



No. 246

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 62 OF 2011**

BENSON GETUGI OTUNDO ..... PLAINTIFF

VERSUS

ZACHARY OGAMBA OMARI..... 1<sup>ST</sup> DEFENDANT

JOSEPH OGAMBA ATENGA..... 2<sup>ND</sup> DEFENDANT

MARKO OMBATI.....3<sup>RD</sup> DEFENDANT

RICHARD BIKERI .....4<sup>TH</sup> DEFENDANT

OMWANZA ATENGA .....5<sup>TH</sup> DEFENDANT

MARTHA ZAKAYO NYAMOTE .....6<sup>TH</sup> DEFENDANT

**RULING**

1. What is before me is the plaintiff's application brought by way of Notice of Motion dated 5<sup>th</sup> April 2011. In the application the plaintiff has sought; a mandatory injunction to compel the defendants to yield up possession and vacate all those parcels of land known as **LR Nos. Nyaribari Chache/B/B/Boburia/5838 and 5839** (hereinafter referred to as "**the suit properties**") pending the hearing and determination of this suit and a temporary injunction to restrain the defendants from entering into, trespassing onto, cultivating, building structures, planting trees, interfering with and/or in any other manner whatsoever, dealing with the suit properties and/or any portion thereof pending the hearing and determination of this suit.
2. The plaintiff's application is supported by affidavit and further affidavit sworn by the plaintiff on 5<sup>th</sup> April 2011 and 2<sup>nd</sup> April 2013 respectively. The application has been brought on the grounds that the plaintiff is the registered proprietor of the suit properties and that he occupied and remained in possession of the suit properties from the time the same was registered in his name until the month of January, 2010 when the defendants trespassed into a substantial portion of the suit properties and fenced off the same. The defendants also commenced planting of trees on the said portion of the suit properties on which they had trespassed. The plaintiff reported the defendant's said activities to the area chief who urged the defendants to desist from the said acts of trespass. The defendants heeded the chief's direction but only for some time because in the month of March, 2011 the defendants re-entered the suit properties and commenced once again cultivation of a substantial portion thereof. The plaintiff has contended that the defendants said

- activities are intended to deprive the plaintiff of his rights over the suit properties. The plaintiff has contented further that the defendants have no valid claim over the suit properties.
3. The plaintiff has claimed that he acquired the suit properties from his deceased father one, **Otundo Mochache** (hereinafter referred to only as “**Otundo**”). The plaintiff has stated in his affidavits in support of the application herein that Otundo acquired the suit properties lawfully from the previous owners who are related to the defendants before the same were transferred to the plaintiff. The plaintiff has stated that the suit properties are sub-divisions of a parcel of land known as **LR No. Nyaribari Chache/B/B/Boburia/4778** (“hereinafter referred to as “**Plot No. 4778**”). Plot No. 4778 was also a sub-division of the original parcel of land known as **LR No. Nyaribari Chache/B/B/Boburia/2382** (hereinafter referred to as “**Plot No. 2382**”). The plaintiff has stated that Otundo had a dispute with one, **Atengao gamba and Ombati Ogamba** (hereinafter referred to as “**the Ogambas**”) who were some of the registered proprietors of **Plot No. 2382** which dispute ended up in court as, **Kisii HCCC No. 191 of 1998** (hereinafter referred to as “**the High Court Case**”). The High Court case was determined in favour of Otundo and the court ordered that the Ogambas do transfer to Otundo a portion measuring 2.5 acres of Plot No. 2382 and in default on their part to do so the executive officer of the court should execute all necessary documents to facilitate the said transfer in favour of Otundo. The plaintiff has stated that the Ogambas sought the review of the said decision by the High Court but their application was dismissed. The Ogambas thereafter lodged an appeal in the Court of Appeal against the High Court decision that dismissed their review application which appeal was also dismissed by the Court of Appeal on 20<sup>th</sup> June 2003 in the Court of Appeal at Kisumu, Civil Appeal No. 195 of 2001. The plaintiff has stated that following the said decision of the High Court, the Deputy Registrar of the High Court executed the necessary mutation form for the sub-division of Plot No. 2382 into two portions namely, LR No. Nyaribari Chache/B/B/Boburia/4777 (hereinafter referred to as “**Plot No. 4777**”) which remained registered in the names of the Ogambas and Plot No. 4778 which was registered in the name of Otundo. The plaintiff has stated that Plot No. 2382 was sub-divided strictly in accordance with the decision of the High Court and only a portion thereof measuring 2.5 acres comprised in Plot No. 4778 was transferred to Otundo.
  4. The plaintiff has stated that Otundo thereafter sub-divided Plot No. 4778 into two portions namely LR Nos. Nyaribari Chache/B/B/ Boburia/5838 and 5839 (“**the suit properties**”) and caused both portions to be transferred to the plaintiff. The plaintiff has contented that from the foregoing, the plaintiff’s titles over the suit properties were acquired lawfully through a valid court order and as such the same cannot be impeached by the defendants.
  5. The plaintiff’s application has been opposed by the defendants. Through a replying affidavit sworn by the 2<sup>nd</sup> defendant on his own behalf and on behalf of the other 5<sup>th</sup> defendants on 28<sup>th</sup> March 2013, the defendants have termed the plaintiff’s application as baseless and unmeritorious. The defendants have contented that the suit properties were fraudulently created from Plot No. 4778 which was also fraudulently created from Plot No. 2382. The defendants have contented that Otundo had purchased a portion measuring 26 meters by 115 meters only of all that parcel of land known as Plot No. 2382 from the Ogambas who are all deceased having passed on between 1984 and 1994. The defendants have contented that pursuant to the decisions that were made by the High Court and the Court of Appeal foresaid, Otundo was entitled only to a portion of Plot No. 2382 and not the entire parcel of land. The defendants have contented that the plaintiff in collusion with the land registry staff “stole” the whole parcel of land comprised in title No. 2382 although he was only entitled to a portion thereof that had been purchased by his deceased father, Otundo. The defendants have contented that since the Ogambas were all deceased, the plaintiff should have gone to the succession court to claim Otundo’s share of Plot No. 2382 that was decreed by the court. The defendants have contented that the Ogambas were their parents and that they have occupied Plot No. 2382 since birth and that the plaintiff although registered as the proprietor of the suit properties albeit through fraud has never occupied the same. The defendants have contented that the plaintiff has not established a prima facie case and has also failed to demonstrate that he stands to suffer irreparable loss unless the orders ought are granted.
  6. On 22<sup>nd</sup> January 2013 the parties agreed by consent to argue the application herein by way of written submissions. The plaintiff filed his submissions in court on 2<sup>nd</sup> April 2013 while the defendants filed their submissions on 26<sup>th</sup> August 2013. I have considered the plaintiff’s application together with the affidavits filed in support thereof. I have also considered the

replying affidavit filed by the defendants in opposition to the application and the parties advocates respective written submissions. The plaintiff has sought both prohibitory and mandatory injunction at this interlocutory stage. The principles to be applied when considering an application for the orders sought herein are now well settled. For a temporary prohibitive injunction to issue, the applicant must establish a prima facie case against the respondent and also demonstrate that unless the order is granted he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. See the case of, **Giella vs. Cassman Brown & Co. Ltd [1973] E. A 358**. With regard to a temporary mandatory injunction, the threshold to be met is higher. For a mandatory injunction to be issued at an interlocutory stage the case must be one which is clear and the order shall not be granted in the absence of special circumstances. Applying the foregoing principles to the case before me, I am satisfied that the plaintiff has made out a case for both prohibitory and mandatory injunction. There is no dispute that the plaintiff's father Otundo had sued the Ogambas in the High Court case over Plot No. 2382 which case was determined in favour of Otundo. The High Court ordered that a portion of Plot NO. 2382 measuring 2.5 acres be transferred and registered in the name of Otundo. The High Court made a further order that in the event that the Ogambas failed to execute the necessary documents to effect the said transfer, the executive officer of the court should do so. The Ogambas application for the review of the said High Court decision was dismissed by the court. The Ogambas appeal to the Court of Appeal against that dismissal was similarly dismissed by the Court of Appeal.

7. The effect of the foregoing is that, the decision of the High Court that a portion of Plot No. 2382 measuring 2.5 acres be transferred to Otundo remained in force. The plaintiff has annexed to his affidavit in support of the application herein a copy of mutation form dated 23<sup>rd</sup> August 1990 (annexture "BG04"). Through this mutation form, Plot No. 2382 was sub-divided and a portion thereof measuring 2.5 acres curved out for Otundo in execution of the High Court decree aforesaid. The mutation form was signed by the Executive Officer of the High Court of Kenya, Kisii on behalf of the Ogambas whom I presume had declined to execute the same. Plot No. 2382 was sub-divided into two (2) portions namely, LR. No. Nyaribari Chache/B/B/Boburia/4777 (Plot No. 4777) which measured 1.79ha and LR. No. Nyaribari Chache/B/B/Boburia/4778 (Plot No. 4778) which measured 1.01ha. Whereas Plot No. 4777 remained registered in the names of the Ogambas, Plot No. 4778 was transferred to Otundo. I am satisfied that the sub-division of Plot No. 2382 was carried out in accordance with the decision of the High Court. I am not in agreement with the submission by the defendants that Plot No. 2382 was sub-divided fraudulently and that Otundo got more land than he was entitled to from Plot No. 2382. As I have stated above, the High Court had awarded Otundo 2.5 acres of Plot No. 2382. When Plot No. 2382 was sub-divided as aforesaid, only a portion measuring 1.01ha. was transferred to Otundo. In my calculation, 1.01ha. is equivalent to 2.5 acres, no more no less.
8. It is my finding therefore that the sub-division of Plot No. 2382 was carried out lawfully in execution of a court order that has neither been set aside nor reviewed. The defendants have put up a further argument that the sub-division of Plot No. 2382 could not have been carried out because as at the time the same was done the Ogambas were all deceased. This argument must fail for a number of reasons. First, the sub-division was carried out by the court in execution of a court order that provided that in the event that the Ogambas failed to execute the necessary documents to effect the sub-division, the same should be executed by the executive officer of the court. Secondly, Kwamboka Ogamba and Monda Ogamba, who were two (2) of the three (3) registered proprietors of Plot No. 2382 died before the institution of the High Court case and were not parties to that case. Their death therefore had no effect on the execution of the orders issued in that case. On the other hand, Atenga Ogamba who was the other registered owner of Plot No. 2382 and who was a party to the High Court case died on 1<sup>st</sup> September 1994 after Plot No. 2382 had been sub-divided by the court on 4<sup>th</sup> September 1990.
9. Finally, the issue as to whether the execution of the High Court decree was lawfully carried out cannot be raised in this suit. This is an issue which should have been raised in the High Court for determination under Section 34 of the Civil Procedure Act, Cap 21 Laws of Kenya. Having found that the creation of Plot No. 4778 and the registration of the same in the name of Otundo was lawful, I find nothing untoward in Otundo sub-dividing the said Plot into LR Nyaribari Chache/B/B/ Boburia/5838 and LR No. Nyaribari Chache/B/B/Boburia/5839 ("the suit

properties”) and transferring the same to the plaintiff. On the material before me, I am persuaded that the suit properties are lawfully registered in the name of the plaintiff. I am in agreement with the submission by the plaintiff that the Ogambas interest in the parcels of land which are now comprised in the titles of the suit properties was laid to rest in the decisions of the High Court and the Court of Appeal aforesaid. There can never be any other contest as to whether Otundo was entitled to 2.5acres of Plot No. 2382 or not. The defendants who claim to be the descendants of the Ogambas have no valid claim over the suit properties and in the absence of any such claim, they are trespassers on the said properties. In the case of **Shariff Abdi Hassan vs. Nadhif Jama Adan [2006] eKLR**, it was stated that;-

**“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However where it is prima facie established as per the standard spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to property”.**

10. I am satisfied that the plaintiff has established a strong and clear case with overwhelming chances of success at the trial that the defendants are wrongfully in occupation of the suit properties. I am also satisfied that the plaintiff would suffer irreparable harm unless the orders sought are granted. I am convinced therefore that this is an appropriate case to grant both prohibitory and mandatory injunction at interlocutory stage. In conclusion, I find merit in the plaintiff’s application dated 5<sup>th</sup> April, 2011. The same is allowed in terms of prayers 3 and 4 thereof. The defendants shall comply with the orders issued in terms of prayer 3 within 120 days from the date hereof during which period the orders issued in terms of prayer 4 shall be stayed but only as concerns the defendants’ entry into the suit properties. The plaintiff shall have the costs of this application.

**Delivered, dated and signed at Kisii this 16<sup>th</sup> day of May 2014.**

**S. OKONG’O**

**JUDGE**

**In the presence of:-**

Mr. Ochwang’i for the Plaintiff

Mr. Minda for the Defendants

Mr. Mobisa Court Clerk

**S. OKONG’O**

**JUDGE**