



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCC NO.183 OF 2011**

**DICKSON OPOLA OKUMU.....PLAINTIFF**

**VERSUS**

**TOM ODHIAMBO ODARI**

**JOHN OWIRO ODARI.....DEFENDANTS**

**RULING**

This is a ruling on an application filed here on 27/10/2011. The application is a Notice of Motion and is brought under Order 40 Rule 1,2 and 3 and Order 51 Rule 1 of the Civil Procedure Rules read together with Section 1(a), 3, 3A of Civil Procedure Act and all other enabling provisions of the law.

In essence, what is sought is a restraining order directed at the defendants/respondents – **TOM ODHIAMBO ODARI** and **JOHN OWIRO ODARI** – whether by themselves, their agents, servants, and/or employees from trespassing upon, cultivating, constructing or interfering with the plaintiff/applicant's possession and title to land parcel No. **KISUMU/KONYA/1649**.

Provision for costs of the application is also asked for.

The application is premised on the grounds that the plaintiff/applicant – **DICKSON OPOLA OKUMU** – is the registered owner of land parcel number **KISUMU/KONYA/1649**, hereafter the suit land. The defendants/respondents are said to have moved into that land and started using it without the plaintiff's permission. The plaintiff's supporting affidavit states more or less what the grounds advanced contain.

A consent was entered way back on 14/12/2011 that the defendant's side be allowed to file responses to the application. It was also agreed that parties file written submissions.

In the Court file, there are written submissions but there is no written response to the application.

The submissions from both sides refer to a replying affidavit but that replying affidavit is not in the Court file. The Court therefore does not know what the replying affidavit referred to contains.

In the plaintiff's submissions, the court was urged to find that the plaintiff/applicant has established a prima facie case. This is by dint of showing that he is the registered proprietor of the suit land. It was also submitted that it is well shown that the defendants/respondents have trespassed on to the suit land. That being the case, the Court was told that the applicant has made out a prima facie case with a probability of success and that irreparable loss could be his fate if interlocutory injunction is denied. The well known case of **GIELLA VS CASSMAN BROWN & CO. LTD (1973) EA** was availed as a guide.

The court was also urged to make the defendants pay the costs attendant to the application.

The respondents on the other hand submitted through counsel that the suit land belonged to their late father and they have lived on it since childhood.

If the plaintiff has title, then he obtained it fraudulently. It is suggested that he never obtained letters of Administration nor sought the defendant's consent.

Because of that, a prima facie case is said not to have been established. The Court was urged to dismiss the application.

A look at this matter shows that from a legal standpoint, the plaintiff/applicant currently has the title to the suit land and allegations that he does not own the land sound hollow.

That is not to say however that such ownership is indefeasible. It will all depend ultimately on how the defence articulate and demonstrate their case during hearing.

The situation on the ground seems to be volatile since the defendants appear to have moved into the land.

In the Court's view, a prima facie case is well made out. It is also noted that the plaintiff/applicant has given a written undertaking filed here on 10/11/2011 to pay damages should it ultimately turn out that the restraining order is given through misrepresentation of facts.

The Court's considered view is that when the principles in the decided case of **GIELLA VS CASSMAN BROWN CO LTD** (Supra)

are considered the applicant herein has the upper hand. It is also well to consider the observations of **OJWANG J** (as he then was) in the case of **AMIR SULEIMAN VS AMBOSELI RESORT LIMITED: HCC NO.1078/03, NAIROBI** (unreported). The judge observed that the Court should endeavour to adopt a more intrinsic test namely: Always opt for the lower rather than the higher risk of injustice.

In this matter, the applicant is prima facie the owner of the suit land. The respondents continue to use it without his permission. It is not clear what would happen if continued use alters the land completely. If it ultimately turns out that the applicant has to continue owning the land, one would be at a loss as to how any damage occasioned can be computed. With this possible scenario in mind, it appears that the applicant would suffer the higher rather than the lower risk of injustice.

For all these reasons, the application herein is allowed **BUT** costs will be in the cause.

**A.K. KANIARU – JUDGE**

**27/6/2013**

**27/6/2013**

A.K. Kaniaru – Judge

Dianga G. - Court clerk

No party present

Interpretation – English/Kiswahili

Olel for Mwamu for defendants

Oyuko (absent) for plaintiff/applicant

**COURT**

Ruling on application filed on 27/10/2011 read and delivered in open **COURT**.

**Right of Appeal – 30 days.**

**A.K. KANIARU – JUDGE**

**27/6/2013**