



REPUBLIC OF KENYA

High Court of Kisii

Civil Suit 138 of 2012

NYABUTO ARAMBE ABUSA.....PLAINTIFF

VERSUS

JOSEPH MATO NGOKO..... DEFENDANT

RULING

1.The plaintiff brought this suit on 18th April, 2012 against the defendant seeking a permanent injunction to restrain the defendant from trespassing on or in any other way interfering with the Plaintiff's enjoyment of all that parcel of land known as **LR. No. Nyaribari Chache/B/B/Boburia/9223** (hereinafter referred to as "**the suit property**") and the intended development and use thereof. The Plaintiff's claim as pleaded in the Plaint dated 17th April, 2012 is that, sometimes in the

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month of February, 2012, the defendant without any lawful cause entered the suit property and destroyed a fence that had been erected around the suit property by the Plaintiff. The Plaintiff has averred that the said fence which has been destroyed by the Defendant was put up by the Plaintiff on the suit property and not on the defendant's parcel of land and if the defendant is allowed to continue with its said acts of trespass upon the suit property, he is likely to interfere with the present boundary of the suit property by reducing the size thereof an act that will subject the Plaintiff to loss and damage. Together with the Plaintiff, the Plaintiff lodged an application by way of notice of motion dated 17th April, 2012 seeking an interlocutory injunction to restrain the defendant from trespassing into the suit property and interfering with the existing beacons and replacing them with the new ones pending the hearing and determination of this suit. The Plaintiff's application is brought on the grounds set out in the

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face thereof and on the affidavit and further of the Plaintiff sworn on 17th April, 2012 and 23rd May, 2012 respectively. In his affidavit in support of the application, the Plaintiff has deposed that he purchased the suit property from one **Peris Nyangara Oriosa** (hereinafter referred to as "**the seller**") on 26th August, 2011. The seller obtained the land control board consent on the same day and executed a document of transfer in favour of the Plaintiff. The Plaintiff has deposed that together with the transfer and the consent

of the land control board, the seller also gave him a mutation. The suit property was a sub-division of an original plot then known as **LR.No.Nyaribari Chache/B/B/Boburia/7608**. The Plaintiff took the said transfer, mutation, land control board consent to the land registrar who duly registered the transfer of the suit property in favour of the Plaintiff on 29th August, 2011. On the same day, the Plaintiff was also issued with a title deed for the suit property which is indicated to be measuring

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approximately 0.04 hectares. It is the Plaintiff's contention that before entering into the said agreement for sale with the seller, he carried out a search on the title of the suit property that revealed that the seller was the registered proprietor of the suit property. The Plaintiff has deposed further that after the transfer of the suit property to him, he took possession immediately and put up a fence around the same. The Plaintiff claims that he was informed by the husband of the seller in February, 2012 that the defendant had destroyed his fence claiming that the Plaintiff had encroached into his parcel of land known as **LR.No.Nyaribari Chache/B/B/Boburia/1989** which shares a boundary with the suit property. The Plaintiff has denied encroaching upon the defendant's said property and has insisted that the fence was placed along the boundary beacons of the suit property. The Plaintiff claims therefore that the defendant is a trespasser upon the suit property and should be restrained by injunction from continuing with the

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said trespass. The plaintiff has annexed copies of, certificate of official search dated 15th August, 2011, agreement for sale dated 26th August, 2011, undated application for consent of Land Control Board, letter of consent dated 26th August, 2011, transfer dated 29th August, 2011, Mutation Form dated 1st October, 2010, a title deed for the suit property in favour of the Plaintiff and a demand letter to the defendant dated 13th March, 2012.

2.The Plaintiff's application is opposed by the defendant. The defendant filed a replying affidavit and a further replying affidavit sworn on 10th May, 2012 and 29th May, 2012 respectively in opposition to the application. In his affidavit in reply to the application, the defendant denied the allegations of trespass leveled against him by the Plaintiff. The defendant has deposed that he is the registered proprietor of the parcel of land known as **LR. No. Nyaribari Chache/B/B/Boburia/1989** (hereinafter referred to as "**the defendant's plot**") which

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measures approximately 0.26 hectares which according to him the Plaintiff in the company of some strangers trespassed into between 21st and 23rd August, 2011 and took measurements with a view to annexing a portion thereof. The defendant has deposed further that he later learnt that the seller had sold to the Plaintiff a portion of the former parcel of land known as **LR. No. Nyaribari Chache/B/B/Boburia/7608** using a defective mutation which was not in accord with the area index map and which made one of the subdivided plots namely, the suit property encroach into the defendant's plot. The defendant claims that when the Plaintiff learnt that he had been duped into purchasing a none existent parcel of land, he reported the matter to the police who preferred a charge of obtaining money by false pretence against the seller and her husband in Kisii Chief Magistrate Court Criminal Case No. 166 of 2012. The defendant has deposed further that he has had a long standing boundary dispute with the seller and her husband and the

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Court had at one time ordered them out of the defendant's plot. The defendant has deposed that the Plaintiff cannot be granted injunction with respect to a parcel of land which in fact belongs to the defendant. The defendant claims that the Plaintiff having admitted that he was conned and has handed over the matter to the police, he cannot turn round and allege that the defendant has encroached on his land. The defendant has contended further that the Plaintiff who has never taken possession of the suit property cannot suffer any loss if the orders sought are not granted. The defendant claims that he has filed another suit against the Plaintiff the service of summons in which the Plaintiff had evaded. The defendant contends that the Plaintiff's application is not well merited and should be dismissed accordingly. The defendant has annexed to his affidavit in reply, copies of land certificate for the defendant's plot, register for the suit property, original registry index map of Nyaribari/Cache location where the disputed

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properties are situated, Charge Sheet for Criminal Case No.166 of 2012, Plaint and other pleadings in Kisii High Court Case No. 83 of 2012. In response to the defendant's replying affidavit, the Plaintiff filed a further affidavit in which he denied the allegations contained in the said affidavit. He maintained that the suit property was sold to him in a lawful manner and the fact that he has initiated criminal proceedings against the seller and her husband is not a bar to these proceedings. The Plaintiff claimed that the defendant is not competent to comment on the mutation and he proposed that a surveyor be appointed to pick out and fix the beacons on the boundary between the suit property and the defendant's plot. In response to the Plaintiff's further affidavit aforesaid, the defendant filed a further replying affidavit in which he maintained that the plot that the Plaintiff was shown by the seller was in fact the defendant's plot. On the issue of appointing an independent surveyor to pick and ascertain the beacons on the ground, the defendant's

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response is that the said exercise had been done in a previous case between the defendant and the previous owners of the suit property and each party knew clearly its boundary. In the said case the previous owners of the suit property had in fact been ordered to demolish the structures that they had put up on a portion of the defendant's plot. The defendant claims that the Plaintiff was aware of all these disputes concerning the suit property and still went ahead and committed his money to the suit property. The defendant contends that the Plaintiff from his conduct is not deserving of the orders sought.

3.The parties filed written submissions with the Plaintiff filing his submissions on 28th June, 2012 and the defendant filing his submissions on 8th July, 2012. I have considered the Plaintiff's application and the affidavits filed in support thereof. I have also considered the Plaintiff's advocates submissions. I have with equal measure of care considered the defendant's affidavits in opposition to the application and the defendant's

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advocates submissions. This is the view that I take on the matter;

4.For the plaintiff to succeed in the present application, the plaintiff has to satisfy the court that the plaintiff has a prima facie case with a probability of success against the defendant and that unless the orders sought are granted, the plaintiff will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the matter on a balance of convenience. These principles were set out in the case

of **Giella**

–vs- **Cassman Brown & Company Limited [1973] E.A. 358** and have remained our law on interlocutory injunctions to date.

5.The point to start therefore is to answer the question whether the plaintiff on the material presented to court and on his Advocates' submission has established a prima facie case of trespass against the defendant with a probability of success. The court will thereafter consider whether the plaintiff has demonstrated that he will suffer irreparable harm if the orders

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sought are not granted. I have already summarized above the Plaintiff's case and the defendant's response to it. The plaintiff has claimed that he bought the suit property from the seller for Ksh.2 million. The said seller gave him a copy of the mutation which showed how the suit property which is said to be a subdivision of the parcel of land then known as **LR. No. Nyaribari Chache/B/B/Boburia/7608** came about. The seller also showed him the boundaries and beacons of the suit property. After the suit property was registered in his name, he took possession and put up a fence along the boundaries that had been shown to him. The Plaintiff got surprised when he was told by the husband of the seller that the defendant who owns a property that shares a boundary with the suit property had knocked down his fence. It is the Plaintiff's case therefore that by knocking the Plaintiff's fence aforesaid, the defendant is a trespasser into the suit property and should be restrained

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from committing any further acts of trespass. In response to the Plaintiff's case, the defendant has claimed that, in fact, it is the Plaintiff who has trespassed on the defendant's plot aforesaid. The defendant claims that the seller sold to the Plaintiff a none existent parcel of land on the strength of a defective mutation form and proceeded to show the Plaintiff the defendant's plot as the property sold(**the suit property**). The defendant has denied destroying the Plaintiff's fence as claimed and has put the Plaintiff to strict proof. It is not possible for this court in the face of these conflicting facts to determine whether it is the defendant or the Plaintiff who is a trespasser. This issue will have to be determined at the trial. What I need to determine now is whether the Plaintiff has on a prima facie basis proved that the defendant has trespassed into the suit property. I am not persuaded that the Plaintiff has surmounted this burden. The defendant has placed material before the court which shows that the Plaintiff was a victim of

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fraud as the land that was purportedly sold to him seems to have been none existent. The Plaintiff has in fact reported the fraud to the Police for investigation and the Police has proceeded to charge the seller who sold the suit property to the Plaintiff and her husband who allegedly informed the Plaintiff of the alleged trespass with the offence of obtaining money from the Plaintiff by false pretence before Kisii Chief Magistrates Court. It is instructive to note that the Plaintiff failed completely to disclose these material facts in his affidavit in support of the application herein. This to me amount's to concealment of material facts to the court which should alone without more disentitle the Plaintiff to the equitable remedy of injunction. It is my finding that the Plaintiff having admitted that he was defrauded by the seller of the suit property who sold to him a none existent parcel of land cannot in these proceedings contend that the defendant whose plot was apparently shown to the Plaintiff as the parcel of land that was

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being sold is a trespasser on that plot. As much as I agree with the Plaintiff's argument that the initiation of criminal proceedings is not a bar to civil proceedings, both civil and criminal proceedings are legal proceedings and the Plaintiff unless he is out to abuse the process of the court cannot be allowed to tell the criminal court one thing and the civil court another. The defendant has also placed before the court material that shows that there was a previous court case between the defendant and the previous proprietors of the original plot that was purportedly subdivided to give rise to the suit property. The said court case concerned the boundary between the defendant's plot and the said original parcel of land that gave rise to the suit property and the case was determined in favour of the defendant. The defendant has presented to court a copy of the ruling in that case and an order that directed the eviction of one **Francis Oriosa Orango** (the seller's husband) who owned the original plot that was

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subdivided several times and ultimately gave rise to the suit property. In the face of all these evidence to the contrary, I am unable to hold that the Plaintiff has shown a prima facie case against the defendant with a probability of success. I am in agreement with the Plaintiff's advocate's submission that the registration of the Plaintiff as the proprietor of the suit property gives the Plaintiff absolute ownership over the suit property pursuant to the provisions of section 24 of the Land Registration Act, 2012. This presupposes however that the land registered in the name of the Plaintiff is in existence and that it was so registered lawfully. In this particular case the existence of the suit property has been called into question both in the criminal court and before this court. The right conferred upon the Plaintiff under that section cannot be absolute to the extent of attaching upon a non-existent parcel of land or land obtained illegally. As I had mentioned earlier, whether the suit property exist on the ground or not and

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whether it was acquired lawfully or not are issues that cannot be determined at this stage. The much I can say is that I am not convinced on a prima facie basis that the Plaintiff's right over the suit property is absolute. Having held that the Plaintiff has failed to show a prima facie case with a probability of success, I am not obliged to consider whether or not the plaintiff is likely to suffer loss which cannot be compensated in damages unless the orders sought are granted. I want to state though that if I was to determine this issue, I will hold against the Plaintiff. The Plaintiff has not placed any material before the court to show that the Plaintiff is in possession of the suit property. I cannot see therefore what loss the Plaintiff stands to suffer that cannot be compensated in damages if the orders sought are not granted.

6. I am in agreement with the defendant's advocates' submission that the Plaintiff's application whether looked at on merit or on a balance of convenience must fail. The Notice of Motion

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application dated 17th April, 2012 is dismissed with costs to the defendant.

Dated, signed and delivered at Kisii this 8th day of March, 2013.

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

In the presence of:-

No appearance for the plaintiff.
No appearance for the defendant
Mobisa Court Clerk

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

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