event the orders are not granted, the deceased's estate and its beneficiaries stand to suffer substantial losses, damages and prejudice for the following reasons;

- (a) They stand to lose a pivotal asset and land resource.
- (b) They stand to lose their bargaining power in and over the suit land.
- (c) The estate stands to lose a critical investment.
- (d) The beneficiaries of the estate shall be prejudiced in the event the 1st defendant/respondent sells and/or disposes off the suit land.

The applicant believes that upon considering the weight of the evidence to be tendered, the balance of convenience tilts in favour of the estate of the deceased. That the defendants/respondents shall not suffer any prejudice in the event the orders sought are granted and any inconveniences may be remedies by way of an award of costs. That it is fair and just that the orders be granted so as to protect and preserve the estate of the deceased and the rights, interests and/or entitlement of the estate's beneficiaries.

The application is opposed by Evans Omwenga who states that prior to filing of this suit on 18th April 2013, he filed suit **No. 256 of 2013 Evans Mairura Omwenga Vs Daniel Chebet** in court and sought for a permanent injunction restraining the defendant from trespassing into, constructing upon, disposing of and/or in any way interfering with the part of that parcel of land known as L.R. Eldoret Municipality/Block 14/783 and a declaration that the plaintiff is the lawful owner of the suit land – L.R. Eldoret Municipality/Block 14/783. Ultimately he prayed for an order that the defendant pays mesne profits and general damages for unlawful encroachment into the suit land. In that suit, he

contemporaneously filed an application for injunction wherein he sought interlocutory orders which was heard and determined in his favour. That the defendant, one Daniel Chebet proceeded not to appeal against the said order and it remained in force until the determination of the suit and is still in force. That the defendant thereafter on 8th August, 2013 filed a defence and counterclaim alleging ownership among other things.

That he filed documents evidencing his proprietary interest and indeed from the documents given in court and the evidence tendered, it is clear that the said Daniel Chebet did not have any proprietary interests in the suit land. He urged the court to refer to copies of witness statements and documents filed in court on behalf of both parties so as to verify his assertions.

The defendant states that the plaintiff herein was one of the witnesses of the said Daniel Chebet and that indeed, Mr. Daniel Chebet preferred a criminal complaint in Eldoret Chief Magistrate's Court against the defendant and that he has been charged over non-existent allegations. In his view, which this suit was filed upon the said Daniel Chebet sensing that he would lose the suit. The defendant respondent claims that the plaintiff/applicant has filed this suit improperly as he has no locus standi to agitate this suit since no proper grant as averred could issue as the lawful administrators had filed an application for full grant and that the plaintiff herein did consent to other person other than himself to prefer an application for full grant which has indeed been preferred and in the application for full grant, this parcel of land is not included as an asset of the deceased.

The respondent contends that the plaintiff/applicant has not been truthful to the court and does not deserve equitable orders for reasons that he has not disclosed that he testified for one Daniel Chebet he averred that his late father sold the land to Daniel Chebet. The respondent depones that the transfer was properly effected by the Lands Office and the propriety thereof was subject to previous proceedings that are concluded.

The Plaintiff/Applicant submits through **learned counsel, Mr. Ombima** that the applicant has *locus standi* to file and prosecute the suit as he applied for letters of administration then *ad litem*. He argues forcefully that he has established that he has a *prima facie* case with a probability of success as a beneficiary of the estate of the late Paul Kibor Kemboi. According to Mr. Ombima, the applicant cannot be compensated with damages and that the balance of convenience tilts in favour of the applicant.

Mr. Nyachiro on his part, argues that the applicant has failed to demonstrate that he has a *prima facie* case as no document of title has been exhibited to prove ownership. He argues that the judgment in Eldoret E&L Case No. 256 of 2013 conferred the right of ownership to the respondent. According to Mr. Nyachiro, the suit is *res judicata* and that the court is *functus officio*.

On irreparable loss and damage, he submits that the applicant has not demonstrated that he stands to suffer irreparable loss as he neither resides nor uses the suit property.

Lastly, he argues that the balance of convenience tilts in favour of the respondent as he already has a judgment in respect of the suit property.

I have considered the Notice of Motion, affidavits on record and submissions of both counsel and do find that the applicant has not annexed the Letters of Administration *ad litem* and therefore has not demonstrated that he has *locus standi* to commence this suit. Moreover, the respondent has demonstrated that a full grant in respect of the Estate of Paulo Kibor Kemboi was issued to Everlyne Jelegat Tanui and Teresa Jepchirchir Kemboi by the High Court of Kenya at Eldoret in Succession Cause No. 319 of 2014 and therefore the plaintiff cannot purport to commence a claim on behalf of the deceased Estate as he is not his legal representative recognized by law. He could be a beneficiary of the Estate of the late Paulo Kibor Kemboi but lacks capacity to sue on behalf of the Estate.

The issue of compensation does not arise as the property was not registered in the name of the deceased at his time of death. The evidence on record shows that the said property was transferred to one Joseph Ongoro on 23.7.1987 and later to Evans Omwenga on the 19.6.1996 and a certificate of lease issued.

I agree with Mr. Nyachiro that the applicant has failed to demonstrate that he has a *prima facie* case with a probability of success as no document of title in his name or name of deceased has been produced.

Moreover, the plaintiff/applicant having given evidence in Eldoret E&L Case No. 256 of 2013 that his father sold the suit parcel to Daniel Chebet, he cannot claim that he is likely to suffer irreparable loss because according to his testimony, his father had sold the parcel of land to a third party.

Though the suit cannot be found to be *res judicata* as the plaintiff was not a party to proceedings of Eldoret E&L Case No. 256 of 2013, it borders on an abuse of the process of the court in view of the fact that the plaintiff gave evidence in **Eldoret E&L Case No. 256 of 2013** and could have applied to be enjoined in the suit as a defendant. Moreover, he could have appealed or applied for review of the judgment of the court but not to file a fresh suit. However, what is before me is an application for injunction which must fail as the applicant has not satisfied this court that there is a *prima facie* case with a likelihood of success and that if the injunction is not granted the applicant will suffer irreparable harm.

The upshot of the above is that the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF OCTOBER, 2015.

ANTONY OMBWAYO

JUDGE

Delivered in the presence of: