



NO.97

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO. 304 OF 2012

MICAH NGOJE OTULA

(suing as a personal representative

of the estate of JACKTON OTULA ABWAO).....PLAINTIFF

VERSUS

ESTHER ATIENO OUMA.....1ST DEFENDANT

HELLEN ANYANGO OUMA..... 2ND DEFENDANT

RULING

1. The plaintiff is the son and the administrator of the estate of Jackton Otula Abwao, deceased (herein after referred to only as “**Otula**”). The defendants are the widows of Thomas Ouma Abwao, deceased (hereinafter referred to only as “**Ouma**”). The deceased persons, Otula and Ouma were brothers. At all material times, Otula was and is still registered as the proprietor of all that parcel of land known as LR. No. Kamagambo/ Kanyajuok/364 (hereinafter referred to as “**the suit property**”). The plaintiff has brought this suit against the defendants herein claiming that sometimes in the month of June, 2012 the defendants in the company of other persons who have not been named encroached upon and began tilling a portion of the suit property on the allegation that they were entitled thereto on the basis of a court decree made in favour of Ouma in, **Kisii HCCC No. 582 of 1995**. The plaintiff claims that the decree referred to by the defendants as the basis for their entry into the suit property had been discharged by the court and that the defendants’ actions complained of amount to intermeddling in the estate of Otula and have deprived the beneficiaries of the said estate of their rightful entitlement to the suit property. The Plaintiff claims that despite demand that the defendants cease their illegal actions aforesaid, they have persisted in the same thereby making the filing of this suit inevitable. In his plaint dated 7th August, 2012, the Plaintiff has sought a permanent injunction restraining the defendants from encroaching upon, trespassing, alienating or in any manner dealing with the suit property. In addition, the Plaintiff has also sought general damages for trespass and waste committed by the defendants on the suit property.
2. The defendants filed a joint statement of defence in which they denied the plaintiff’s claim against them. The defendants have claimed in their defence that the suit property was registered in the name of Otula to hold for himself and in trust for his brother Ouma and that the defendants have been in occupation of a half portion of the suit property since 1969 and that they know no other

home a part from the one on the suit property. The defendants have counter-claimed against the Plaintiff for a declaration that Otula held the suit property on his own behalf and in trust for Ouma and as such the defendants who are the widows of Ouma are in occupation of the suit property as of right.

3. Together with the Plaintiff, the plaintiff filed an application by way of Notice of motion dated 7th August, 2012 for an order of temporary injunction to restrain the defendants from encroaching upon, trespassing onto, alienating or in any other manner dealing with the suit property 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 August, 2012, in support thereof. In his grounds in support of the application and in 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 personal representative of the estate of Otula who is registered as the proprietor of the suit property. The Plaintiff has deposed that in the month of June, 2012 the defendants encroached on a portion of the suit property and began tilling the same claiming that they were entitled to the same by virtue of a decree that was issued by the court in favour of their deceased husband, Ouma in Kisii HCCC No. 582 of 1995. The Plaintiff has deposed that the decree issued in Kisii HCCC No. 582 of 1995 on the basis of which the defendants purported to lay a claim to a portion of the suit property was set aside and the suit marked as having abated on 16th May, 2011. The Plaintiff has deposed further that in the circumstances, there is nothing on the basis of which the defendants can lay a claim to the suit property. The Plaintiff annexed to the supporting affidavit, a copy of letters of administration ad litem of the estate of Otula issued to him on 14th June, 2012, a copy of a certificate of official search with respect to the suit property dated 23rd April, 2012 which shows that the said property is registered in the name of Otula, a copy of a decree issued on 27th March, 2001 in Kisii HCCC No. 582 of 1995 in favour of Ouma and a copy of the order given on 16th May, 2011 setting aside the said decree. The Plaintiff claims that the defendants' acts aforesaid have deprived the beneficiaries of the estate of Otula of the use, possession and enjoyment of the suit property and that unless the orders sought are granted, the said beneficiaries will suffer irreparable loss and damage.
4. The Plaintiff's application was opposed by the defendants who filed an affidavit in reply thereto sworn by the 1st defendant on 24th August, 2012. In her replying affidavit, the 1st defendant stated that the suit property was initially registered in the name of one, **Jacob Abwao Agenga**, deceased (hereinafter referred to only as "**Abwao**"). Abwao was the father of Otula and Ouma with Otula, who was the father of the Plaintiff being Abwao's eldest son while Ouma, who was the husband of the defendants was his younger son. The 1st defendant has stated further in the said affidavit in reply that after the death of Abwao in 1982, the suit property was registered in the name of Otula being the eldest son to hold in trust for himself and for his younger brother Abwao. The 1st defendant claims that when Abwao died on 13th August, 1982, he was buried on a portion of the suit property. The 1st defendant has annexed to her affidavit a copy of a certificate of official search dated 4th May, 2001 which shows that the suit property was registered in the name of Otula on 15 February, 1982. The 1st defendant claims that Ouma had before his death filed a suit against Otula in Kisii HCCC No. 582 of 1995 for a declaration that Otula held ½ of the suit property in trust for Ouma and for the sub-division of the said property so that the Ouma may have his half share which suit was determined in Ouma's favour but the determination was later set aside. The 1st defendant claims that she has resided on the suit property since she was married to Ouma in 1969 and the same applies to the 2nd defendant who was married to Ouma in 1974. The 1st defendant claims that they are in occupation of a half portion of the suit property together with their children and as such it would be very harsh to grant the injunction sought as they have no other home a part from the one on the suit property. In conclusion, the 1st defendant has stated that in the circumstances of this case the most appropriate order to make is to have the parties maintain status quo pending the hearing and determination of this case. The Plaintiff filed a supplementary

affidavit in reply to the 1st defendant's replying affidavit in which he denied all the allegations made by the 1st defendant in her affidavit in reply save for the fact that she is the widow of Ouma. The Plaintiff maintained that Ouma and Otula have at all times occupied different parcels of land and he annexed photocopies of some proceedings before the District Magistrate's Court at Rongo in Rongo DMCC No. 14 of 1981 in support of that contention.

5. On 6th February, 2013, the parties agreed to argue the application by way of written submissions. The Plaintiff filed his submissions on 11th March, 2013 while the defendants filed their submissions on 20th March, 2013. The Plaintiff's advocates submitted that the Plaintiff has established a prima facie case against the defendants with a probability of success and has also shown that the Plaintiff stands to suffer irreparable harm unless the orders sought are granted. The Plaintiff's advocates submitted that even if the application is considered on a balance of convenience, the same tilts in favour of the Plaintiff. The Plaintiff's advocates cited the case of, **Aikman-vs-Muchoki, (1984) KLR 353** in support of their submissions. In a brief submission in reply, the defendants' advocates submitted that the defendants have occupied a portion of the suit property as their home for several years and have lodged a counter-claim against the Plaintiff for a declaration that Otula held half of the suit property in trust for them. The defendants' advocates submitted further that the most appropriate order to make in the circumstances is that for the maintenance of the status quo pending the determination of the parties' rights on merit at the trial.
6. I have considered the plaintiff's application and the affidavits filed in support thereof. I have also considered the submission by the advocates for the plaintiff. Equally, I have considered the affidavit in reply and submission made by the defendants' advocates in opposition to the plaintiff's application. The following is the view I take of the matter. The principles for granting interlocutory injunction are well settled. As 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 with a probability of success and that unless the injunction sought 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”.

The question therefore that I need to answer in this application is whether the plaintiff has 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 the name of Otula and that he is the legal representative of the estate of Otula. The defendants have not disputed the fact that the suit property is registered in the name of Otula. What they have disputed is the absolute ownership of the suit property by Otula. The defendants have contended that the suit property was registered in the name of Otula to hold in trust for himself and for their deceased husband, Ouma who was Otula's younger brother. They maintained that they have occupied a half portion of the suit property for several years with the 1st defendant occupying it since 1969 to date and the 2nd defendant from 1974 to date. The defendants contend that they have their homesteads on the said half share of the suit property and that if the orders of injunction sought are issued against them, they will have nowhere to live. They have claimed that when their husband Ouma died, he was buried on the portion of the suit property in their occupation. The defendants denied the Plaintiff's claim that they encroached on and/or trespassed on the suit property in June, 2012 and maintained that they have all along been in occupation of the property as stated above. As I had pointed out in my summary of the parties' respective cases above, the Plaintiff has denied all these allegations by the defendants. The issues that arise for determination between the parties are; first, whether Otula was registered as the proprietor of the suit property in trust for himself

and for his brother Ouma who was the defendants' husband and secondly, whether the 1st and 2nd defendants have been in occupation of a portion of the suit property since 1969 and 1974 respectively as alleged by them or they only entered and/or encroached upon the suit property in June, 2012 as claimed by the Plaintiff. I am of the view that these are not issues which this court can be able to determine on affidavit evidence. These issues can only be determined at the trial. The Plaintiff has invited me to find that the defendants claim over the suit property based on trust has no basis as Ouma himself in the proceedings that took place before the District Magistrates Court at Rongo in, **Rongo DMCC No. 14 of 1981** had stated on oath on 25th November, 1981 that their father, Agenga had before his death distributed his property among his sons and that the suit property had been given to Otula and should be transferred to his name. I am unable to find that the issue as to whether or not Ouma was entitled to any share in the suit property was determined by the decision of the District Magistrate at Rongo in the above case for various reasons. First, I have not been able to appreciate what the case that was before the District Magistrate's Court at Rongo was all about. The heading of the proceedings reads, **Land Succession No. 14 of 1981** and the parties to the suit were, Land Registrar as Plaintiff and Abwao Agenga (the father of Otula and Ouma) as the defendant. It looks from the proceedings that this was a succession case over the estate of Otula and Ouma's father. I am not sure whether the procedure followed was proper. As at 25th November, 1981 when the District Magistrate made his decision on which the Plaintiff has put reliance, The Law of Succession Act, Cap. 160 Laws of Kenya was in force the same having commenced on 1st July, 1981. The Law of Succession Act provides in section 2 (2) thereof that the procedure to be followed in administering estates of persons who had died prior to the commencement of the said Act is that provided for in the Act. The legality of the procedure that was adopted before the District Magistrate Court at Rongo whereby the Land Registrar sued the Otula, deceased for the determination of the issue as to who was entitled to inherit his land is therefore questionable. This issue therefore requires some interrogation at the trial. The other issue connected to the foregoing is that, it looks from the proceedings that took place before the Rongo District Magistrate's court that the suit property was the only one registered in the name of Abwao Agenga, the father of Ouma and Otula as at the time of his death. Although in the said proceedings, Abwao Agenga is said to have distributed his land among his sons before he died and that the suit property was given to Otula, the details of these other parcels of land more particularly the one that he had given to Ouma are not given and it is not clear why the same did not form part of the subject of the succession proceedings. I have raised all these issues to show that the proceedings that took place before the District Magistrate's Court at Rongo cannot be taken as absolutely binding upon the defendants until evidence is led on the circumstances under which the said proceedings took place and decision made. It follows therefore that the issue as to whether or not Otula held the suit property in trust for himself and for Ouma is still at large. The defendants' counter-claim cannot therefore be wished away as baseless. Courts have over the years recognized customary law trusts as conferring interest on registered land. In the case of **Gathiba – vs- Gathiba [2001] 2 E.A 342, Khamoni, J.** stated as follows (at page 348) with regard to section 30 and section 28 of the Registered Land Act, Cap. 300 (now repealed):-

“The position as I see it is therefore as follows:- correctly and properly, the registration of land under the Registered land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to section 28 of the Registered Land Act such registration does not relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

7. This statement by **Khamoni, J.** was approved by the court of Appeal in the case of **Mukangu –vs- Mbui, KLR (E&L)1,622** where the court stated as follows at page 633;-

“We have also examined other authorities and we think it cannot be argued too strongly that the proper view of the qualification or proviso to section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from the possession and occupation of part of the Registered land which although strictly it may not be an overriding interest under section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act”.

In this case the court held that a trust arose in favour of a son from the son’s possession and occupation of his father’s land which trust was protected under sections 28 and 30(g) of the Registered Land Act, Cap. 300 (now repealed). Customary law trusts are now expressly recognized in law as overriding interest under section 28(b) of The Land Registration Act, 2012. It follows therefore that if the defendants prove at the trial that Otula as Ouma’s elder brother was registered as the proprietor of the suit property to hold in trust for himself and for Ouma, then, the defendants would be entitled to half portion of the suit property as beneficiaries of the estate of Ouma. As I have stated above, the defendants are claiming that they are in occupation of half portion of the suit property. The Plaintiff has denied this fact. The Plaintiff has however not indicated where the defendants are staying. It is therefore the Plaintiff’s word against the defendants. There is nothing to prove that the defendants are staying in or outside the suit property apart from the claim by the Plaintiff and the denial by the defendants. Due to the foregoing, I am doubtful that the Plaintiff has established a prima facie case that the suit property was owned absolutely by Otula and that the defendant encroached and/or trespassed thereon in June, 2012.

8. On the issue as to whether or not the Plaintiff will suffer irreparable loss unless the orders sought are granted, this is also doubtful as there is no clear evidence that the defendants have trespassed on the suit property. In view of these findings, the Plaintiff’s application falls for consideration on a balance of convenience. Otula is registered as the proprietor of the suit property. If the injunction sought is not granted and it is proved at the trial that Otula owned the suit property absolutely, the Plaintiff as the administrator of the estate of Otula and other beneficiaries of the said estate will have vacant possession of the suit property. They will not have suffered any serious prejudice as a result of this court’s refusal to grant them interlocutory injunction. However if the interlocutory injunction sought is granted and the defendants who claim to be living on the suit property are barred from accessing what they call the only home they know and it is proved by them at the trial that Otula held the suit property in trust for himself and for Ouma, the defendants would have suffered serious prejudice and injustice arising from the said interlocutory injunction. The balance of convenience in the circumstances would lean against granting the injunction sought. The order that commends itself to me in the circumstances is to maintain the status quo pending the hearing and determination of this suit. The plaintiff’s Notice of Motion application dated 7th August, 2012 is therefore disallowed. I order that the parties shall maintain the status quo prevailing as of the date hereof pending the hearing and determination of this suit. The costs of the application shall be in the cause.

Dated, signed and delivered at Kisii this 12th day of July, 2013.

S. OKONG’O,

JUDGE.

In the presence of:

Mr. Mokuia holding brief for Nyamurongi for the plaintiff

No appearance for the defendants

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.