



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 92 OF 2012

JOHN NYASANI ONDIEKI PLAINTIFF

VERSUS

ELKANA OMANWA ONDIEKI DEFENDANT

RULING

1. What is before me is the plaintiff's application dated 30th May 2013 seeking, "*an ex parte interim injunction against the defendant, his agent and/or assigns restraining them from interfering with the quiet possession of the plaintiff's title No. Isoge/Kineni Block I/321 pending the hearing and determination of **this application (emphasis mine)***" and, an order that the OCS Manga Police Station do enforce the order. The plaintiff's application that was brought under Order 8 rules 3 and 5 and Order 40 rules 1, 2 and 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act was brought on the grounds that were set out on the face thereof and on the supporting affidavit of the plaintiff sworn on 30th May 2013 and a further affidavit sworn on 16th August 2013.
2. In summary, the plaintiff contended that; he is the proprietor of all that parcel of land known as **Title No. Isoge Kineni/Block 1/321** (hereinafter referred to as "**the suit property**"). The suit property is a portion of a parcel of land formerly known as **Title No. Isoge/Kineni/Block I/33** (hereinafter referred to only as "**Plot No. 33**"). Plot No. 33 was initially owned by the plaintiff's deceased father, one, **Ismael Ondieki** who was also the defendant's father (hereinafter referred to only as "**the deceased**"). The deceased had other sons a part from the plaintiff and the defendant herein. During the deceased lifetime, the deceased directed that Plot No. 33 be transferred into the name of one of the deceased's sons one, **Moses Barake** (hereinafter referred to only as "**Barake**") to hold the same in trust for himself and the deceased's other sons and heirs. In accordance with the deceased's said wish, Plot No. 33 was transferred to Barake who undertook to hold the same in trust as aforesaid. Following the death of the deceased, Barake after a series of consultative meetings with the deceased's heirs, the plaintiff and the defendant included, decided to distribute to the deceased's sons their respective shares in Plot No. 33. The modalities and the shares of each heir of the deceased was agreed upon at the said meetings. Barake then caused Plot No. 33 to be sub-divided into three (3) portions namely, **Title Nos. Isoge Kineni/Block I/312, 313 and 321**. Of the three (3) subdivisions, the plaintiff got **Title No. Isoge/Kineni/Block I/321** ("the suit property"). The deceased had (3) wives and the said distribution was done in accordance with the "houses" of the deceased's said three wives. The share of Plot No. 33 that was allocated to each house was agreed upon by all concerned and the respective boundaries of the three portions on the ground were also agreed upon. Apart from the plaintiff, the defendant and the other sons of the deceased go their respective shares of Plot No. 33. The dispute between the plaintiff and the defendant arose when the defendant disregarded the boundaries of their respective portions of the original Plot No. 33 and entered the suit property on which he put up structures. The plaintiff has contended that attempts to have the defendant move out of the suit property have not borne any fruit. It is on account of the foregoing that the plaintiff has moved the court for the injunction sought herein. The plaintiff annexed to his affidavits in support of the application; a copy of the title deed for the suit property in his name, a copy of the mutation form through which Plot No. 33 was sub-divided, copies of the minutes of the meetings held by the heirs of the deceased to discuss the sub-division of Plot No. 33 and a copy of the letter of authority that the deceased is said to have given to Barake over Plot No. 33.
3. The plaintiff's application was opposed by the defendant. Through a replying affidavit sworn on 2nd July, 2013 the defendant contended that the transfer of Plot No. 33 to Barake was done fraudulently and as such the plaintiff's title that was conferred through a transfer from Barake is illegal. The defendant contended that before

the death of the deceased, the deceased had divided Plot No. 33 among his three wives and clearly marked the boundaries for each one of them on the ground. The defendant contended that the parcel of land occupied by him, which the plaintiff claims to form part of the suit property was allocated by the deceased to the defendant's mother and as such is under the occupation of the defendant as of right. The defendant contended that he has been in occupation of the said parcel of land and has held the same over the years even when the deceased was still alive. The defendant denied that he has trespassed into the suit property maintaining that he is occupying a portion of Plot No. 33 that was given to him by the deceased. The defendant annexed his affidavit in opposition to the application; copies of a charge sheet, proceedings and ruling made in Keroka Senior Resident Magistrate's Court Criminal Case No. 1656 of 2009 in which the defendant was charged and acquitted of malicious damage to the plaintiff's property and copies of certificate of official search for **Title Nos. Isoge Kineni/Block I/321, 313, 312 and 33.**

4. On 2nd July, 2013 the court directed that the plaintiff's application be argued by way of written submissions. The plaintiff filed his submissions on 27th September 2013 while the defendant filed his submissions in reply on 7th October 2013. I have considered the plaintiff's application, the affidavits filed in support thereof and the submissions by the plaintiff's advocates. I have also considered the defendant's affidavit filed in opposition to the application and the submissions by the defendant's advocates. As I had stated at the beginning of this ruling, the plaintiff has sought "***an ex parte interim injunction against the defendant pending the hearing and determination of this application.***" The plaintiff has not sought a temporary injunction pending the hearing and determination of the plaintiff's suit herein. It is apparent on the face of the plaintiff's application that the order sought herein could only have been granted and was intended to be sought on an ex parte basis. The plaintiff either through an oversight or lack of diligence forgot to add a prayer in his application for an injunction pending the hearing and determination of this suit. This court cannot grant the order sought by the plaintiff first, because the order is being sought ex parte while the matter was argued inter partes and secondly and more importantly, the order would be spent as soon as it is issued. I am concerned that none of the advocates noted this serious anomaly in the plaintiff's application. The plaintiff's application would fail on this ground alone.
5. In view of what I have stated, I would not consider whether the plaintiff has met the conditions for granting an interlocutory injunction that were set in the case of, **Giella –vs- Cassman Brown [1973] E. A 358** on which the parties submitted at length. This is because, no such injunction has been sought in the present application. However, even if the application was considered on merit, I am of the opinion that the orders sought by the plaintiff would still not issue. As rightly submitted by the defendant's advocates, the plaintiff's main complaint is that the defendant has trespassed into the suit property and put up structures thereon. The plaintiff's grievance cannot in the circumstances be remedied by a prohibitory injunction alone. The plaintiff should have sought both prohibitory and mandatory injunction for the removal of the defendant's alleged illegal structures on the suit property. The orders sought by the plaintiff would not be effective unless the defendant is ordered to remove the alleged structures from the suit property which order has not been sought. A court of law would not act in vain. The plaintiff has sought an order restraining the defendant from among others, constructing and/or erecting structures on the suit property which structures on the plaintiff's own affidavit have already been erected. Only a mandatory injunction can undo what has been done and not a prohibitory injunction. The order sought cannot therefore issue also on this ground.
6. The upshot of the foregoing is that the plaintiff's application dated 30th May 2013 has no merit. The same is accordingly dismissed with costs to the defendant. However in the interest of justice and with a view to stop the escalation of hostilities between the parties herein who are brothers, I would order that the parties do maintain the status quo prevailing as of the date hereof in relation to possession and use of the suit property pending the hearing and determination of this suit. For the avoidance of doubt, henceforth neither party should interfere with the occupation and use of whichever portion or part of the suit property currently in occupation and use by the other. Orders accordingly.

Delivered, dated and signed at Kisii this 28th day of February 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

Mr. Okemwa h/b for Minda for the Defendant

Mr. Mobisa

Court Clerk.

S. OKONG'O

JUDGE