



No. 184

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 57 OF 2013**

JAMES RIOBA SERERIA ..... PLAINTIFF

VERSUS

SIMION MORANGE BOROYE ..... DEFENDANT

**RULING**

1. The Plaintiff brought this suit on 13<sup>th</sup> February, 2013 seeking a declaration that the defendant holds 10 hectares of all that parcel of land known as **LR. No. Bukira/Bwisaboka/4039** (“**the suit property**”) in trust for the Plaintiff. The Plaintiff’s suit was brought on the grounds that the Plaintiff is the son of one, **Sereria Boroye** who was the brother of the Plaintiff and that the defendant fraudulently caused himself to be registered as the sole proprietor of the suit property which measures approximately 12.139 hectares which the defendant was supposed to share with the Plaintiff’s said father. The Plaintiff contended that this fraud that was discovered by the Plaintiff’s father sometimes in 1988 has denied the Plaintiff and his siblings who have been residing on the suit property over the years of their interest on the suit property. The defendant filed a statement of defence on 12<sup>th</sup> April, 2013 in which he denied the Plaintiff’s claim in its entirety. The defendant contended that the Plaintiff’s suit is time barred and res judicata a similar suit having been brought by the Plaintiff in the year 2004 which suit was dismissed on 2<sup>nd</sup> November, 2000.
2. Together with the Plaintiff, the Plaintiff brought an application by way of Notice of Motion dated 16<sup>th</sup> April, 2013 seeking a prohibitory order to issue prohibiting the defendant from further selling the suit property pending the hearing and determination of this suit. The Plaintiff’s application was brought under Order 40 rule 2 of the Civil Procedure Rules and section 3, 3A and 63(c) of the Civil Procedure Act, Cap. 21 Laws of Kenya. The application was brought on the grounds that the defendant is the brother of the Plaintiff’s late father with whom they shared the suit property on “**an canal basis**” and that the defendant intends to sell the suit property while this suit is pending with the sole purpose of defeating the outcome of this suit and that in the circumstances, it was only fair and just that the order sought be issued so as to maintain the status quo pending the hearing and determination of this suit. The Plaintiff’s application was opposed by the defendant through a replying affidavit sworn on 3<sup>rd</sup> July, 2013. The defendant contended that the Plaintiff has no valid claim over the suit property which can form a basis for the prohibitory order sought. The defendant contended that the defendant is the lawfully registered owner of the suit property and that the Plaintiff does and has never resided on the suit property. The defendant contended that the Plaintiff had filed an earlier case against him namely, Kisii High Court, Civil Case No. 415 of 1994 which case was dismissed on 2<sup>nd</sup> November, 2000. The defendant annexed to his affidavit a copy of the register for the suit property which showed that the suit property is a sub-division of

LR. No. Bukira/Bwisaboka/2965 and that it was registered in the name of the defendant on 28<sup>th</sup> February, 2012. The defendant also annexed a copy of a court order that was issued in Kisii High Court, Civil Case No. 415 of 1994, James Rioba Sereria vs. Simion Morange Boroye & Another on 2<sup>nd</sup> November, 2000 through which the said case was dismissed for want of prosecution.

3. When the application came up for hearing before me on 9<sup>th</sup> July, 2013, Mr. G.J.M. Masese appeared for the Plaintiff/applicant while Mr. Nyagwencha appeared for the defendant/respondent. In his submission in support of the application, the Plaintiff's advocate submitted that the plaintiff is residing on the suit property and has been resided on the same over the years. He submitted that in the circumstances, if the defendant disposes of the suit property the plaintiff would suffer irreparable harm. In his submission in response, the defendant's advocate submitted that the plaintiff's suit is time barred under section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya and as such the same cannot form a basis for the interlocutory order sought. The defendant's advocate submitted that the plaintiff has pleaded in the plaint that his father discovered the alleged fraudulent registration of the suit property in the name of the defendant in 1988. The defendant's advocate submitted that this suit was filed after a lapse of 24 years from the date of the accrual of the cause of action and as such the same is statutorily time barred. The defendant's advocate submitted that the Plaintiff's suit is a non-starter and the same should be dismissed in its entirety.
4. I have considered the Plaintiff's application and the opposition thereto by the defendant. As I have stated at the beginning of this ruling, the Plaintiff's application seeks "a prohibitory order" to issue prohibiting the defendant from selling the suit property until the hearing and determination of this suit. It is not clear to me why the Plaintiff chose to seek a prohibitory order instead of an injunction although his application was indicated to have been brought under Order 40 rule 2 of the Civil Procedure Rules. In my view, prohibitory orders are only issued under the Civil Procedure rules upon attachment of an immovable property under Order 22 rule 48 of the Civil Procedure Rules. If the Plaintiff was desirous of obtaining an order short of an injunction to prohibit dealings with the suit property, the application should have been brought under section 68 of the Land Registration Act, 2012 for an order of inhibition. So as not to determine the Plaintiff's application on this technicality on which it would have been struck out, I would consider the application as if it was brought under section 68 of the Land Registration Act, 2012 for an order of inhibition. The power of the court to issue an order of inhibition is discretionary. The purpose of an order of inhibition generally is to preserve an immovable property pending the determination of an issue concerning it. In this case, the prohibition is sought pending the hearing and determination of the suit herein which has been brought by the Plaintiff against the defendant who is the registered owner of the suit property. Since the effect of an order of inhibition is to restrict or fetter the rights of a registered proprietor from dealing with his property, the order is only granted for good reason or cause. In the present case, the Plaintiff has on obligation to demonstrate that he has sufficient interest in the suit property which should be protected by the court through an order of inhibition pending the hearing and determination of this suit. From the material before me, the Plaintiff has not come out clearly on the interest that he has on the suit property. It is not clear whether the Plaintiff is claiming the suit property on behalf of his deceased father or as of right. The Plaintiff's case as I have understood it is that the defendant and the Plaintiff's deceased father, one, Sereria Boroye were brothers and as such the two were entitled to the suit property. It is not clear from the pleadings whether this entitlement arose out of the previous ancestral ownership of the suit property or otherwise. According to the Plaintiff's affidavit in support of the application herein, the Plaintiff's said father and the defendant are said to have shared the suit property on "**an canal basis**". I don't know what kind of land ownership this is. The Plaintiff's claim is based on trust. Trust must be established as there are various forms of trust which arises in specific circumstances. In the present case the Plaintiff has not established the form of trust on which the suit property is said to be held on his behalf by the defendant. Even if it is assumed that the suit property was ancestral and that defendant and the Plaintiff's father who were brothers were entitled to the same in equal shares and that the registration of the entire parcel in the name of the defendant made him a trustee of the half share thereof on behalf of the Plaintiff's deceased father, the Plaintiff would only be able to claim the suit property under such trust(customary) as a legal representative of the estate of his deceased father and not otherwise. The merit of the Plaintiff's claim which has been brought not as a legal representative of his deceased father but as

- of right is therefore doubtful.
5. The defendant had also brought up an issue about the competency of the Plaintiff's suit on which the present application is premised. In paragraph 4 of the plaint, the plaintiff has averred that his deceased father discovered the defendant's fraudulent registration of the entire parcel of land constituting the suit property in 1988. If that be the case, a cause of action for the recovery of land of which the Plaintiff's said father was deprived of as a result of the alleged fraud should have been brought within 12 years which expired in the year 2000. It is apparent from the record that the Plaintiff in fact brought a suit within time in the year 1994 but the same was dismissed for want of prosecution in the year 2000. While the dismissal of a suit for want of prosecution at that time was not a bar to a fresh suit being brought, such fresh suit could only be brought subject to the operation of the Limitation of Actions Act, Cap. 22, Laws of Kenya to the cause of action in respect to which the dismissed suit was brought. The defendant's contention that the Plaintiff's suit herein which was brought 25 years after the accrual of the cause of action and 13 years after the dismissal of the previous suit on the same subject matter is time barred is not without basis.
  6. The upshot of the foregoing is that the Plaintiff has not persuaded me that he has sufficient interest in the suit property which would entitle him to an order of inhibition. I am not satisfied that his alleged occupation of the suit property alone which has not even been demonstrated or proved would entitle him to the relief. I would wish to add that the Plaintiff has not shown that the defendant is in the process of selling the suit property. What are before me are mere allegations which are not backed by any form of evidence. Due to the foregoing, I have not found any merit in the Plaintiff's application dated 16<sup>th</sup> April, 2013. The same is accordingly dismissed with costs to the defendant.

**Delivered, dated and signed at KISII this 24<sup>th</sup> day of January 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Onyango h/b for Masese for the Plaintiff

N/A for the Defendant

Mobisa Court clerk

**S. OKONG'O**

**JUDGE**