



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Suit 254 of 2011

DANIEL ISAACK NCHOE.....PLAINTIFF

VERSUS

SIMALE OLE SITO.....DEFENDANT

RULING

The Notice of Motion dated 19/9/2011 is brought pursuant to **Order 40 Rule 1(a) and (b)(2)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. The applicant, Daniel Isaack Nchoe seeks an order of injunction to restrain the defendant/respondent, Simale Ole Sito, his agents or servants from entering, cultivating, evicting or in any way in any way interfering with the plaintiff's quiet and peaceful possession and enjoyment of Land parcel 693 Olosholesito Adjudication Section till this matter is heard and determined.

The application is premised on grounds found on the face of the application and two affidavits sworn by of the applicant on 19/9/2011 and 22/11/2011. The applicant has deposed that he was jointly registered with his late father, Lemolo Ole Nchoe, as owners of Parcel 693 Olosholesito Adjudication Area (DIN 1). His father and the respondent have had a long standing boundary dispute during adjudication. The applicant's father claimed part of Parcel No. 77 Olosholesito Adjudication Section in Land Adjudication Committee No. 1/1977. The committee found in favour of the respondent, who was a member of the said committee and sat on it (DIN 2). An appeal was lodged to the Appeals Board in 1994 and the Board found in favour of the applicant's father (DIN 3). An objection was lodged by the respondent but was rejected and appeal upheld (DIN 4). A further appeal was made to the DC Narok by the respondent but it was dismissed (DIN 5). The applicant claims to have a locus standi in these proceedings as he is jointly registered with the father and denies having any claim to the respondent's Parcel No. 77. The applicant also depones that the respondent has challenged the above decision vide Judicial Review No. 55/2011 (DIN 7); That although the said proceedings are still pending, the respondent has threatened to enter and evict the applicant from Parcel 693; that the respondent had made such an attempt on 7/9/2011 but it was thwarted by the village elders. The applicant's counsel relied on the decision in **Abraham Wanjala Nambilo v Fentry W. Wanasi & David W. Wanasi CA 69/2001** in which the judge applied the principles for grant of injunctions as espoused in **Giella vs Cassman Brown Co. Ltd (1973) EA P.358**.

Mr. Simiyu, counsel for the respondent made reliance on the replying affidavit in which Simale Ole Sito

deponed that the dispute between him and the applicant is over Parcel No. 77; that he filed JR 55/2011 in which he has obtained a stay (SOS 1) and he does not understand how the applicant would be jointly registered with his father as owner of the disputed land. The respondent denied being a member of the Adjudication Committee as alleged by the applicant; that the applicant was not party to the proceedings between his father, Lemolo ole Nchoe and himself before the Objection Committee dated 22/9/1977 nor was he party to the proceedings between his father and the respondent before the Appeals Board dated 26/10/2001; that the applicant only showed up in the proceedings during objection and appeal proceedings. He contends that the manner in which the respondent was registered as owner of Parcel 693 was unprocedural and that neither the applicant nor his father have ever lived on the subject land.

The principles for grant of injunction are well settled in **Giella** case (supra). The first principle is that the applicant must show that he has a prima facie case with a probability of success; Secondly, an applicant must show that if the order of injunction is not granted, he is likely to suffer irreparable loss that cannot be compensated by way of damages; Thirdly, if the court is in doubt, the application should be decided on a balance of convenience.

Having considered the grounds on the face of the application and the facts contained in the affidavits of both parties, it is clear that there has been a long standing dispute between the respondent and the applicant's father and now the applicant has taken over. The parties have been before different fora to try and resolve the said issue. Whereas the applicant claims to be the owner of Parcel 693, the respondent claims to be owner of Parcel 77. The map annexed to the applicant's further affidavit shows that the plots are adjoining. The problem between the two parties seems to be that one has been encroaching on the parcel of the other. I say so because in addition to the map of the area, the applicant has exhibited a certificate from the District Land Adjudication & Settlement Officer Narok North confirming that Plot No. 693 Olosholesito is registered in the names of Lemolo Ole Nchoe and Daniel Isaack Nchoe. It is dated 20/5/2011. This number was issued to the applicant on 27/10/94 by the Olosho Lesito Appeals Board and the decision was confirmed on 13/9/2007 following an objection lodged by the respondent. Further on 24/2/2011, the District Commissioner Narok dismissed the appeal against the decision of 27/10/1994 which directed that the applicant's father be given a number for the plot. The respondent has not attempted to demonstrate that the land parcel 693 or part of it, is his. That is a matter that needs to be determined at a full hearing.

It is the respondent's contention that JR Misc. 55/2011 filed by the respondent is still pending before the court, that stay orders were granted therein and if the orders sought herein are granted, they may conflict with the stay order. In Misc. 55/2011, the respondent seeks orders of certiorari to quash the decision of the District Commissioner Narok dated 24/2/2011 and to reinstate the award made to the respondent on 22/9/1977 by the Land Adjudication Committee. The prayer for stay relates to the decision of the District Commissioner dated 24/2/2011 and preserve the orders made by the Land Adjudication Committee on 27/7/1977. Even if an order was granted to stay the decision of the District Commissioner dated 24/2/2011 there were other decisions made in 1994 and 2001 confirming the decision to give the land to the applicant's father. Besides, a Judicial Review application will not be determining the issue of land ownership but is concerned with whether due process was followed by the bodies that dealt with the matter. It cannot therefore be a bar to a party filing a civil matter over the ownership of land.

The respondent questions the manner in which the applicant came to be registered as the joint owner of Plot 693. That is an issue that can only be resolved at a full hearing by calling the officers involved in registration of land at adjudication stage.

In the end, I do find that there has been a long standing dispute between the two parties over the parcels of land 693 and 77. I find that the applicant has demonstrated that he has a prima facie case with high probability of success having been registered as joint owner of Plot 693. If an order of injunction is not granted the substratum in the main suit might disappear. I therefore grant an order of injunction in terms of prayer 3 of the Notice of Motion dated 19/9/2012. Costs to abide the suit.

DATED and DELIVERED this 18th day of May, 2012.

R.P.V. WENDOH
JUDGE

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PRESENT:

Mr. Morintat for the plaintiff/applicant

Mrs Omari holding brief for Mr. Osoro for the defendant/respondent

Kennedy – Court Clerk