



REPUBLIC OF KENYA

High Court of Kisii

Civil Suit 84 of 2006

CYPRIAN ATUKI NYANGAU.....PLAINTIFF

V

PHILIP KAYAGO OTOIGO.....1ST DEFENDANT

LAND REGISTRAR, KISII.....2ND DEFENDANT

RULING

1. Since this suit was filed on 14th June, 2006, no serious attempt has been made by any of the parties to list it for hearing. Instead, the parties have for the last six years engaged in filing applications one after the other for all sorts of reliefs. The 1st defendant's application before me is one of those that have prevented this case from being heard. The same was filed on 23rd January, 2012, five years after the suit was filed. The application which is dated 10th January, 2012 is seeking a temporary injunction to restrain the Plaintiff from interfering with, wasting, constructing on, alienating, damaging and/or

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doing any activity on the parcel of land known as L.R.No. West Kitutu/Bomatara/1399(hereinafter referred to as "**the suit property**") pending the hearing and determination of this suit. The application is supported by the affidavit of the 1st defendant sworn on 15th November, 2011. In the said affidavit, the 1st defendant has stated that he is the registered proprietor of the suit property having purchased the same from one, Simion Maurice Momanyi, deceased(hereinafter referred to only as "**the deceased**") sometimes in 1980. At the time of purchase of the suit property, the same was part of a larger parcel of land known as L.R.No. West Kitutu/Bomatara/838

(hereinafter referred to as “**the original parcel**”). The deceased applied for and obtained land control board consent to subdivide the original parcel and transfer a portion thereof namely the suit property to the 1st defendant. The 1st defendant was duly registered as the proprietor of the suit property and was subsequently issued with Land Certificate on 31st March,

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1980. The 1st defendant has annexed to his affidavit copies of the Land Certificate for the suit property dated 31st March, 1980, Certificate of official search dated 3rd July, 2006, application for consent of land control board dated 16th July, 1979, Consent of the Land Control Board dated 18th July, 1979 and transfer of the suit property by the deceased to the 1st defendant dated 12th February, 1980. The 1st defendant has stated further that he took possession soon after purchasing the suit property and had no problem over it while the deceased was a live until the year 2006 when the Plaintiff’s mother who is also deceased sued him over the ownership of the suit property. The 1st defendant claims that the Plaintiff herein who was substituted as a Plaintiff in this suit in place of his deceased mother has forcefully entered the suit property and commenced construction works thereon. The 1st defendant claims further that the Plaintiff’s entry into the suit property and the carrying out of the said construction works is

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subjecting the suit property to waste which will result in irreparable loss and damage to the 1st defendant.

2. The 1st defendant’s application is opposed by the Plaintiff. In his affidavit in reply sworn on 30th May, 2012, the Plaintiff claims that the 1st defendant’s ownership of the suit property was obtained fraudulently through acts of collusion involving the 1st and 2nd defendants. The Plaintiff who is the son of the deceased and the administrator of the estate of the deceased claims that the deceased did not sell the suit property to the 1st defendant and that the 1st defendant has not set foot on the suit property since it was purportedly sold to him over 20 years ago. The Plaintiff has annexed to his affidavit a copy of a letter dated 14th December, 2009 from the District Officer, Manga Division and a copy of the Mutation Form dated 4th September, 1979 to show that the purported subdivision of the original parcel and alleged transfer of the suit property by the deceased to the 1st defendant

was irregular. The Plaintiff claims that the title of the suit

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property held by the 1st defendant is irregular and fraudulent and as such the current application has not met the threshold for granting interlocutory injunction.

3. The application was argued before me on 25th February, 2013 when Mr.Ondari, advocate made submissions on behalf of the 1st defendant while the Plaintiff appeared and made submissions in person. Mr.Ondari reiterated the contents of the 1st defendant's affidavit in support of the application and submitted that the 1st defendant had proved that the 1st defendant was the duly registered proprietor of the suit property and that the Plaintiff had no right to occupy the same. Counsel submitted that the 1st defendant had established a prima facie case against the Plaintiff warranting the granting of the orders sought. Counsel submitted that when the Plaintiff's father(the deceased) died, the 1st defendant was in possession of the suit property on which he had put up houses which houses has since been taken over forcefully by the Plaintiff after the 1st defendant was evicted

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therefrom by an unlawful gang. Counsel submitted that this is an appropriate case to grant a temporary injunction. On his part, the Plaintiff submitted that there are two houses standing on the suit property, one permanent and the other semi-permanent which were both put up by the deceased. The Plaintiff submitted that the 1st defendant did not put up any house on the suit property. He submitted that when the deceased died, he was buried on the suit property and left the Plaintiff and his deceased mother living in the houses which the 1st defendant is now claiming. The Plaintiff submitted that the 1st defendant who has never come to the suit property could not have put up the said houses and that the said houses constitute his only home and the orders sought if granted would result in his eviction. The Plaintiff submitted that there is doubt whether any consent was granted for the alleged transaction between the 1st defendant and the deceased. The Plaintiff submitted further that

the alleged Mutation Form for the subdivision of the original

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parcel was signed by the 1st defendant who was not the registered proprietor of the said property an act which makes the document irregular and suspect. The Plaintiff submitted that it would be sad if this court

was to cause his eviction from his home on the basis of these suspicious documents. The Plaintiff urged the court to dismiss the application so that the suit may be heard on merit.

4. I have considered the case put forward by the 1st defendant in support of his application for injunction and the Plaintiff's case against the grant of the same. I have also considered the submissions made by the parties. The following is the view I have taken of the matter. I am not satisfied that the 1st defendant's application has met the thresh hold for granting a temporary injunction that was pronounced in the case of **Giella-vs-Cassman Brown & Company Ltd.(1973) E.A.358**. The Plaintiff's case against the 1st defendant is based on fraud. The Plaintiff has claimed that the 1st defendant colluded with the

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Land Registrar, Kisii, the 2nd defendant herein to defraud them of the deceased land which is the Plaintiff's inheritance after the death of the deceased. In support of his case, the Plaintiff has contended that although the 1st defendant claims to have purchased the suit property in 1979, the 1st defendant never showed up on the suit property during the life time of the deceased and in fact only came to lay a claim to the property in the year 2003, 20 years after the death of the deceased and 23 years after the date of the alleged purchase. The Plaintiff has also put material before the court which casts doubt whether consent of the land control board was lawfully obtained for the transaction. There is no dispute that the 1st defendant is registered as the proprietor of the suit property. There is however a dispute as to the legality of that proprietorship. The facts and material put before the court raises some doubt as to the legality of the 1st defendants ownership of the suit property.

These doubts cannot be laid to rest at this stage on affidavit

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evidence. I am of the view that it would be unsafe in the circumstances to issue the orders sought that would dispossess the Plaintiff of possession of the suit property which he claims to have been occupying since he was born before hearing this case. Due to the foregoing I disallow the 1st defendant's application dated 10th January, 2012. However, with a view to preserve the suit property pending the hearing and determination of this suit, I hereby order that neither party should sell, transfer, lease, charge or mortgage the suit property or any portion thereof until the hearing and determination of this suit. The parties are advised to comply with the necessary pre-trial procedures with a view to listing this old case for hearing. The costs of the application shall be in the cause.

Dated, signed and delivered at KISII this 17th day of May, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Plaintiff Present in Person.

Mr. Bosire holding brief for Ondari for the 1st Defendant

No appearance for the 2nd Defendant

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

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