

REPUBLIC OF KENYA

IN THE E & L COURT OF KENYA AT BUNGOMA

CIVIL SUIT NO. 83 OF 2012

TOM LIHRU WANAMBISI..... PLAINTIFF

VERSUS

DICKSON W. BABANDEGE 1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION..... 2ND DEFENDANT

PAUL OKETCH t/a PAMBO INVESTMENT 3RD DEFENDANT

RULING

The applicant has moved this court under order 40 of the Civil Procedure Rules and Sec. 1A, 1B & 3A of the Civil Procedure Act seeking:

“ a temporary order of injunction to be issued restraining the 1st defendant, his servants and or agents from trespassing into, taking possession, destroying any property and or interfering with L.R. Nos. Ndivisi/Makuselwa/89 and 90 pending the hearing and determination of this suit.”

He also prayed for costs of the application. The application is based on the grounds on the face of it and the supporting affidavit sworn by Tom. L. Wanambisi, the applicant on 25th October 2012. He also swore a further affidavit on 6th February 2013 in support of his application.

Briefly he is seeking to restrain the 1st defendant for interfering with his two parcels of land, L.R. No. Ndivisi/Makuselwa/89 and 90. That the 1st defendant did destroy his property on 29th December 2010 and a second time on 17th October 2012. The transfer of L.R No. Ndivisi/Makuselwa/89 to the 1st defendant according to him was irregular and unlawful.

The 2nd and 3rd defendants have filed a replying affidavit to oppose the application. The 1st defendant did not file any documents to the application or the suit. However on 29th January 2013, I made an order directing the applicant to properly serve the 1st defendant. He never made such efforts. It is my finding that the 1st defendant has not been served and therefore no orders will issue as against him as that will go against the rules of natural justice. It was incumbent upon the applicant to properly serve him especially with the plaint and summons to enter appearance before taking any steps in the future.

Although the orders as per the presentation of the application were strictly to issue against the 1st defendant, the 2nd & 3rd defendants were served. They have filed their response and therefore I will consider their response visa vi the merit of the application. The 2nd defendant advanced to the applicant a loan in the sum of Kshs. 330,000/= on 10th January 2005. This is not denied. What the applicant denies is the manner in which the security was realized. This court has noted from the documents filed that the sale took place on 16th April 2010. The suit property was thereafter transferred to the 1st defendant on 11th January 2011. According to him, the 1st defendant moved onto the suit property on 29th Dec 2010. **He is seeking to stop/injunct what took place two years back.**

In any event the 2nd activities of the 1st defendant complained of which took place on 17th October 2012 on L.R No Ndivisi/Makuselwa/89 cannot amount to trespass. As at this date, the 1st defendant was the registered owner of the suit parcel. The manner in which he acquired title can only be questioned and determined at full trial of the case. Similarly, issues on whether the sale and transfer to the 2nd defendant was lawfully and regularly done are for determination during a full hearing. The destructions

undertaken on L.R. Ndivisi/Makuselwa/90 if at all, took place in 2010 and this court is unable to issue the orders sought as the same would go against the intention and purpose of order 40. Order 40 is to preserve what is about to happen and not to undo an event that has already taken place.

I have read through the list of case law annexed in support of the application. They relate to the provisions of section 6 (1) referring to obtaining of Land Control Board consent. I find them not applicable at this stage of the application. Probably the applicant can refer to them in his final submissions after the suit is heard.

Consequently, I find this application as lacking in merit and dismiss it with costs to the 2nd & 3rd defendant. For avoidance of doubt, the earlier orders given ex parte are also vacated.

RULING DATED, SIGNED, READ and DELIVERED in open court this 29th day of August 2013.

A.OMOLLO

JUDGE.