



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.97 OF 2014

RONALD ONGAGA ACHIRA

(having power of attorney to sue

on behalf of DENNIS ONGUBO ACHIRA)..... PLAINTIFF

VERSUS

ESTHER NYASANI MAKORI 1ST DEFENDANT

GEORGE OGAKE PIUS 2ND DEFENDANT

DISHON ATEMBA ONSONGO 3RD DEFENDANT

RULING

1. The plaintiff is the attorney of one, **Dennis Ongubo Achira** (hereinafter referred to as "**Ongubo**"). The plaintiff brought this suit against the defendants on 11th March, 2014 seeking; a declaration that "**Ongubo**" is the sole registered proprietor of all that parcel of land known as **LR No. South Mugirango/Bogetenga/3104** (hereinafter referred to as "**the suit property**"), an order for the eviction of the defendants from the suit property, a permanent injunction to restrain the defendants from re-entering, trespassing onto, cultivating, ploughing, building structures, dealing or otherwise interfering with the suit property, general damages for trespass, mesne profits and costs of the suit.
2. Together with the plaint, the plaintiff brought an application by way of notice of motion dated 11th March 2014 seeking; a temporary injunction to restrain the defendants from selling and/or dealing in any manner with the suit property pending the hearing and determination of this suit, a declaration that Ongubo is the sole proprietor and registered owner of the suit property and a permanent injunction to restrain the defendants from selling and/or dealing in any manner whatsoever with the suit property. This is the application which is the subject of this ruling. The plaintiff's application was supported by the affidavit of the plaintiff sworn on 11th March 2014. The application was brought on the grounds that; Ongubo purchased the suit property from the 1st defendant on 5th July 2013 and paid the purchase price in full. The suit property was a portion of the former larger parcel of land known as **LR No. South Mugirango/Bogetenga/3119** (hereinafter referred to as "**Plot No. 3119**"). The suit property was transferred to Ongubo upon sub-division of Plot No. 3119. Upon transfer and registration of the suit property in the name of Ongubo, he was issued with a title deed for the same.
3. The plaintiff has contended that the 2nd and 3rd defendants have trespassed on the suit property and erected permanent structures thereon. The plaintiff has contended further that the 2nd and

- 3rd defendants who have claimed that the portions of the suit property on which they have trespassed were sold to them by the 1st defendant, have fenced off the said portions of the suit property thereby denying Ongubo the opportunity to enjoy his proprietary rights over the suit property. The plaintiff annexed to his affidavit in support of the application among others; a copy of the power of attorney donated to him by Ongubo, a copy of agreement for sale dated 5th July 2013 between Ongubo and the 1st defendant, a copy of the title deed for the suit property dated 24th July 2013 in the name of Ongubo, a copy of certificate of official search on the title of the suit property dated 2nd January 2014 and photographs of the structures said to have been erected by the defendants on the suit property.
4. The 1st defendant and his son, Gedion Mosoti Makori who is not a party to this suit swore separate affidavits on 23rd May 2014 supporting the plaintiff's application. The plaintiff's application was however opposed by the 2nd and 3rd defendants. The 2nd and 3rd defendants filed notice of preliminary objection and grounds of opposition both dated 23rd May 2014 in opposition to the application. In their grounds of opposition, the 2nd and 3rd defendants contended that the plaintiff's suit is scandalous, frivolous, vexatious and discloses no reasonable cause of action. The 2nd and 3rd defendants contended further that the application is intended to embarrass the 2nd and 3rd defendants and that the plaintiff has never occupied the suit property. The 2nd and 3rd defendants have contended that the power of attorney on the basis of which this suit was filed is not valid and as such the suit is incompetent and should be struck out.
 5. On 26th May 2014, the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. The plaintiff's advocates filed their submissions on 8th September 2014 while the 2nd and 3rd defendants' advocates filed their submissions on 5th November 2014. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the 2nd and 3rd defendants notice of preliminary objection and grounds of opposition filed in opposition to the application. Finally I have considered the written submissions filed by the parties' respective advocates and the authorities cited in support thereof. The following is my view on the application before me. In the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, it was held that for a temporary injunction to issue, the applicant must show a prima facie case with a probability of success against the respondent and must also demonstrate that he will otherwise suffer irreparable injury if the order is not granted. If the court is in doubt as to the above, the application would be determined on a balance of convenience.
 6. It is not in dispute that Ongubo is the registered proprietor of the suit property. The plaintiff proved this fact by copies of the title deed for the suit property and a certificate of official search on its title of the suit property that were annexed to his affidavit in support of the application. The 2nd and 3rd defendants on the other hand have not come out clearly on the nature of the interest that they have on the suit property. The plaintiff has contended that the 2nd and 3rd defendants entered the suit property in January, 2014 without the plaintiff's permission and erected permanent structures thereon. The plaintiff has exhibited photographs of the structures that the 2nd and 3rd defendants are said to have erected on the suit property. The 2nd and 3rd defendants chose to oppose the plaintiff's application through notice of preliminary objection and grounds of opposition in which they raised merely points of law. The averments contained in the plaintiff's affidavit as concerns the 2nd and 3rd defendants unauthorized entry into the suit property and putting up of permanent structures thereon are therefore not controverted. The plaintiff having proved that Ongubo is the registered proprietor of the suit property and that the 2nd and 3rd defendants entered the suit property without Ongubo's permission and put up permanent structures thereon, the onus shifted to the 2nd and 3rd defendants to justify their entry and occupation of the suit property.
 7. As I have stated above, the 2nd and 3rd defendants did not file a replying affidavit in response to the plaintiff's application. This being an interlocutory application, evidence can only be placed before the court through affidavit. In the absence of an affidavit, I have no evidence before me from the 2nd and 3rd defendants as to what interest they have on the suit property that would justify their entry and occupation thereof. In their defence and counter-claim, the 2nd and 3rd

defendants have contended that they purchased the land comprised in the suit property from the 1st defendant in the year 2010 long before the suit property was sold to the plaintiff by the same 1st defendant in the year 2013. In the absence of any affidavit by the 2nd and 3rd defendants on the alleged sale of the suit property to them by the 1st defendant, the said averments contained in the 2nd and 3rd defendants statement of defence and counter-claim are mere allegations. The 2nd and 3rd defendants have therefore failed to justify their entry and occupation of the suit property.

8. The 2nd and 3rd defendants having entered and occupied the suit property without Ongubo's permission or justifiable cause, the 2nd and 3rd defendants are trespassers on the suit property. I have considered the 2nd and 3rd defendants notice of preliminary objection and grounds of opposition. I am in agreement with the submission by the plaintiff's advocates that the same have not answered the issues raised in the plaintiff's application. For the foregoing reasons, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants. I am also satisfied that the plaintiff stands to suffer irreparable injury if the injunction sought is not granted. If the defendants sell or alienate the suit property, the same would be beyond the reach of the plaintiff.
9. The upshot of the foregoing is that the plaintiff has satisfied the conditions for granting a temporary injunction. I have noted that the plaintiff has sought in addition to a temporary injunction, a declaratory relief and a permanent injunction. These two reliefs cannot be granted at this stage. I therefore allow the plaintiff's application dated 11th March 2013 in terms of prayer 3 thereof. The plaintiff shall have the costs of the application.

Delivered, signed and dated at KISII this 19th of December, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i h/b for Bunde for the plaintiff

N/A for the 1st defendant

Mr. Mose L. for the 2nd and 3rd defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE