



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND COURT CASE NO. 379 OF 2015**

**GEOFFREY ONDEYO OTUMU ..... PLAINTIFF**

**VERSUS**

**WILLIAM KERINDO KIAGE ..... DEFENDANT**

**RULING**

1. The plaintiff herein Geoffrey Ondeyo Otumo filed a Notice of Motion dated 11<sup>th</sup> August 2015 premised on Order 40 Rule 1 (a), Order 51 Rule 1 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act seeking:-

**1. Spent**

**2. That an order of permanent injunction restraining the defendant from interfering with the road of access over the parcel numbers N. Chache/B/B/Boburia/7771 and 7770.**

**3. That an order of temporary injunction restraining the defendant from interfering with the road of access over parcel No. N. Chache/B/B/Boburia/7771 and 7770 and an order to open it forthwith.**

**4. That an order directing that the defendant do surrender the Title No. N. Chache/B/B/Boburia/7770 that he holds to the lands office with a directive to the land registrar to rectify the register and re issue the titles to both plaintiff and defendant in line with the area occupied on the ground.**

**5. That costs be provided for.**

2. The above application was supported by the plaintiff's affidavit sworn on 11<sup>th</sup> August 2015. In the supporting affidavit the plaintiff avers that he is the registered owner of **L.R Nyaribari Chache/B/B/Boburia/7771** (hereinafter referred to the "suit land") situate in Kisii town and annexed copies of the certificate of official search and title deed marked as "**G001 (a)**" and "**G001 (b)**" in support of the averment. The plaintiff further deposes that the suit land was carved out from **L.R. Nyaribari Chache/B/B/ Boburia/ 4267** (hereinafter referred to as the original suit land) following a subdivision. That the original suit land was subdivided to create parcels 'A' and 'B' which parcels were given title numbers **L.R Nyaribari. Chache/B/B/ Boburia/7770** and **7771**. The plaintiff states at the time he purchased his parcel of land, he was shown parcel 'A' now registered as **L.R Nyaribari Chache/B/B/ Boburia/7770**. The plaintiff avers that the defendant bought parcel 'B' now registered as **LR No. Nyaribari Chache/B/B/ Boburia/7771** but apparently the titles were wrongfully interchanged at the time of registration.

3. The plaintiff further contends that he actually occupies ground 'A' that is **L.R Nyaribari Chache/B/B/ Boburia/7770** as shown in the mutation and has effected developments in that piece of land and has been accessing the suit land which he occupies using the road of access provided until 2<sup>nd</sup> August 2015 when the defendant started building a wall which has completely blocked the road of access. He further contends that the act of blocking the road of access to the suit land has caused untold suffering to him and his family and despite persistent requests to the defendant and his agents not to interfere with the road of access, the defendant has adamantly refused. The plaintiff now contends that if the defendant is not restrained from blocking the road of access to the plaintiff's parcel of land and also ordered to surrender the title he holds for rectification in the land registry, the plaintiff stands to suffer irreparable loss.

4. The application was opposed by the defendant who filed both grounds of opposition and a replying affidavit dated 27<sup>th</sup> August 2015. The defendant reiterates the grounds of opposition in the replying affidavit and contends the plaintiff's Notice of Motion is anchored in conscious and deliberate falsehoods which are merely meant to mislead the court into granting injunctive orders. The plaintiff depones that on 26<sup>th</sup> September 2012, he entered into a land sale agreement with one Zachary Ombati Motondo (hereinafter referred to as vendor) where the vendor sold to him the entire portion **L.R Nyaribari Chache/B/B/ Boburia/7770**. That the sale transaction was completed and the vendor executed all the necessary transfer documents and caused **L.R Nyaribari Chache/ B/B/Boburia/7770** to be transferred and registered in the defendant's name as evidenced by the copy of the title deed, abstract of title and certificate of official search tendered in evidence by the defendant.

5. The defendant further deposes that he took possession of **L.R Nyaribari Chache/B/B/Boburia/7770** which he fenced using barbed wire and chain link to safeguard and protect the same from interference/encroachment by third parties. The defendant further states that in the month of August 2015 he wished to commence development of land parcel **LR No. Nyaribari Chache/B/B/ Boburia/7770** and thus deposited assorted building material at the site and at the same time started building a perimeter wall around his parcel of land.

6. While in the course of depositing the building materials and constructing the perimeter fence the defendant avers that the plaintiff in the company of the area assistant chief stopped him contending that he (defendant) had blocked a road of access allegedly passing through **L.R Nyaribari Chache/B/B/ Boburia/ 7770**. The defendant states that he informed the area assistant chief and the plaintiff that there was no road of access passing through **L.R Nyaribari Chache/B/B/ Boburia/7770** and availed a copy of the mutation form leading to the creation of **L.R Nyaribari Chache/B/B/ Boburia/7770** which showed that the plaintiff had a direct access to the main road (on the lower portion) to the plaintiff and the area assistant chief. Nevertheless the assistant chief prevented him from going on with the intended development activities. The plaintiff lodged a complaint with the police which resulted in the defendant being arrested and charges for the offence of malicious damage being preferred against the defendant.

7. The defendant asserts that there is no road of access that cuts through land parcel **Nyaribari Chache/B/B/Boburia/7770** registered in his name and avers that the plaintiff is using both the local administration and the police to force a road of access to be opened where there is none. The defendant further deposes that the mutation form exhibited by the plaintiff does not in fact support the plaintiff's position set out in the application as it does not show any access road running through land parcel **Nyaribari Chache/ B/B/Boburia/7770** as the plaintiff wants the court to believe. The defendant avers that the road of access that services the plaintiff's **land parcel Nyaribari Chache/B/B/Boburia/7771** does not run through the defendant's parcel of land but rather abuts land parcel number **4268** and runs along land parcel number **4148** as per the copy of mutation annexed to the plaintiff's application and to the defendant's replying affidavit

8. The defendant contends that the plaintiff has not approached the court with clean hands as he has concealed material and relevant information relating to the actual situation on the ground and this should disentitle him to the equitable remedy of injunction that he seeks. The defendant contends that the plaintiff has consequently not demonstrated a prima facie case and has not satisfied the conditions for grant of interlocutory injunction and that his application ought to be dismissed.

9. On the directions of the court the parties filed written submission to canvass their respective positions in the matter. The plaintiff/applicant's submissions were filed on 5<sup>th</sup> November 2015 and the respondent's submissions were filed on 4<sup>th</sup> December 2015.

10. I have reviewed and considered the pleadings, the plaintiff's Notice of Motion application together with the affidavits sworn in support and in opposition thereto together with the annexures thereof, the defendant's grounds of opposition and submissions made by the parties and the authorities referred to the court. Prayers 2 and 4 of the Notice of Motion are couched in final terms and at this interlocutory stage the court cannot grant final orders, without hearing the parties on their evidence. To grant the orders as prayed under prayer 2 and 4 would amount to determining the case without hearing the evidence. At the outset therefore, prayers 2 and 4 of the Notice of Motion are declined as they cannot be appropriately granted at this interlocutory stage. The court needs to receive evidence and witnesses cross examined on their evidence.

11. The issue for the court to determine at this interlocutory stage is whether the plaintiff has satisfied the conditions for grant of a temporary injunction prayed for under prayer (3) of the Notice of Motion. The principles upon which a temporary injunction may be granted are now well settled and are as established in the case of **Giella –vs- Cassman Brown and Company Ltd [1973 E. A 358]** which are:-

**(a) That the applicant must satisfy the court that he has a prima facie case with a probability of success.**

**(b) That the applicant will otherwise suffer irreparable injury which is uncompensable in damages; and**

**(c) If in doubt, the court will determine the application on a balance of convenience.**

In the case of **Mrao Ltd -vs- First American Bank of Kenya and 2 Others [2003] KLR 125**, the Court of Appeal while considering what constitutes a prima facie case held:

**“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which in the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

12. Applying the principles laid out in the **Giella –vs- Cassman Brown Case** (supra) and considering the test of what would constitute a prima facie case as stated in the case of **Mrao Ltd –vs- First American Bank of Kenya and 2 Others (Supra)**, I am not satisfied that in the present case the plaintiff has demonstrated a prima facie case with a probability of success. The evidence as deduced from the affidavits by the parties indicates land parcels **LR No. Nyaribari Chache/B/B/Boburia/7770** and **7771** registered in the defendant's and plaintiff's names respectively were subdivisions from land parcel **Nyaribari Chache/B/B/Boburia/4267** as per the mutation form exhibited by each of the parties. The mutation form does not show that the access road runs through **land parcel 7770** owned by the defendant. The access road indeed shows it ends at the base of the parcel shown as **number 4268**.

13. The plaintiff states that he has been accessing his plot using the access road provided but the material he has availed does not show there is such an access. The defendant acknowledges there is an access up to **Plot No. 4268**. This is as borne out by the mutation forms. The plaintiff in the replying affidavit deposes that during subdivision he was shown portion 'A' which later became **parcel 7770**. He avers that this is the plot he has occupied and developed and not **land parcel 7771** of which he holds the title. The plaintiff's title as per the copy of the title was issued to him on 2<sup>nd</sup> September 2011 while the defendant's title in respect of **parcel number 7770** was issued to him on 17<sup>th</sup> June 2014 nearly 3 years later.

14. The two parcels of land are separate and distinct. The plaintiff has not brought any credible evidence at this stage to show he is in occupation of **parcel 7770**. At any rate the two parcels are of different sizes

with parcel 7770 being **0.14Ha** while parcel 7771 is **0.04Ha**. It is inconceivable how the two parcels can be exchanged by way of title rectification when their sizes are clearly different. If the plaintiff was inadvertently shown the wrong plot (and there is no evidence) the plaintiff may as well consider relocation. This perhaps is a matter the plaintiff ought to have sought solution by engaging with the land registrar before he came to court as the land registrar/surveyor would have established whether there is an access road where the plaintiff says there is one and if so whether the same had been blocked by the defendant.

15. As it is, the plaintiff has not tendered any evidence to show that there is an access road that the defendant has interfered with. I therefore hold that no prima facie case has been demonstrated to warrant the court to grant the order of injunction sought. The evidence adduced infact shows both parcels 7770 and 7771 are served by an access road. There is an access road running parallel to parcel number 4148 and through the entire length of land parcel 7771 registered in the plaintiff's name. This is the access road the plaintiff is supposed to use.

16. The plaintiff's application dated 11<sup>th</sup> August 2015 is without any merit and I order the same dismissed with costs to the defendant.

**Ruling dated, signed and delivered at Kisii this 15<sup>th</sup> day of April, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the defendant

**J. M. MUTUNGI**

**JUDGE**