



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 356 of 2012

LEONARD BRONSON AENCHA PLAINTIFF

VERSUS

WALTER MOKOMBA 1ST DEFENDANT

JOB MOBISA 2ND DEFENDANT

JUMA OMWANSA 3RD DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion under **Order 40 Rule 1 (a) and(2)** of the **Civil Procedure rules** dated 2nd October 2012 seeking:-

(a) This application be certified urgent and service thereof be dispensed with in the first instance and the same be heard ex parte.

(b) A temporary injunction do issue pending the hearing inter partes and determination of this application on the day of 2012 restraining the defendants, their servants and/or agents from burying the remains of the deceased SALOME OENGA on the plaintiff's/applicant's parcel of land NO. NYARIBARI CHACHE/NYANTURAGO/ 867 on 5th October 2012 or on any other day thereafter.

(c) Pending the hearing inter partes and determination of the main suit injunction do issue restraining the defendants, their servants and/or agents from burying the remains of the deceased SALOME OENGA on 5th October 2012.

(d) The OCS Keroka police station do enforce the Court Orders.

(e) Costs of this application be provided for.

2. The notice of motion was supported by an affidavit sworn by the plaintiff averring that he is the registered proprietor of land parcel NO. NYARIBARI CHACHE/NYANTURAGO/867 (herein referred to as the suit property that he wants to restrain the defendants from burying the remains of one SALOME OENGA on the suit property, that the said Salome Oenga died on 28th September 2012 and her body is awaiting burial on 5th October 2012 and he stands to suffer irreparable lose if the body of the deceased were to be buried on his land without his consent or authority.

3. He further averred that it will be a violation of his constitutional and property rights if the

defendants'/respondents' proceed to bury the remains of the deceased in his land and that in the circumstances it is only fair and just that the defendants/respondents be restrained from burying the deceased on the suit property until this suit is heard and determined. He therefore prayed for an injunction to restrain the defendants/respondents, their agents and/or servants from burying the deceased on the suit property.

4. On 4th October 2012 I granted part (b) of the application dated 2nd October 2012.

5. The defendants/respondents on their part filed a memorandum of appearance and defence dated 10th October 2012 through M/s Okemwa Elijah & Co. Advocates. The replying affidavit sworn by the 1st defendant/respondent revealed that the deceased Salome Oenga was the first wife of the late Joseph Aencha who was the father of the applicant being the son of the second wife (Bathsheba Kwamboka Aencha (also deceased), that when Joseph Aencha (applicant's father) died the mother to the applicant (Bathsheba Kwamboka Aencha now deceased) in complicity with the Kisii Land Registrar secretly altered the title deed(s) of the deceased Joseph Aencha and the same read as if the applicant's mother was the proprietor of the said properties, that the applicants deceased mother tampered with the title deeds of the late Joseph Aencha including the suit property and changed or transferred the said title deed into her name without consulting her co-wife Salome Oenga as 1st wife of the late Joseph Aencha, and that when the applicant's mother died the applicant secretly transferred the suit title deed into his name.

6. He further averred that the deceased (Salome Oenga) had filed a suit in Kisii Chief Magistrate's court being Civil Suit No.36 of 2000 where a temporary order of injunction was issued against the applicant and other parties. That the deceased had been living on the suit property since she was married in 1972 without any obstruction from anybody as opposed to the applicant who has never lived thereon, nor done any farming and that the applicant only wants to grab the said parcel of land from the deceased's family.

7. When the application dated 2nd October 2012 came for hearing before court on 18th October 2012, and on realizing that the parties came from the same family, the advocates on record requested to be allowed time to try settlement of the dispute out of court. I therefore ordered that the Divisional Officer Keumbu Division (D.O.) and the area Chief Ibeno location do preside over the dispute.

8. On perusal of the proceedings presided over by the Assistant Chief of Kirwa sub location, the applicant admitted that the deceased Salome Oenga Aencha was actually the 1st wife of his father Joseph Aencha thus making her his step mother. All family members who testified before the Administration attested to this fact and even indicated that the deceased Salome Aencha resided in the suit property and even some of her children were buried there. The only bone of contention was that the plaintiff/applicant insists on having family properties left behind by the deceased Joseph Aencha (his father) divided first before the burial while the defendants want Salome Aencha to be buried first. However, it still remains unclear to court how the plaintiff acquired title of the suit property without even indicating to the court whether or not he took out letters of administration taking into account the fact that the suit property belonged to his deceased father.

9. I have read submissions from both counsel and also heard oral submissions. I have also looked at the official search certificate filed by the plaintiff to prove ownership of the suit property. According to the official search the plaintiff acquired title of the suit land on 8th February 2011 while the deceased Salome Aencha had already obtained a temporary order of injunction in Civil Suit No.36 of 2010 dated 26th January 2010 restraining the plaintiff and others from entering the suit property for purposes of re-surveying, demarcating and alienating the same. The plaintiff has not proved that the order made in Civil Suit No.36 of 2010 had been lifted in order for him to go ahead and register the suit property in his name.

10. This in itself means that the plaintiff has failed to prove to this court that he indeed deserves the injunction he prays for. No *prima facie* case has been established and neither has he proved that he is likely to suffer loss that cannot be compensated in form of damages in accordance with the principles of granting an injunction highlighted in the land mark case of **Giella –vs- Cassman Brown & Co.**

Ltd. [1973] EA 388.

11. I therefore dismiss the application dated 2nd October 2012 as the same is an abuse of court process. I award costs of this application to the Defendants/Respondents.

Dated and delivered at Kisii this 7th day of February, 2013

**RUTH NEKOYE SITATI
JUDGE.**

In the presence of:

Mr. Minda h/b for G.J.M. Masese for the Plaintiff

Mr. Okemwa (present) for the Defendant

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI
JUDGE.**