



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.472 OF 2013

MUO HAMISI J.O WILLIAMS PLAINTIFF

VERSUS

JOSHUA OUMA ALEMA..... DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 28th November 2013 seeking; a permanent injunction to restrain the defendant from interfering, entering, cultivating or otherwise dealing with all that parcel of land known as **LR No. South Sakwa/Waware/1040** (“hereinafter referred to as “**the suit property**”), a declaration that the defendant is a trespasser on the suit property, special damages, loss of expected income, mesne profits and general damages. In his plaint dated 26th November 2013, the plaintiff averred that he purchased the suit property from one, Maurice Arodi Nyanungo sometimes in the year 2012. After purchasing the property, he discovered that the defendant had a fourth ratoon sugarcane on a half portion of the said property which sugarcane the defendant had planted on the suit property without the consent of the previous owner. At the request of the defendant, he allowed him in good faith to harvest the said sugarcane.

2. The plaintiff averred that without his knowledge or consent, the defendant proceeded to plant fresh sugarcane on the suit property in August, 2012 and if that was not enough, on or about the month of August 2013, the defendant without the plaintiff’s consent or permission planted maize on a portion of suit property that had remained unutilized. The plaintiff averred that the defendant once again asked him to allow him to harvest the said maize to which request he acceded to. The plaintiff averred that, thereafter, he proceeded to plant maize on a portion of the suit property that was not being used by the defendant. The defendant who was not happy with that actionsprayed the plaintiff’s maize plants with pesticide thereby completely destroying the same. At the same time, the defendant uprooted over 100 graviella trees that the plaintiff had planted on the suit property and chased away the plaintiff’s workers. The defendant has since then continued to interfere with the plaintiff’s access to and use of the suit property.

3. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 26th November 2013 seeking a temporary injunction to restrain the defendant from interfering with, entering, destroying, uprooting trees from, cultivating or otherwise dealing with the suit property pending the hearing and determination of this suit. The plaintiff sought a further order that the officer commanding Awendo police station; do assist with the enforcement of the orders sought if granted. The plaintiff’s application was brought on the grounds set out on the face thereof and on the affidavit of the plaintiff sworn on 26th November 2013. In the said grounds and affidavit in support of the application, the

plaintiff reiterated the contents of the plaint that I have highlighted hereinabove at length. The plaintiff annexed to his affidavit; a copy of the title deed for the suit property in his name dated 30th May 2012, a copy of a certificate of official search on the title of the suit property dated 28th August 2013, a copy of a letter dated 30th August 2013 addressed to the defendant by the chief East Sakwa location asking him to stop interfering with the suit property and, a copy of a letter dated 3rd September 2013 in response to the said letter, by the defendant's erstwhile advocates, Tom Mboya & Co. Advocates. The plaintiff contended that it would only be fair in the circumstances of this case to grant the orders sought so as to stop the defendant from interfering with the plaintiff's rights over the suit property.

4. The plaintiff's application was opposed by the defendant through a replying affidavit filed in court on 16th December 2013. In his affidavit, the defendant deposed that he has occupied and cultivated the disputed parcel of land for several years and that no one has ever raised a claim in respect thereof. The defendant deposed further that the suit property originated from a parcel of land known as **LR No. South Sakwa/Waware/373 ("Plot No. 373")** that was registered in the name of his deceased cousin one, **Joshua Ongoma** (hereinafter referred to as "**Ongoma**"). The defendant deposed that following the death of Ongoma, two gentlemen, namely, Japheth Abongo Aloka and Maurice Arodi Nyanungo took advantage of the illiteracy of Ongoma's wife one, Rosa Olal Ongoma and caused her to apply for grant of letters of administration in respect of the estate of Ongoma after which she had Plot No. 373 transferred to her name and subsequently to the said Japheth Abongo Aloka and Maurice Arodi Nyanungo. The defendant deposed that Plot No. 373 was sub-divided into three (3) portions namely, LR Nos. South Sakwa/Waware/1003, 1004 and 1005 which were registered in the names of Rosa Olal Ongoma, Japheth Abongo Aloka and Maurice Arodi Nyanungo respectively. The defendant deposed that Japheth Abongo Aloka and, Maurice Arodi Nyanungo who sold the suit property to the plaintiff are not related to Ongoma and were not entitled to benefit from his estate.

5. The defendant deposed that LR No. Sakwa/Waware/1005 that was registered in the name of Maurice Arodi Nyanungo was subsequently sub-divided into two (2) portions, one portion of which was sold and transferred to the plaintiff namely, LR No. South Sakwa/Waware/1040 ("the suit property"). The defendant deposed further that the grant of letters of administration that was issued to Rosa Olal Ongoma pursuant to which Maurice Arodi Nyanungo acquired a portion of what was formerly Plot No. 373 that he sold and transferred to the plaintiff is being challenged by one, Gladys Ongoma and Laurent Ongoma who are relatives of Ongoma. The defendant contended that the parcel of land in dispute was given to her by Rosa Olal Ongoma. He denied that he has trespassed on the suit property and that he has denied the plaintiff the use and enjoyment of the said property. The defendant annexed to his affidavit; a copy of a grant of letters of administration that was issued to Rosa Olal Ongoma on 27th March 2000, a copy of the register for Plot No. 1004 and a copy of the register for Plot No. 1041. With leave of the court, the plaintiff filed a further affidavit sworn by the plaintiff on 29th January 2014 in response to the defendant's replying affidavit. In this affidavit, the plaintiff deposed that the defendant's homestead is not situated on the suit property and that the same was not on the original parcel of land that gave rise to the suit property. The plaintiff stated that he is a stranger to the challenge if any that has been mounted against the grant of letters of administration that was issued to Rosa Olal Ongoma.

6. On 16th December 2013, I directed that the plaintiff's application be heard by way of written submissions. The plaintiff filed his submissions on 26th February 2014 while the defendant did so on 11th December 2014. I have considered the plaintiff's application together with the two (2) affidavits filed in support thereof. I have also considered the defendant's affidavit in opposition to the application. Finally, I have considered the written submissions filed by both parties and the authorities cited in support thereof. The principles upon which this court proceeds while considering application for interlocutory injunction are now well settled. As was held in the case of **Giella -vs- Cassman Brown & Co. Ltd [1973] E. A 358**, an applicant for an interlocutory injunction must show a prima facie case with a probability of success against the respondent. He must also demonstrate that he will suffer irreparable injury which would not be adequately compensated for in damages unless the order is granted. If the court is in doubt as to the above, the application would be determined on a balance of convenience.

7. The plaintiff has established that he is the registered proprietor of the suit property. This fact is not

disputed by the defendant. As the registered proprietor of the suit property, sections 24, 25 and 26 of the Land Registration Act, 2012 confers upon the plaintiff absolute rights over the suit property which rights can only be defeated, on grounds of fraud and misrepresentation in the acquisition of the property to which the plaintiff is proved to be a party or where the plaintiff's title to the property was acquired illegally, unprocedurally or through corrupt scheme. The defendant has not claimed that the plaintiff acquired title to the suit property fraudulently or through misrepresentation. The defendant has also not claimed that the plaintiff's title was acquired illegally, unprocedurally or through corrupt scheme. The defendant has not laid any sound legal basis for his claim over the suit property apart from saying that he has occupied the suit property for a long time. The defendant's story on how he came to the suit property seems to have changed several times. In the letter by his advocate dated 3rd September 2013 that was written in response to the chief's letter dated 30th August 2013 (see exhibits "MJOHW2" and "MJOHW3" to the plaintiff's affidavit sworn on 26th November 2013), the defendant claimed that the suit property was given to him by his "in-law". In his replying affidavit filed in court on 16th December 2013, the defendant claimed that the suit property was given to him by Rosa Olal Ongoma who is a wife to his cousin Joshua Ongoma, deceased. In his written submissions dated 11th December 2014, the defendant claimed that the suit property is a portion of his ancestral land that his father had inherited from his grandfather and as such he is entitled to the same as a beneficiary of the estate of his father. The defendant has placed no evidence before the court in proof of the fact that the suit property was given to him by his unnamed in-law or Rosa Olal Ongoma. The defendant has also not placed any evidence to show that the suit property belonged to his grandfather. There is also no evidence that the defendant's homestead is situated on the suit property.

8. From the foregoing, the defendant has not given any justifiable cause for his occupation or use of the suit property. The mere fact that the defendant has occupied the suit property for several years cannot confer upon the defendant rights of ownership over the suit property save where he has acquired such rights through adverse possession. The defendant has not pleaded adverse possession and has not contended in these proceedings that he has acquired such rights. Such claim would in any event have been inconsistent with the defendant's contention that the suit property was given to him by Rosa Olal Ongoma and that he is entitled to the same as a beneficiary of the estate of his deceased father. Although the defendant has claimed that the grant of letters of administration that was issued to Rosa Olal Ongoma has been challenged, the defendant has not placed any material before the court in proof of that fact. In any event, I am of the opinion that the plaintiff's title is protected under the provisions of section 93 of Law of Succession Act, Cap 160 Laws of Kenya and cannot be nullified even if the grant of letters of administration that was issued to Rosa Olal Ongoma is revoked. The defendant has not denied that he has planted sugarcane and maize on the suit property after the plaintiff acquired the same. The defendant has also not denied that he uprooted the plaintiff's graviella trees and also destroyed the plaintiff's maize plants using pesticide. The defendant's denial of this act in his submission is not sufficient. He should have done so in his replying affidavit. The defendant has also not denied that he chased away the plaintiff's workers from the suit property and that he has since denied the plaintiff access and use of the property.

9. As I have stated above, the plaintiff has demonstrated that he is the registered proprietor of the suit property. As such proprietor, the plaintiff has absolute right to occupy and use the suit property. The plaintiff having established his ownership of the suit property, it was upto the defendant who is in occupation hereof to justify his continued occupation and use of the same. As I have stated above, the defendant has not convinced me that he has any lawful or reasonable cause for his occupation of the suit property or use thereof. I am satisfied therefore that the plaintiff has established a prima facie case of trespass against the defendant. I am also satisfied that the plaintiff would suffer irreparable injury if the orders sought are not granted. The plaintiff is the registered proprietor of the suit property. If the order sought is not granted, the plaintiff would continue to be kept out of the property. This no doubt would cause him irreparable harm.

10. I am satisfied that the plaintiff has met the conditions for granting interlocutory injunction. The plaintiff's application dated 26th November 2013 is allowed in terms of prayer 2 thereof pending the hearing and determination of this suit. The plaintiff shall have the cost of the application. For the

avoidance of doubt, this order shall not in any way stop or prevent the defendant from accessing or occupying his residence or house if he has any on the suit property.

Delivered, signed and dated at KISII this 20th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE