



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.272 OF 2014

LAWRENCE MAONI OKEYO PLAINTIFF

VERSUS

BARONGO OKEYO 1ST DEFENDANT

ALFRED OKIOMA MAKORI 2ND DEFENDANT

CHARLES MAKARIO MAKORI 3RD DEFENDANT

SAMUEL OKEYO MAKORI 4TH DEFENDANT

PATRICK MOI MAKORI 5TH DEFENDANT

THE DISTRICT SURVEYOR KISII DISTRICT 6TH DEFENDANT

THE REGISTRAR OF LANDS KISII DISTRICT 7TH DEFENDANT

RULING

1. The plaintiff's case is that; he is the son of one, **Samuel Okeyo Masiemo**, deceased (hereinafter referred to only as "**the deceased**"). The deceased had two (2) wives. The plaintiff's mother was the 1st wife. Before his death, the deceased divided his land between his two wives. Each wife was then supposed to divide the land that was allocated to her by the deceased among her sons. The plaintiff's mother had five (5) sons namely, Andrew Kirيامa Okeyo ("Kirيامa") deceased, Matundura Okeyo ("Matundura") deceased, Barongo Okeyo ("the 1st defendant") and Lawrence Maoni Okeyo ("the plaintiff"). The deceased gave the plaintiff's mother a parcel of land measuring 1.01ha. that she was supposed to share among her five (5) sons aforementioned. Each of the sons was supposed to get approximately 0.2ha. of the said parcel of land. Because of the size of the land that each of them was supposed to get, Kirيامa and Miruka purchased land elsewhere and relinquished their portions to the 1st defendant herein. Following this development, the 1st defendant was supposed to get 0.6ha from the said ancestral land, Matundura 0.2ha. and the plaintiff 0.2ha.
2. During the adjudication process that took place in the year 1976, the plaintiff was a minor. The said ancestral land was therefore registered in the names of the 1st defendant and Matundura. As was agreed, the portion of the ancestral land that was registered in the name of the 1st defendant was 0.6ha. The remaining portion which measured 0.41ha. was registered in the name of

Matundura who was to hold the same in trust for himself and the plaintiff who was a minor. They were entitled to 0.2ha. each. The 1st defendant's parcel of land was registered as LR No. Kisii/Bomariba/698 while the parcel of land that was registered in the name of Matundura to hold in trust for himself and the plaintiff was registered as LR NO. Kisii/Bomariba/699. When Matundura was alive, he showed the plaintiff his portion of LR No. Kisii/Bomariba/699 (hereinafter referred to as "**the suit property**"). The plaintiff settled on the same and put up permanent structures thereon. The plaintiff has occupied the said portion of the suit property now for over 40 years. Matundura however died before sub-dividing the suit property and transferring to the plaintiff his share thereof.

3. The 2nd to 5th defendants are the children of Matundura. The plaintiff's complaint against the 2nd to 5th defendants is that in the month of June 2014, the 2nd to 5th defendants without any notice to the plaintiff proceeded to sub-divide the suit property and in the process interfered with the boundary that had been fixed by the plaintiff and Matundura that marked their respective portions of the suit property. The 2nd to 5th defendant have told the plaintiff that he has no interest in the suit property. It is on account of the foregoing that the plaintiff brought this suit against the defendants seeking an injunction to restrain the 1st to 5th defendants from damaging, demolishing, alienating, disposing or in any way interfering with the plaintiff's possession, use and occupation of the portion of the suit property under his occupation. The plaintiff has also sought a declaration that he is entitled to a half (1/2) share of the suit property that was held in trust for him by Matundura and an order directing the 6th and 7th defendants to survey and sub-divide the suit property into two equal portions between the plaintiff and the 2nd to 5th defendants and to issue new title deeds for each portion.
4. Together with the plaint, the plaintiff filed an application dated 11th July 2014 seeking a temporary injunction to restrain the 2nd to 5th defendants from trespassing on, disposing off, leasing or in any other manner howsoever interfering with the suit property in a manner adverse to the plaintiff pending the hearing and determination of this suit. The plaintiff's application was brought on the same grounds that I have set out herein above. The application was supported by the 1st defendant through a replying affidavit that was sworn on 21st July 2014 and filed in court on 28th July 2014. In his affidavit, the 1st defendant corroborated the contents of the plaintiff's affidavit in support of the application as concerns the plaintiff's interest in the suit property. He stated that the plaintiff and Matundura who is the 2nd to 5th defendants' father were supposed to divide the suit property equally between them. He stated that Matundura and the plaintiff had a clearly marked boundary between their respective portions of the suit property. The plaintiff's application was however opposed by the 2nd to 5th defendants through a replying affidavit sworn on 21st July 2014 by the 5th defendant. In the said affidavit, the 5th defendant contended that they have in no way encroached on the portion of the suit property which is occupied by the plaintiff. The 5th defendant has contended that the suit property was divided amicably after the death of Matundura. The 5th defendant has contended that the plaintiff is not entitled to the portion of the suit property which is the subject of this suit and that the application herein is intended to enable the plaintiff to acquire a parcel of land that he is not entitled to.
5. When the plaintiff's application came up for hearing on 24th November 2014, Mr. Nyamweya advocate appeared for the plaintiff while there was no appearance for the defendants. In support of the plaintiff's application, Mr. Nyamweya submitted that the orders sought are intended to maintain the status quo in relation to the suit property pending the hearing and determination of this suit. Counsel relied entirely on the plaintiff's affidavit sworn on 11th July 2014 filed herein in support of the application and urged the court to grant the orders sought. I have considered the plaintiff's application and the affidavits filed in support thereof. I have also considered the 5th defendant's affidavit in opposition thereto. In the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and must also demonstrate that unless the injunction is granted he is likely to suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience.
6. I am satisfied that the plaintiff has established a prima facie case against the 2nd to 5th defendants.

The 2nd to 5th defendants have not denied that the plaintiff is a younger brother to their deceased father Matundura. The 2nd to 5th defendants have also not denied that the suit property was registered in the name of their father to hold in trust for himself and the plaintiff. The defendants have also not denied that the plaintiff has over the years occupied the suit property side by side with their father. The defendants have also not denied that without any notice to the plaintiff they did enter the suit property and started sub-dividing the same by placing beacons thereon. The plaintiff has proved through his affidavit and the affidavit of the 1st defendant the contents of which have not been controverted in any significant manner that Matundura held half (1/2) portion of the suit property in trust for him. The 2nd to 5th defendants have no right therefore to interfere with the plaintiff's occupation of that portion of the suit property that he has occupied and used over the years as representing his half share of the suit property.

7. The plaintiff's interest in the suit property is recognized under sections 25 (2) and 28 (b) of the Land Registration Act, 2012. The same cannot be defeated merely because the suit property was registered in the name of the 2nd to 5th defendants' father alone. I am satisfied that the plaintiff has an arguable case based on trust. I am also satisfied that the plaintiff would suffer irreparable harm if the orders sought are not granted. As I have stated above, it is not disputed that the plaintiff has occupied the suit property for several years. The plaintiff as I have stated above is entitled to a half (1/2) portion of the suit property. If the orders sought are not granted, the 2nd to 5th defendants may evict the plaintiff from the suit property. They may also sell or lease the suit property. Any of these actions would subject the plaintiff to irreparable harm.
8. Due to the foregoing, I am persuaded that the plaintiff has satisfied the conditions for granting a temporary injunction. The plaintiff's application dated 11th July 2014 is well merited. The same allowed in terms of prayer 3 thereof. For the avoidance of doubt this order shall not stop the 2nd to 5th defendants from occupying and using the portion or portions of the suit property which they have been occupying and using prior to June, 2014. The plaintiff shall have the costs of the application.

Delivered, signed and dated at KISII this 13th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE