



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 290 OF 2013

OBADIAH OMAIYO PLAINTIFF

VERSUS

MUSA NCHAGA 1ST DEFENDANT

NCHAGA MUSA 2ND DEFENDANT

MOGIRE MUSA 3RD DEFENDANT

OSEKO MUSA 4TH DEFENDANT

NCHAGA CHUMA 5TH DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on 28th June 2013 by a plaint dated 26th June 2013 in which he sought as against the defendants jointly and severally; a declaration that he is the rightful owner and entitled to exclusive, quiet and peaceful enjoyment of all that parcel of land known as LR No. Majoge/Bokimonge/3004 (“**suit property**”) and that the defendants have trespassed thereon, a permanent injunction to restrain the defendants from entering onto, cultivating, ploughing and/or in any manner whatsoever interfering with the suit property and/or the plaintiff’s occupation thereof, costs of the suit and further or any other relief deemed just.
2. In the said plaint, the plaintiff averred that he is the registered proprietor of the suit property which measures 0.9ha.or thereabouts on which he has established his homestead consisting of four (4) semi-permanent houses, a cattle shed, a store and a granary and that the homestead is fenced all-round with a barbed wire and a life fence (sic). The plaintiff averred further that on or about 9th June 2013, the defendants jointly and severally forcefully and unlawfully entered the suit property while armed with jembes, spades, bows and arrows and while thereat destroyed a building foundation that the plaintiff had put up for a permanent house that the plaintiff wanted to construct on the suit property. The plaintiff averred that after efforts to settle the dispute amicably and the plaintiff’s demand upon the defendants to cease their unlawful activities failed to yield any positive results, the plaintiff was left with no alternative but to file this suit for the reliefs set out above.
3. Together with the plaint the plaintiff filed an application by way of Notice of Motion dated 26th June 2013 seeking a temporary injunction to restrain the defendants from entering onto, cultivating, ploughing and/or in any manner whatsoever interfering with the suit property pending the hearing and determination of this suit. The plaintiff’s application was supported by affidavit and supplementary affidavit sworn by the plaintiff on 26th June 2013 and 19th July 2013

- respectively. In his affidavit sworn on 26th June 2013 the plaintiff reiterated his averments in the plaint which I have highlighted above. The plaintiff stated that he resides with his family at Kasarani in Nairobi and that while away, his sister one, Rhoda Kerubo Ochege and Cosmas Omundi Nyabende are responsible for taking care of his home on the suit property.
4. In the month of May, 2013, he dug trenches on a portion of the suit property for the purpose of putting up a foundation for a permanent house that he wanted to construct on the suit property. He thereafter assembled building materials for the purposes for the said construction works. On 9th June 2013 he travelled together with his wife to Kisii to commence the construction aforesaid when the defendants invaded the suit property while armed with bows, arrows, pangas, jembes and spades and destroyed the trenches that had been dug for laying the foundation, filled up the same and flattened the place. The defendants dared whoever attempted to interfere with them with physical harm. They also threatened to burn down the plaintiff's homestead and to evict the plaintiff therefrom in the event that the plaintiff attempted to continue with construction of the said permanent house on the suit property. The incident was reported at Ogembo Police Station.
 5. The plaintiff contended that the defendants acts aforesaid are unlawful and that the same has now curtailed the plaintiff's right to exclusive and quiet enjoyment of the suit property. The plaintiff averred that a portion of the suit property was purchased by his deceased father for him while the other portion was purchased by him from the 1st defendant at a consideration of kshs. 215,000/=. The plaintiff stated that at the beginning of the year 2013 his house in Nairobi was broken into by robbers who stole a number of household goods and personal documents which included the agreement for sale that he entered into with the 1st defendant for a portion of the suit property. The plaintiff stated further that he became sick in the year 2012 in the process of which he lost ability to speak fluently and eloquently. The plaintiff annexed to his supporting affidavit; a copy of the title deed for the suit property dated 21st August 2008 which showed that the suit property is a portion of a parcel of land then known as LR No. Majoge/Bokimonge/1110 ("Plot No. 1110") and that the same was registered in the name of the plaintiff on 21st August 2008. The plaintiff also annexed copies of photographs said to have been taken on the suit property on 13th June 2013, a copy of the plaintiff's medical report dated 12th December 2012 and copies of two (2) police abstracts both dated 5th January 2013.
 6. The plaintiff's application was opposed by the defendants. The defendants filed two (2) replying affidavits sworn by the 1st and 5th defendants. In his affidavit, the 1st defendant stated that he swore the affidavit on his own behalf and on behalf of the 2nd, 3rd and 4th defendants who are his sons. In his affidavit the 1st defendant contended that only a portion of the suit property is in dispute and that the said portion belongs to him having purchased the same from one Nyakeruri George Nyabende on 7th April 1982 at a consideration of kshs. 222,000/=. The 1st defendant contended that he took possession of that portion of the suit property immediately after purchase and planted trees around its boundary while cultivating it at the same time. The 1st defendant contended that whereas the plaintiff's father had only purchased a portion of the suit property while the other portion was purchased by the 1st defendant, the plaintiff through acts of fraud caused the entire parcel of land to be registered in his name. The 1st defendant denied that they entered the suit property on 9th June 2013 and caused the damage complained of by the plaintiff. The 1st defendant contended that the 4th defendant and him were at his home throughout the day when they are said to have invaded the plaintiff's home.
 7. On the other hand, the 1st and 3rd defendants are residing in Nairobi and were not at home on 9th June 2013 when they are said to have joined the 1st and 4th defendants in damaging the plaintiff's properties. The 1st defendant contended that the plaintiff has acquired title over his (the 1st defendant) property through fraud and as such the plaintiff has approached the seat of justice with unclean hands. The 1st defendant annexed to his affidavit a purported agreement for sale dated 7th April 1982 between the 1st defendant and one, Nyakeruri Nyabende over the disputed portion of land. The agreement is in Ekegusii language and the 1st defendant has not provided English translation thereof. The 1st defendant also annexed to his affidavit a photograph said to have been taken on the disputed portion of the suit property showing the trees that the 1st defendant claims to

have planted thereon. In his affidavit, the 5th defendant stated that he has no interest in the suit property and that he never left home on 9th June 2013 when he is said to have destroyed the plaintiff's properties with the other defendants. He denied entering the suit property on the material day.

8. The plaintiff filed a supplementary affidavit on 7th August 2013 in reply to the 1st defendant's affidavit the contents of which I have highlighted above. The plaintiff denied that the 1st defendant purchased a portion of the suit property from Nyakeruri Nyabende at KShs. 222,000/= and termed the agreement for sale annexed to the 1st defendant's affidavit as the 1st defendant's own creation. The plaintiff contended that the trees on the photograph annexed to the 1st defendant's affidavit were planted by the plaintiff and belongs to him. The plaintiff reiterated that the 1st defendant sold to him the portion of the suit property in dispute and that all the defendants entered the suit property on 9th June 2013 and participated in the destruction of his properties. The plaintiff denied that he acquired the disputed portion of the suit property fraudulently as claimed by the 1st defendant.
9. When the application came up for hearing inter partes on 10th July 2013 the defendant's advocate applied for leave to cross-examine the plaintiff on his affidavit in support of the application herein. The said application was opposed by the advocate for the plaintiff. In a ruling that was delivered on 19th July 2013, I allowed the defendant's application for leave to cross-examine the plaintiff on his supporting affidavit. When the hearing of the application resumed on 21st November 2013, the plaintiff presented himself for cross examination. The said cross-examination did not however take place. When the plaintiff's advocate started to examine the plaintiff prior to his cross-examination, I noted that the plaintiff had serious difficulties in communicating. In view of that development, I ruled that no useful purpose was going to be served by taking the plaintiff through the ordeal of cross-examination because he was incoherent and his responses although sensible were not coordinated. I directed further that the plaintiff's application be heard by way of written submissions. The plaintiff filed his submissions on 15th January 2014 while the defendants filed their submissions in reply on 28th February 2014. On 5th March 2014 the advocates for the parties highlighted their written submissions on the issue of the competency of the plaintiff's affidavit in support of the present application.
10. I have considered the plaintiff's application together with the affidavits filed by the defendants in opposition thereto. I have also considered the written and oral submissions by the advocates for the parties together with the authorities and statutes cited. This being an application for a temporary injunction what I need to determine is whether the plaintiff has established a prima facie case with a probability of success against the defendants and secondly, whether the plaintiff has demonstrated that he will suffer irreparable harm unless the order sought is granted. If the court is in doubt as to the above, the court would determine the application on a balance of convenience. These are the principles that were enunciated in the case of **Giella -vs- Cassman Brown and Co. Ltd [1973] E. A 358**.
11. Before I consider the plaintiff's case on merit, I would like to dispose of one issue. In their written submissions, the advocates for the defendants contended that the affidavit filed herein by the plaintiff in support of the present application is of no probative value, worthless and should be struck out and expunged from the court record. The defendants submitted that the plaintiff had presented himself for cross-examination on the said affidavit pursuant to the order of the court but was unable to communicate with the court and as such was stood down and discharged. The defendants submitted that having regard to the state of the plaintiff's mind and physical health, there is no way that the plaintiff would have sworn the affidavit in question. The affidavit according to the defendants must be a concoction that was manufactured by a third party on behalf of the plaintiff to enable the plaintiff obtain the orders sought herein.
12. In response to these submissions, the plaintiff's advocates submitted that the plaintiff is an adult of sound mind and the fact that he has an impaired speech arising from sickness does not render him incapable of giving evidence. The plaintiff's advocates submitted that the sickness has only interfered with the plaintiff's speech and not his mental faculties. The court was referred to the plaintiff's medical report prepared on 4th December 2012 about six (6) months before the filing of this suit in which the doctor indicated that the plaintiff's problem at the time was only with regard

to speech and memory. The plaintiff's advocates submitted that under sections 125 and 126 of the Evidence Act, Cap 80 Laws of Kenya even a person of unsound mind is a competent witness provided he can communicate with the court which communication need not be only oral but can also be in the form of signs or written. The plaintiff's advocates submitted that the fact that the plaintiff could not communicate with the court orally does not mean that he is incapable of communicating with the court at all so as to be declared an incompetent witness. The plaintiff's advocates submitted that the plaintiff's speech impairment has nothing in the circumstances to do with his competency or inability to swear the affidavits filed herein in support of the present application.

13. On this issue, my take is that I have no evidence before me that the plaintiff was of unsound mind when he swore the affidavit in support of the injunction application herein. I am in agreement with the contention by the defendants' advocates that if the plaintiff was of unsound mind at that particular time then it is not only the affidavit that was filed herein in support of the injunction application that will be incompetent but the entire suit. This is because a person of unsound mind cannot maintain a suit in his/her own name. The medical report that I was referred to by the plaintiff's advocate is not very helpful. The same was made six (6) months before the date of the affidavit in contention. It cannot therefore be a proper guide as to the mental state of the plaintiff as at the date when he swore the affidavit in question. I am not a medical expert. I am not in a position therefore to declare a person to be of unsound mind based on his response to questions put to him in court. It is true as contended by the defendants' advocate that when the plaintiff appeared in court for cross-examination, he was totally incoherent and his thought process was unco-ordinated I believe as a result of memory lapses. I am not able to determine whether the plaintiff would have been able to swear an affidavit in this state. I am also not certain whether the plaintiff was in the same state of mind on 26th January 2013 when he swore the affidavit in question. Due to the foregoing, I am of the opinion that the defendants have not laid a proper basis on which this court can declare the plaintiff's affidavit sworn herein on 26th January 2013 incompetent, null and void. The defendants' objection to the said affidavit based on its competence is overruled.
14. The determination of that issue takes me back to the principles for granting interlocutory injunction and whether the plaintiff has satisfied the same. The plaintiff's case is that he is the registered proprietor of the suit property and that on 9th June 2013 the defendants without any lawful excuse entered the suit property and destroyed the building materials that the plaintiff had assembled thereon and interfered with the preparations that the plaintiff had put in place to commence construction of a permanent house on the suit property. The plaintiff's complaint is that he has been prevented by the defendants from continuing with the said construction works. The plaintiff's case is that the defendants have no interest in the suit property and as such their actions aforesaid are illegal and amounts to trespass. The plaintiff has exhibited a copy of his title deed for the suit property in proof of his ownership of the same.
15. The defendants have not denied that the plaintiff is registered as the owner of the suit property. The 1st defendant's contention is that the plaintiff acquired the title of the suit property through fraud. The 1st defendant's contention is that the plaintiff was entitled only to half portion of the suit property while the other portion belongs to the 1st defendant. The plaintiff has contended that the 1st defendant had sold to him the half portion of the suit property which is being claimed by the 1st defendant. This sale has been denied by the 1st defendant. The plaintiff has not denied the fact that the 1st defendant used to own a portion of the original parcel of land which is now comprised in the suit property. What is in contention is whether that portion was sold by the 1st defendant to the plaintiff or not. The plaintiff has not placed any material before the court in proof of the sale of this portion of land by the 1st defendant to the plaintiff. The plaintiff has claimed that the agreement for sale that they had entered into with the 1st defendant got lost when robbers invaded the plaintiff's house in Nairobi early last year.
16. I am unable to determine on the material before me whether the 1st defendant sold to the plaintiff the portion of land in dispute or not. The matter can only be determined at the trial. Under section 26 of the Land Registration Act, 2012 a certificate of title issued upon registration or to a purchaser of land is a prima facie evidence that the person named therein is the absolute and

JUDGE