



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 63 of 2011

IN THE MATTER OF LAND TITLE DEED NUMBER SOUTH MUGIRANGO/BOIKANGA/926

AND

**IN THE MATTER OF SECTIONS 37 AND 38 OF THE LIMITATION OF ACTIONS ACT CAP
22 LAWS OF KENYA**

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES – 2010

BETWEEN

**ROSA MORAA ONSARIGO PLAINTIFF/APPLICANT
AND**

THE CHAIRMAN, SCHOOL COMMITTEENYANGWETA

D.O.K. PRIMARY SCHOOL 1ST DEFENDANT/RESPONDENT

THE CLERK

THE COUNTY COUNCIL OF GUSII 2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff filed an originating summons on 6th April 2011 seeking:-

1) *that the plaintiff ROSA MORAA ONSARIGO be declared the absolute owner of Land portion measuring approximately ZERO POINT FIFTY ONE HECTARES of land forming part of Land Parcel Title Number South Mugirango/Boikanga/926 which she has occupied used and possessed peacefully openly and uninterruptedly for a period of over 27 years since 1984.*

2) *That the Defendants THE CHAIRMAN, SCHOOL COMMITTEE, NYANGWETA D.O.K. PRIMARY SCHOOL, THE CLERK, THE*

COUNTY COUNCIL OF GUSII be ordered to execute all necessary documents for subdivision and

transfer of the said portion of land measuring approximately ZERO POINT FIFTY ONE HECTARES forming part of land PARCEL TITLE SOUTH MUGIRANGO/

BOIKANGA/926 in favour of the plaintiff failing which Deputy Registrar and/or an Executive Officer of this Court be empowered to execute the same in place of the defendants.

3) That the defendants by themselves, their agents, assigns, legal representatives and/or any other persons or persons howsoever, be ever restrained by an Order and Injunction of this Court from in any way or manner interfering with and/or dealing with the plaintiff's quiet enjoyment, possession, occupation and use of the said ZERO POINT FIFTY ONE HECTARES of land to be incised from land parcel TITLE NUMBER SOUTH MUGIRANGO/BOIKANGA/926 which the plaintiff has quietly enjoyed the occupation, possession, use and quiet enjoyment since 1984 to date.

4) Costs of this summons

5) Any other grant or orders or reliefs as it may deem just and proper to grant in the circumstances of this suit.

2. She also filed a notice of motion under **Order 40 Rules 1, 2, 3 and 4** of the **Civil Procedure Rules** and an affidavit all under certificate of urgency seeking:-

a) That this honourable court be pleased to **CERTIFY** this Application **URGENT** and direct that the same be heard *ex parte* in the first instance.

b) That pending the hearing and final determination of this application, the defendants/respondents by themselves, their agents, servants, assigns, workers and/or any other person or persons working under their instructions directly or indirectly and/or claiming under their title be restrained by a temporary and mandatory orders of injunction from interfering, trespassing into, tilling and/or in any way or manner dealing with and/or obstructing in any way or manner whatsoever the plaintiff/applicant, her agents, servants, assigns and family members from entering, remaining, staying, cultivating, occupying, possessing and using a portion of land measuring approximately 0.51 Hectares forming part of Land Title NUMBER SOUTH/MUGIRANGO/

BOIKANGA/926 registered in the names of the defendants/respondents and/or in any way or manner whatsoever from evicting the plaintiff/respondent her agents, servants, assigns, her family members and/or relatives from the suit portion of land.

c) That pending the hearing and final disposal of this suit, the defendants/respondents by themselves, their agents, servants, assigns, workers and/or any other person or persons working under their instructions directly or indirectly and/or claiming under their title be restrained by a temporary and mandatory orders of injunction from interfering, trespassing into, tilling and/or in any way or manner dealing with and/or obstructing in any way or manner whatsoever the plaintiff/applicant, her agents, servants, assigns and family members from entering, remaining, staying, cultivating, occupying, possessing and using a portion of land measuring approximately 0.51 Hectares forming part of Land Title NUMBER SOUTH/MUGIRANGO/

BOIKANGA/926 registered in the names of the defendants/respondents and/or in any way or manner whatsoever from evicting the plaintiff/respondent her agents, servants, assigns, her family members and/or relatives from the suit portion of land.

d) That this honourable court be pleased to grant such further or other orders as it will deem it fit in the circumstances of this suit.

e) That costs of this application be provided for.

3. The notice of motion was supported by an affidavit where the plaintiff averred that her late husband

and herself stayed in the suit portion of land since 1984, were blessed with four issues and her husband died in 1993 and left her and her four children staying on the suit land to date. That her homestead comprises of two semi permanent houses, pit latrine is situate in the suit land, she has cultivated and used the suit portion of land for now 28 years. That her late husband and co-wife were both buried in the suit portion of land. She has peacefully uninterruptedly and quietly enjoyed occupation, possession and use of suit land for over 28 years and that the defendants/respondents have been aware and knowing that she has occupied, possessed and used/or cultivated the suit portion of land for over 28 years.

4. The plaintiff/applicant has also averred that since she has lived on the suit land since 1984, and now that she is threatened with eviction, she has satisfied the conditions of **Giella –vs- Cassman Brown & Company Ltd. [1973] EA 358** to warrant an order of injunction being issued pending hearing and determination of the Originating Summons. She argues that she has established a *prima facie* case with the probability of success and further that unless the order of injunction is issued, she is likely to suffer irreparable loss as she and her whole family will be evicted from the suit land which they have known and called home for over 28 years.

5. The defendants/respondents filed their respective Replying Affidavits. Henry Kenyanya swore a replying affidavit on behalf of the 1st defendant/respondent. The deponent avers that the suit land which measures about 4.6 of an hectare (sic) belongs to the 1st defendant/respondent as per title deed issued on 27th August 2009. The deponent also avers that the plaintiff/applicant who owns her own parcel of land known as South Mugirango/Boikanga/1972 measuring some 2.17 of an hectare moved from her said portion of land onto the suit land in or about October 2009 and that efforts made by the 1st defendant/respondent thereafter to have the plaintiff/applicant move out of the suit land have been fruitless. The deponent says that if indeed the suit land had been grabbed from the plaintiff/applicant, she would have made a report to the relevant authorities. Henry Kenyanya urged this court to dismiss the plaintiff's application for injunction.

6. The Replying Affidavit on behalf of the 2nd defendant/respondent was sworn by Isaac Nderitu Githui, the Clerk to County Council of Gusii on 26th April 2011. He depones that though the plaintiff/applicant has been in occupation of the suit land, she has been in such occupation as a trespasser on council land. The deponent therefore opposes the application for injunction.

7. The application for injunction proceeded by way of written submissions filed on 6th June 2011 for the plaintiff/applicant, 20th June 2011 for the 1st defendant and also for the 2nd defendant. I have carefully read the said submissions. I have also read the pleadings and considered the law cited by both parties. The issue that arises for determination is whether the plaintiff/applicant has satisfied the conditions for the granting of an injunction as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd.** (supra).

8. From the pleadings and the submissions and particularly from the contradictory statements by the defendants herein, I am persuaded that the plaintiff/applicant has made out a *prima facie* case with a probability of success to warrant the granting of an injunction in terms of the **Giella case**(above). In case I am wrong on the first principle I am of the considered view that unless the order of injunction is granted, the plaintiff/applicant is likely to suffer irreparable damage as she and her entire family face eviction from the suit land.

9. In any event, and for the reasons that the defendants' "statements are at variance as to when the plaintiff/applicant came into possession and occupation of the suit land, the balance of convenience tilts in favour of the plaintiff/applicant.

10. In the premises, I allow the Notice of Motion dated 6th April 2011 and grant a temporary order of injunction in terms of prayer (c) of the said application. The costs of this application shall await the outcome of the main suit which should now be set down for directions and hearing in an expeditious manner.

11. Finally, the delay in delivering this ruling was brought about by the parties who indicated at the time

the ruling was due that they were ready to settle the matter amicably. They took a long time to come back and inform the court that the negotiations had failed.

Dated and delivered at Kisii this 19th day of February, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Bosire Gichana for Plaintiff

Mr. Momanyi Aunga for 1st defendant

Mr. N. Migiro (absent) for 2nd Defendant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.