



**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND CASE NO. 283 OF 2012**

**JOHNSON OTIENO ADERA..... PLAINTIFF**

**VERSUS**

**PAUL ODERA OKODE..... DEFENDANT**

**RULING**

1. The plaintiff is the registered proprietor of all that parcel of land known as LR No. Kamagambo/ Kanyimach/ 787 (hereinafter referred to as “**the suit property**” where the context so admits). The plaintiff has brought this suit against the defendant seeking; an order of eviction and demolition, a mandatory injunction compelling the defendant forthwith to vacate the suit property and handover vacant possession thereof to the Plaintiff, a permanent injunction restraining the defendant from occupying, trespassing on, tilling or in any other manner dealing with the suit property, general damages for trespass and costs. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 28<sup>th</sup> August, 2012 seeking; a temporary prohibitory injunction to restrain the defendant from trespassing on, occupying, developing, allocating, leasing, tilling, planting trees or crops on, alienating, interfering with the boundary of , threatening the Plaintiff from using the suit property or in any way dealing with the suit property pending the hearing and determination of this suit and, a temporary mandatory injunction ordering or compelling the defendant to forthwith vacate and hand over possession of the suit property to the Plaintiff. The Plaintiff’s case against the defendant as set out in the amended Plaint dated 28<sup>th</sup> August, 2012 and the Plaintiff’s affidavit sworn on 28<sup>th</sup> August, 2012 in support of the injunction application is that; the Plaintiff purchased the suit property from one, Joseph Okech and Abel Odago on 3<sup>rd</sup> April, 2010 at a consideration of Ksh. 850,000.00 and had the property transferred and registered in his name on 24<sup>th</sup> February, 2012. After the purchase but before the suit property was transferred to the Plaintiff by the previous proprietors aforesaid, the defendant who owns a parcel of land neighboring the suit property forcefully moved into and occupied a portion of the suit property on or about 3<sup>rd</sup> September, 2009. Attempts by the previous owners of the suit property to have the defendant move out of the suit property through the provincial administration failed. The defendant who still remains in possession even after the Plaintiff became the registered owner of the suit property has now incited local villagers against the Plaintiff and has threatened the Plaintiff with violence should he set foot on the suit property. The Plaintiff can now only access the suit property while accompanied with armed police escort. The defendant is now cultivating the suit property and has destroyed its boundary features and burned down and damaged the crops that the Plaintiff had planted on the suit property. The Plaintiff is seeking the protection of his proprietary rights by this court and prays that the defendant be restrained from carrying out further cultivation and putting up of structures on the suit property. The Plaintiff contends that the acts of

the defendant complained of amount to a violation of the Plaintiff's constitutional, statutory and common law rights. The Plaintiff annexed to his affidavit and further affidavit a copy of a certificate of official search dated 26<sup>th</sup> May, 2010 with respect to the suit property which shows that the suit property was registered in the names of Joseph Okech and Abel Odago on 17<sup>th</sup> October, 1977 and that they were the registered proprietors of the suit property as at 26<sup>th</sup> May, 2010 when the Plaintiff purchased the suit property. The Plaintiff also annexed a copy of the agreement for sale of the suit property dated 3<sup>rd</sup> April, 2010 between the Plaintiff and the said Abel Odago, a copy of a title deed dated 11<sup>th</sup> April, 2012 for the suit property in the name of the Plaintiff, a copy of a certificate of official search on the title of the suit property dated 27<sup>th</sup> June, 2012 which shows that the Plaintiff is the registered proprietor thereof, a copy of a court order issued on 11<sup>th</sup> January, 2010 in Kisii High Court Judicial Review No. 5 of 2008 that quashed the decision of Rongo Land Disputes Tribunal dated 13<sup>th</sup> June, 2006 that purported to award the title of the suit property to the defendant, a court ruling on the said judicial review application dated 10<sup>th</sup> December, 2009 and, a copy of a certificate of official search dated 10<sup>th</sup> November, 2011 with respect to a parcel known as **LR No. Kamagambo/ Kanyimach/ 579** which shows the defendant as the registered proprietor thereof.

2. In his statement of defence dated 28<sup>th</sup> August, 2012 and affidavit in reply to the Plaintiff's application for injunction sworn on 29<sup>th</sup> October, 2012, the defendant denied the Plaintiff's claim against him in its entirety. The defendant contended that he is in occupation of the suit property as of right. The defendant contended that he entered the suit property in the year 2007 after the Rongo Land Disputes Tribunal awarded him the same in the case that he had lodged against the previous owners of the said property with the said Tribunal. The defendant contended that the suit property was unlawfully curved out of his parcel of land known as LR No. Kamagambo/ Kanyimach/ 579 by the previous owners and as such it is the Plaintiff who has encroached on his parcel of land. The defendant contended that, he was not aware of the Kisii High Court Judicial Review No. 5 of 2008 or the order that was made in relation thereto. The only Judicial Review application that he was aware of was the one that was filed in Nairobi, namely, Judicial Review Application No. 557 of 2007 which according to him was still pending hearing and determination. The defendant annexed to his affidavit in reply, a copy of a hearing notice dated 13<sup>th</sup> October, 2009 that was served upon him by the firm of Kwanga Mboya & Co. Advocates with respect to the said judicial review application notifying him that the same was to be heard on 26<sup>th</sup> November, 2009. The defendant also annexed to his said affidavit, a copy of the award that was made in his favour by the Rongo Land Disputes Tribunal on 13<sup>th</sup> June, 2006 and, a copy of an award of a panel of elders that had been made in his favour pursuant to a reference to the said panel that was made in an earlier case that he had filed against the previous owners of the suit property. The defendant maintained that he is legally in occupation of the suit property pursuant to the said award of the Rongo Land Disputes Tribunal.
3. The parties agreed to argue the Plaintiff's application by way of written submissions. The Plaintiff filed his submissions on 28<sup>th</sup> November, 2012. The defendant was ordered on 22<sup>nd</sup> January, 2013 to file his written submissions within 14 days. The defendant failed to put in his submissions despite the extension of that time by a further 14 days on 19<sup>th</sup> March, 2013. On 6<sup>th</sup> May, 2013, the court fixed this matter for ruling on 27<sup>th</sup> September, 2013 and gave the defendant the liberty to file his written submissions if he wished to do so within 7 days from that date. Up to the time of writing this ruling, the defendant had not put in his written submissions. In his submission, the Plaintiff submitted that the defendant is a trespasser on the suit property and as a trespasser; the defendant has to give way to the Plaintiff who is the registered proprietor of the suit property. The Plaintiff submitted therefore that he is entitled to the injunction sought. On his prayer for a mandatory injunction, the Plaintiff submitted that this is an appropriate case for such order to issue because there is no doubt here that the defendant is on the wrong which wrong can only be remedied by meting out instant justice against the defendant by ordering his eviction from the suit property without having to wait for a hearing. On the defendant's contention that he is in occupation of the suit property pursuant to an award made in his favour by the Rongo Land

Disputes Tribunal, the Plaintiff submitted that the said Tribunal had no jurisdiction to determine a dispute over ownership of land and as such could not have made any lawful award in favour of the defendant which can be raised as a valid defence to this claim. The Plaintiff submitted that in any event, the alleged award by the said Tribunal was quashed by this court in, **Kisii High Court Judicial Review No. 5 of 2008, Abel Odago Onyango –vs- Paul Odera Okode & 2 others** on 10<sup>th</sup> December, 2010. The Plaintiff submitted that there is no award from the said Tribunal on the basis of which the defendant can continue to occupy the suit property. In conclusion, the Plaintiff submitted that he had satisfied the conditions for the award of the injunction sought. He submitted that he had established a prima facie case against the defendant with a probability of success and had also demonstrated that he will suffer irreparable harm unless the orders sought are granted. The Plaintiff submitted that even if the matter was considered on a balance of convenience, the same would tilt in favour of granting the orders sought. The Plaintiff relied on a number of authorities to buttress these submissions.

4. As I have mentioned above, the Plaintiff is claiming both prohibitory and mandatory temporary injunctions. The principles applicable to applications for these types of injunctions are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for a temporary prohibitory injunction must prove that he has a prima facie case against the respondent with a probability of success and that unless the order sought is granted, he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. For a temporary mandatory injunction, an applicant must establish more than a prima facie case. It is harder to get a temporary mandatory injunction than a prohibitory one. The granting of a temporary mandatory injunction effectively determines the case without the benefit of a trial. An applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success here must be higher than that which is required of a prohibitory injunction. Such an applicant must also fulfill the usual conditions for granting an interlocutory injunction such as showing that he will suffer irreparable harm unless the orders sought are granted. In the case of **Shepherd Homes Ltd. –vs- Shadahu [1971] 1 ch.34, Meggery J.** had this to say on an interlocutory mandatory injunction;

*“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but*

*at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.*

5. In the case of **Redland Bricks Ltd vs. Morris [1970] AC 652**, it was stated that jurisdiction to issue a mandatory injunction .....“ **is a jurisdiction to be exercised sparingly and with caution but in a proper case, unhesitatingly**”. In the Court of Appeal case of, **Jaj Super Power Cash and Carry Limited vs. Nairobi City Council & 2 others, Nairobi, Civil Appeal No. 11 of 2002 (unreported)** which was cited by the Plaintiff, the court observed that a mandatory injunction at an interlocutory stage..... **“merely serves to redress the status quo ante in deserving cases until the main dispute is determined.”** Applying the foregoing principles to this case, the question that I need to answer is whether the plaintiff has satisfied this court that he has unusually strong and clear case against the defendant that warrants the issuance of the prohibitory and mandatory interlocutory injunction sought.
6. The plaintiff has demonstrated on the material placed before the court that he is the registered proprietor of the suit property. Under **Section 24(a)** of the **Land Registration Act, 2012**, the registration of a person as a proprietor of land vests upon that person the absolute ownership of the said land together with all rights and privileges belonging or appurtenant thereto. Under **Section**

**25 (1)** of the **Land Registration Act, 2012**, the rights of a proprietor of land acquired for valuable consideration is indefeasible except as provided under the said Act. **Section 26 (1)** of the said Act provides that a certificate of title issued by the land registrar upon registration or to a purchaser of land shall be taken by all courts as a prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner thereof. From the foregoing, I am satisfied that the plaintiff has proved on a prima facie basis that he is the owner of the suit property. In the face of this uncontroverted evidence that the plaintiff is the registered proprietor of the suit property, anyone occupying the suit property without the consent or authority of the plaintiff is doing so unlawfully and is a trespasser unless he can justify such occupation.

7. The defendant's justification for his occupation of the suit property is that the suit property was awarded to him by the Rongo Land Disputes Tribunal by its decision dated 13<sup>th</sup> June, 2006. It is pursuant to this award that he proceeded to occupy the suit property in the year 2007. The Plaintiff exhibited in his affidavits in support of this application a copy of a Kisii High Court ruling and order extracted therefrom through which the said decision and/or award of the Rongo Land Disputes Tribunal on the basis of which the defendant has laid a claim to the suit property was quashed. It is plain and beyond argument that after the quashing the said award by the Rongo Land Disputes Tribunal there would be no lawful excuse on the basis of which the defendant can continue to occupy the suit property. In response to the said order that quashed the award that had been made in his favour by the Rongo Land Disputes Tribunal, the defendant claimed that as far as he was concerned, such order did not exist as the Judicial Review Application that had been instituted against him by the previous owners of the suit property to challenge the said award was instituted in Nairobi as, **Judicial Review No. 557 of 2007**. The defendant denied any knowledge of **Kisii Judicial Review No. 5 of 2008** in which the Rongo Land Disputes Tribunal's decision that awarded him the suit property was quashed. In support of this contention, the defendant attached to his affidavit in reply as I have mentioned above, a copy of a hearing notice dated 13<sup>th</sup> October, 2009 that was addressed to the defendant by the firm of Kwanga Mboya & Company notifying him that the said Judicial Review No. 557 of 2007 was coming up for hearing on 26<sup>th</sup> November, 2009. The defendant was therefore surprised that there was another Judicial Review No. 5 of 2008 in which a ruling was delivered on 10<sup>th</sup> December, 2009. The Plaintiff did not respond to the existence of these two judicial review files in his further affidavit through which he responded to the issues that the defendant had raised in his replying affidavit. On my own initiative, I called for these two files from the Registry. The reason for calling for these files was because, first, I wanted to confirm whether the Rongo Land Disputes Tribunal decision dated 13<sup>th</sup> June, 2006 was quashed in Judicial Review No. 557 of 2007 that was filed in Nairobi or in Judicial Review No. 5 of 2008 that was filed in the High Court at Kisii. I also wanted to verify the authenticity of the order that the Plaintiff had annexed to his supporting affidavit which had several alterations and which did not seem to me to be in accord with the ruling of Musinga J. (as he then was) that was delivered on 10<sup>th</sup> December, 2010. I also noted from the said order that the Judicial Review application by the Plaintiff was **"presented to court on 20<sup>th</sup> June, 2007"**. I wanted to check when the Plaintiff obtained leave to present the said application for judicial review in the nature of certiorari on 27<sup>th</sup> June, 2007 to quash a decision of the Tribunal that was dated 13<sup>th</sup> June, 2006 and that was said to have been delivered on 10<sup>th</sup> August, 2006. The report I obtained from the High Court Civil Registry was that, initially, the previous owner of the suit property, Abel Odago Onyango, filed a judicial review application in Nairobi challenging the decision of the Rongo Land Disputes Tribunal that awarded the suit property to the defendant. This was in, Nairobi High Court, Judicial Review No. 557 of 2007. Why the application was filed in Nairobi for a property situated in Rongo is not clear. The said application was transferred by the High Court in Nairobi to the High Court of Kenya at Kisii for hearing and disposal. The transfer was done in the year 2008. The High Court of Kenya at Kisii gave the matter a new number namely, Kisii High Court, Judicial Review No. 5 of 2008. This is how the Nairobi Judicial Review No. 557 of 2007, came to be known as Kisii Judicial Review No. 5 of 2008 that was heard and disposed of by Musinga J. (as he then was) on 10<sup>th</sup> December, 2009. The registry staff did not manage to trace the court file for Judicial Review No. 5 of 2008. The file was said to be misplaced and had not been traced as at the time of concluding this ruling. The information that I have referred to above

was obtained from Kisii high court civil registry case register. Due to the misplacement of the said court file, I was unable to confirm the other information that I have referred to above. I don't know whether the defendant was notified of the transfer of the judicial review application No. 557 of 2007 to Kisii and the fact that it had been assigned a new number. I also don't understand why the firm of Kwanga Mboya & Co. Advocates was still referring to judicial review No. 557 of 2007 in their hearing notice dated 13<sup>th</sup> October, 2009 to the defendant that was issued long after the said application had been transferred to Kisii and assigned a new case number. I don't know whether the defendant attended the hearing of the said judicial review application on 26<sup>th</sup> November, 2009 and if he did, whether he went to the high court in Nairobi or Kisii. It is no wonder that the defendant is claiming that the judicial review application No. 557 of 2007 has not been heard and that he is not aware of Judicial Review No. 5 of 2008. Whether the Rongo Land Disputes Tribunal's decision dated 13<sup>th</sup> June, 2006 was regularly quashed or not is not for this court to decide. However, since it is on that award that the defendant has premised his defence, the issues raised above cannot just be wished away by a court of law. They are relevant when this court is considering whether the Plaintiff has a case with an overwhelming chance of success against the defendant to justify an interlocutory mandatory injunction. I am in agreement with the submission by the Plaintiff that the Tribunal had no jurisdiction to determine a dispute over title to and/ or ownership of land and as such its purported award of the suit property to the defendant was a nullity. Musunga J. (as he then was) held as much. My concern however is that due process must be followed in setting aside such a null and void decision and on the material before me I have doubts whether that was the case here. The Plaintiff herein is seeking equitable remedy and it is a cardinal principle of equity that he who comes to equity must come with absolutely clean hands. Anyway, as I have mentioned above, I am not sitting on a review or an appeal against the decision of Musunga J. (as he then was). I will revisit my misgivings about the manner in which the said judicial review application was handled by the advocates who acted for the previous owners of the suit property at the conclusion of this ruling. As things stand now, I don't see any lawful justification for the defendant's continued occupation of the suit property. In the absence of any other explanation from the defendant as to the reason why he has occupied and remained on the suit property apart from the said tribunal award that has been quashed by a lawful court order, the only conclusion this court can make is that the defendant's occupation of the suit property is illegal. I am therefore satisfied that the plaintiff has proved on a prima facie basis that the defendant is a trespasser on the suit property.

8. Due to the foregoing, I am persuaded that the plaintiff has established a prima facie case with a probability of success against the defendant. The plaintiff is the registered proprietor of the suit property and is entitled to exclusive possession thereof. I am also satisfied that the plaintiff would suffer irreparable harm if the orders sought are not granted as the plaintiff would be kept away from his property. The plaintiff has satisfied the principles for granting interlocutory prohibitory injunction. However, due to the misgivings that I have expressed above on how the order that quashed the decision of the Rongo Land Disputes Tribunal may have been obtained, I am not satisfied that this is a suitable case to grant a temporary mandatory injunction. The Plaintiff has deposed in his affidavit in support of this application that the portion of the suit property on which the defendant has put up his residence is less than an acre and that he actively ploughs about 2 acres only out of this property which measures approximately 10 acres in total. The defendant claims to have entered this portion of the suit property pursuant to a decision in his favour that was made by the Rongo Land Dispute's Tribunal. This decision was made before the Plaintiff purchased the suit property. The defendant also claims to have entered the suit property before the Plaintiff acquired title to the suit property. The defendant claims that as far as he is concerned, the said decision of the Tribunal has not been set aside as he was not aware of and did not participate in the judicial review application in which the order quashing the said decision was made. The Plaintiff has not placed overwhelming evidence before this court to warrant outright rejection of the defendant's contention that he was not aware of the proceedings that led to the quashing of the decision of the Tribunal that was the basis of his occupation of the suit property. I am of the view that this issue can only be fully and finally resolved at the trial. I don't think in the circumstances that it would be fair at this stage to order the eviction of the defendant from the whole of the suit property. As I have mentioned above, the Plaintiff has stated that the defendant has built up about

an acre of the suit property and is ploughing about 2 acres. See paragraph 11 of the Plaintiffs affidavit sworn on 28<sup>th</sup> August, 2012 and paragraph 7 of the amended Plaint. The Plaintiff's prayer as set out in paragraph 11 aforesaid of the affidavit sworn on 28<sup>th</sup> August, 2012 is that the defendant should be restrained from tilling or ploughing or putting up more structures on the remaining portion of the suit property. I am of the view that in the circumstances of this case, an appropriate order to make is to restrain the defendant from having any dealing with the portion of the suit property which is not under his occupation pending the hearing and determination of this suit. The Plaintiff's Notice of Motion application dated 28<sup>th</sup> August, 2012 is therefore allowed in part. I grant prayer (a) of the application. The portion of the suit property where the defendant has put up his homestead shall however be excluded from this order. The plaintiff shall have the costs of the application.

**Dated, signed and delivered at KISII this 30<sup>th</sup> day of August, 2013.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

**Mr. Soire for Kwengu for plaintiff**

**No appearance for defendant**

**Bibu Court Clerk.**

**S. OKONG'O,**

**JUDGE.**