



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 6 of 2013

JOSEPH AMALLA OKUTHE.....PLAINTIFF

VERSUS

PETER OCHAR.....1ST DEFENDANT

SABASTIANO NGONGA.....2ND DEFENDANT

DISTRICT LAND SURVEYOR , HOMABAY DISTRICT.....3RD DEFENDANT

RULING

1. The plaintiff herein is the registered proprietor of the parcel of land known as LR.No.Kabuoch/Konyango Kabonyo Karita/548 (hereinafter referred to as “**the suit property**”) situated at North Kabuoch Location, Riana Division in Ndhiwa District, Homa bay County. The suit property was registered in the name of the Plaintiff on 11th June, 1975. The plaintiff has brought this suit against the defendants herein claiming that sometime in December, 2012 the defendants without the authority or permission from the plaintiff trespassed and/or encroached upon a portion of the suit property and commenced the construction of a road thereon. The plaintiff claims that his right to exclusive occupation, possession and use of the suit property has been interfered with by the defendants as a result of which the plaintiff has suffered loss. The plaintiff in his undated plaint filed in court on 8th January, 2013 seeks a permanent injunction restraining the defendants from entering onto and/ or in any manner interfering with the plaintiff’s quiet and peaceful occupation of the suit property by constructing a road through it without the plaintiff’s permission or consent.

2. The 1st and 2nd defendants have filed a joint statement of defence in which they have denied the plaintiff’s claim against them. The 1st and 2nd defendants have denied ever trespassing on or encroaching upon the suit property. The defendants on 2nd October, 2012 by the 3rd defendant and the area District Land Registrar for public use in accordance with the survey plan for the area after the Plaintiff had closed it. The 1st and 2nd defendants have contended further that they have been wrongly sued as they are not the proprietors of the two parcels of land namely, LR.Nos.Kabuoch/Konyango Kabonyo Karita/547 and 551 which the Plaintiff claims as being served with the road the subject of this suit. The 1st and 2nd defendants have averred that the two properties are registered in the names of their deceased parents, **Millianus Ochar Otieno** and **Ng’ong’a Otieno** respectively with respect to whose estates no grant of letters of administration has been taken out. It is the 1st and 2nd defendant’s case that the Plaintiff’s suit does not lie against them in the circumstances. The 1st and 2nd defendants have prayed for the dismissal of the Plaintiff’s suit. The 3rd defendant has not filed any defence to the Plaintiff’s claim.

3. Together with the Plaintiff, the plaintiff lodged an application by way of Notice of motion dated 8th January, 2013 for an order of a temporary injunction to restrain the defendants from entering, trespassing onto, constructing any road, interfering with and/or in any other manner dealing with the suit property pending the hearing and determination of this suit. In the said application, the Plaintiff also sought an order to restrain the defendants from **“using the doctored map”** with an intention of defeating justice on the suit property (sic) pending the hearing and determination of this suit. The plaintiff’s application was based on the grounds set out in the body thereof and on the affidavit of the plaintiff sworn on 8th January, 2013, in support thereof. In his grounds in support of the application and the supporting affidavit, the plaintiff has reiterated the contents of the plaint that I have already summarized hereinabove. The plaintiff has deposed in the supporting affidavit that he is the proprietor of the suit property on which he has his residence. He also uses the suit property for cultivation for his subsistence. The Plaintiff has deposed that in December, 2012 the defendant’s **“doctored”** an amendment to the survey map for the area and placed a road on a portion of the suit property after which they commenced the destruction of the boundary of the suit property for the purposes of constructing the said road. It is the Plaintiff’s contention that, the defendant’s acts aforesaid are unlawful and if allowed to continue would deprive the Plaintiff of his only source of livelihood thereby causing him irreparable loss and damage. The plaintiff has annexed to the supporting affidavit copies of land certificate for the suit property dated 23rd March, 1977 and Certificate of official search dated 4th January, 2013 to show that he is the registered proprietor of the suit property. In his submission in support of the plaintiff’s application, the plaintiff’s advocate **Mr. Sagwe** adopted the contents of the plaintiff’s affidavit in support of the application and the grounds set out in the body of the application. Counsel thereafter submitted that since the suit property was registered in the name of the plaintiff in 1975, the plaintiff had never known that there existed a road passing through it at its border with LR. Nos. 551 and 547 until 2nd October, 2012 when the defendants herein in the company of members of the public entered the suit property to open up the said road. Counsel argued further that there was no indication in the plaintiff’s title of the suit property that such a road existed. Counsel submitted further that the Plaintiff was not against the construction of the said road provided the suit property was not affected in size. Counsel submitted that the said road has taken about 10 feet from the suit property. Counsel submitted in conclusion that the plaintiff’s application is merited and should be allowed.

4. The Plaintiff’s application was opposed by the 1st and 2nd defendants who are acting in person. The 1st and 2nd defendants swore two separate but similar affidavits in opposition to the plaintiff’s application. In their replying affidavits, the 1st and 2nd defendants reiterated the contents of their statement of defence that I have already summarized hereinabove. The 1st and 2nd defendants have denied the plaintiff’s claim that they have trespassed on the suit property and created a road thereon. The 1st and 2nd defendants have deposed that the suit property neighbors or shares a boundary with LR. Nos. 547 and 551 owned by their deceased parents aforementioned and that during the adjudication process in the area, an access road was demarcated in the boundary between the suit property and the said two parcels of land. The 1st and 2nd defendants deposed further that some years back, the Plaintiff encroached on and ploughed the whole of the said land that was reserved for a road and in the process rendered all his neighbors landlocked. The residents of the area then complained to the area chief about the Plaintiff’s conduct and the chief sought the assistance of the area District Surveyor and District Land Registrar to help in restoring the said access road. The 1st and 2nd defendants have deposed that when the said government officers visited the site on 2nd October, 2012, it was in exercise of their lawful duties and they proceeded to re-open the said road not on the suit property as claimed by the Plaintiff but in accordance with original survey map for the area which had provided for a road in the boundary of the suit property and the neighboring plots. The 1st and 2nd defendants have contended that the local community would be subjected to immense suffering if the disputed road is closed up again. The 1st and 2nd defendants have annexed to their replying affidavits copies of certificates of official search for LR.Nos.547 and 551 to show that the same are not registered in their names, a copy of the survey map for Kanyango/Ajwang/Kabonyo/Karita Registration Section which shows that there is a road running along the boundary of LR. Nos. 548,550,551 and 547 and a copy of a letter dated 26th September, 2012 from the District Land Registrar, Homa bay County by which he notified the area residents of his intention to visit the area on 2nd October, 2012 for the purposes of

opening the said road. In their submission made in court on 24th January, 2013 in response to the submission of the advocate for the Plaintiff, the 1st and 2nd defendants adopted the contents of their replying affidavits and added that the road complained of by the Plaintiff is used by the area residents to access a borehole on L.R.No.678 and that if it is closed the residents will not be able to access the said borehole. With the consent of the advocate for the Plaintiff, one **Jared Abonyo**, the District Surveyor, Homa bay who attended court for the hearing of the application was allowed to address the court although he had not filed an affidavit in opposition to the application. In his address to the court, he informed the court that the Ministry of Lands had a duty to ensure that all public roads are open and that the Land Registrar and the District Surveyor were simply performing public duty by opening the road that the plaintiff was complaining about. **Mr. Abonyo** who also produced the survey map for the area confirmed that the subject road is on the boundary of several plots and has not been created on the Plaintiff's parcel of land as alleged. He clarified that there was no way the acreage of the suit property would be reduced as a result of the said road.

5. I have considered the plaintiff's application and the affidavit in support thereof. I have also considered the submission by the advocate for the plaintiff. In equal measure, I have also considered the affidavits and submission made by the defendants in opposition to the plaintiff's application. The following is the view I take on the matter. The principles for granting interlocutory injunction are now well settled. As it was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A 358**, an applicant for interlocutory injunction must show that he has a prima facie case against the defendant with a probability of success and that unless the injunction is granted, he will suffer irreparable loss. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. In the case of **Mrao Ltd. –vs- First American Bank of Kenya ltd (2003) KLR. 125**, it was held as follows;

“a prima facie case in a civil application includes but is not confined to “a genuine and arguable case”. It is a case which on the material presented to court a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

6. Has the plaintiff on the material placed before this court shown on a prima facie basis that the defendants herein have infringed on any of his rights? The plaintiff has shown that the suit property is registered in his name. This fact is not disputed by the defendants. The plaintiff's title to the suit property is therefore not in dispute. What is disputed is whether or not the defendants have trespassed on the suit property and created a road thereon. The Plaintiff has not placed any material before this court to show or prove that the road complained of is on the suit property. On the other hand the defendants have demonstrated with documentary evidence that the subject road had been reserved during the land adjudication process in the area and that it cuts across the boundary of several parcels of land in the area the suit property being just one of the said parcels. In the absence of any evidence to the contrary, I have no reason not to believe at least at this stage, the material that has been placed before me by the defendants which shows that the road complained of has not been constructed on the suit property and that it was marked and reserved during the adjudication process. I am not satisfied therefore that the plaintiff has shown that the defendants have trespassed on the suit property. It follows therefore that the plaintiff has failed to show a prima facie case against the defendants with a probability of success.

7. Due to the foregoing, the plaintiff has failed to satisfy the main condition for granting interlocutory injunction. I would wish to add that even if the Plaintiff had shown that he has a prima facie case with a probability of success against the defendants, the orders sought would still not issue. This is because, the road complained of was opened on 2nd October, 2012 and the same is in use at the moment by the Public. In the circumstances, the prohibitive injunction sought by the Plaintiff would not be an appropriate remedy. The plaintiff's notice of motion application dated 8th January, 2013 is therefore not for granting. The same is dismissed with costs to the 1st and 2nd defendants.

Dated, signed and delivered at Kisii this 15th day of March, 2013.

**S. OKONG'O,
JUDGE.**

In the presence of:

Mr. Sagwe for plaintiff.

1st defendant present in person.

2nd defendant present in person.

No appearance for 3rd defendant.

Mobisa Court Clerk.

**S. OKONG'O,
JUDGE.**