



No. 231

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 185 OF 2010

OBADIAH OSORO ONGAGA PLAINTIFF

VERSUS

LEONARD MOTARI DEFENDANT

RULING

1. On 29th September, 2010, the plaintiff filed an application by way chamber summons dated 28th September, 2010 pursuant to the provisions of Order XXXIX Rules 1 and 2 of the Civil Procedure rules and sections 3, 3A and 63(e) of the Civil Procedure Rules seeking a temporary injunction to restrain the defendant by himself or through his agents, servants or employees from further trespassing into, cultivating on, working on and/or in any other way whatsoever interfering with the use, occupation and ownership of Land Parcel No. Wanjare/Bomariba/2719 (hereinafter referred to as “**the suit property**”) where the context so admits pending the hearing and determination of this suit. The plaintiff’s application was listed for hearing on 5th October, 2010 at the registry. According to the affidavit of service sworn by a process server, one, James Moracha Ntabo and filed in court on 5th October, 2010, the defendant was served with the said application on 29th September, 2010.
2. When the plaintiff’s application came up for hearing on 5th October, 2010, the defendant did not appear in court and Makhandia J. (as he then was) allowed the application as prayed having satisfied himself that the defendant was duly served with the application and he neither appeared in court for the hearing of the application nor filed any response thereto. The defendant entered appearance on 8th October, 2010 and filed his statement of defence on 26th October, 2010 to which the plaintiff filed a reply on 29th October, 2010. From 29th October, 2010 nothing happened in this matter until 29th January, 2013 when the plaintiff filed his witness statements and list of documents. The suit was thereafter set down for case conference on 11th April, 2013. When the advocates for the parties appeared before me on 11th April, 2013, I directed the defendant who had not filed his witness statements and bundle of documents to do so within 14 days from the date of the order. I directed further that the parties do agree on issues for trial within the same period failure to which each party was at liberty to file its own statement of issues. I gave liberty to the parties to list this suit for hearing at the registry upon compliance with the aforesaid directions. In compliance with the said directions, the defendant filed his statement and bundle of documents on 26th April, 2013. The plaintiff also filed his version of statement of issues for determination on the same date.
3. The parties having complied with the directions that were given by the court on 11th April, 2013, what remained was for them to set down this case for hearing. Strangely enough, instead of doing

so, the defendant filed an application under certificate of urgency on 24th May, 2013, seeking an order that the temporary injunction that was granted by the court herein on 5th October, 2010 in favour of the plaintiff be discharged, varied and/or set aside. The defendant's application was brought by way of Notice of Motion dated 23rd May, 2013 under Order 40 rules 6 and 7 of the Civil Procedure Rules. This is the application before me. The application was brought on the grounds that the defendant was dissatisfied with the said order and that this suit has not been determined within one (1) year from the date when the said order was granted. The defendant also contended that the said order serves no purpose because the portion of the suit property in dispute is under the occupation of the defendant. In his affidavit in support of the application, the defendant contended that he purchased a portion of the suit property which is in dispute in this suit in the year 1991 and took possession in the year 1992. He has remained in possession since then and has developed the same by planting coffee, assortment of trees, bananas and Napier grass thereon. The defendant has claimed that the plaintiff acquired the disputed portion of the suit property by fraud and that the defendant's title to the suit property was confirmed by the Suneka Land Disputes Tribunal on 17th May, 2010. The defendant has contended that the plaintiff did not give any undertaking as to damages when the orders of 5th October, 2010 sought to be discharged were made in his favour and now that the suit has not been heard, the said orders which according to the defendant serves no purpose should be discharged.

4. The defendant's application was opposed by the plaintiff through grounds of opposition dated 1st July, 2013. The plaintiff contended that no good grounds have been shown to warrant the granting of the orders sought and that the defendant's application is intended to delay the hearing and determination of this suit. The plaintiff termed the defendant's application incompetent and an abuse of the process of the court. When the application came up for hearing on 1st July, 2013, the parties agreed to argue the application by way of written submissions. The defendant filed his submissions on 10th July, 2013 while the plaintiff filed his submissions on 22nd July, 2013.
5. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the plaintiff and the written submissions filed by the advocates for the parties. I am in agreement with the submission by the plaintiff that the defendant's application is an abuse of the process of the court and is intended to delay the hearing and determination of this suit. As I have stated at the beginning of this ruling, this suit came up for case conference on 14th April, 2013 when the advocates for both parties appeared before the court. According to the court record, the only request put to the court on that day by the defendant was to be given time to file his witness statements and bundle of documents. The defendant did not at all take issue with the temporary injunction that was granted herein on 5th October, 2010. I am of the opinion that if the defendant was aggrieved with the said order, the appropriate forum where he should have raised the issue having failed to do so earlier was at the pre-trial conference. It reeks of mala fides for the defendant to wait until the court has given pre-trial directions to bring the present application instead of setting down the case for hearing. The defendant's application has been brought on two main grounds. First, the defendant has contended that since this suit has not been determined within one year from the date when the temporary injunction was granted, the said orders have lapsed and as such the same should be set aside. The second ground is that the defendant is dissatisfied with the said order and as such is entitled to have the same set aside.
6. The defendant's application cannot succeed for the following reasons. First, the application has been brought after unreasonable delay and no sufficient reasons have been given to justify the granting of the orders sought. The order sought to be set aside was made on 5th October, 2010 more than 3 years ago. The defendant has been aware of the existence of the said order over the years. If the defendant was dissatisfied with the said order there is no reason why the defendant did not take the earliest opportunity to move the court to set it aside. The defendant has not given an explanation as to why he had to wait until the court has directed that the matter be listed for hearing to seek the setting aside of the said order. Furthermore, the defendant has not given reasons why he is dissatisfied with the said order to justify the setting aside of the same. Whether or not the plaintiff acquired the suit property fraudulently and whether or not the defendant has developed and is in possession of the disputed portion of the suit property are issues that can only be determined at the trial of this suit and cannot justify the setting aside of the said order. In any

event, these are issues which the defendant should have raised in opposition to the application in which the said order was granted. The defendant has not explained why he did not oppose the application. He cannot therefore be allowed to seek the setting aside of the orders herein on the grounds which he should have raised in opposition to the application. It is not enough to claim that one is dissatisfied with an order. The reasons for the dissatisfaction must be such that would justify the discharge or setting aside of such order. The defendant has not given good grounds that would justify the discharge and/or setting aside of the order given herein on 5th October, 2010. The defendant's application cannot succeed also for another reason. This suit was filed before the commencement of the Civil Procedure Rules, 2010. The order sought to be set aside was also made before the said Civil Procedure Rules came into force. In the circumstances, the provisions of the Civil Procedure Rules, 2010 relating to the lapse of temporary injunctions unless the suit in which such injunction was granted is heard and determined within one (1) year cannot apply to the order that was issued herein.

7. The upshot of the foregoing is that the defendant's application dated 23rd May, 2013 is not for granting. The same is hereby dismissed with costs to the plaintiff.

Delivered, dated and signed at Kisii this 4th day of April 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Minda for the Plaintiff

Mr. Bigogo holding brief Sagwe for the Defendant

Mobisa Court Clerk

S. OKONG'O

JUDGE