



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL SUIT NO.24 OF 2012

JACKSON MWANIKI NDUNGU.....PLAINTIFF/APPLICANT

VS

PETER ANJEYO VUHIAH.....DEFENDANT/RESPONDENT

RULING

The Plaintiff's case is that in 1984 he bought land parcel

E. Bukusu/S.Kanduyi/1596 and became the registered owner. The parcel bordered land parcel E. Bukusu/S. Kanduyi/8830 which belonged to one Cresters Kuloba Wambu. The two had a boundary dispute. Kuloba had erected a fence inside the Plaintiff's parcel saying that that was the boundary. He had also built a house inside the Plaintiff's land. The dispute was referred to the Land Registrar Bungoma and Mt. Elgon Districts who resolved it in favour of the Plaintiff. He found that there was a six metre road that formed the boundary between the two parcels. The Registrar rendered his decision on 14/7/06. The decision was adopted by the Chief Magistrate's Court at Bungoma. Crestus was aggrieved and appealed to the High Court in H. C. Civil Appeal no.43 of 2006 at Bungoma. The matter is pending.

In the meantime, the Plaintiff subdivided his parcel into the following parcels:13955, 13956, 13957, 13958, 13959, 13960, 13961, 13962, and 13963 each of which was registered in his name. He sold 13957, 13958, 13959 and 13962 to third parties. He was left with the rest. On or about 2.3.2012 the Defendant entered into parcels 13955, 13956, 13960 and 13961, erected a fence thereon and begun constructing a pit latrine. He came to this court on 8/3/2012 and obtained a temporary injunction in a motion under Order 40 rules 1,2,4(2) of the Civil Procedure Rules and sections 3, 3A and 63 (c) of the Civil Procedure Act.

When the application was served it elicited the following defence. The Defendant denied that he had entered into the Plaintiff's parcels. He stated that he is constructing on his parcels of land E. Bukusu/S.Kanduyi/14796, 14677 and 14676 each of which he has title to and which title he exhibited. He annexed an agreement to show that on 4/10/2010 he bought a plot measuring 50 x 100 ft to be parceled out of E. Bukusu/S.Kanduyi/14676. He stated that the three parcels that he owns were subdivisions from parcel 8830 which belonged to Cresters.

The Plaintiff swore a further affidavit in which he produced copies of register to show that parcels 14677, 14796 and 14676 are subdivisions of 8830 which belonged to Cresters. 14677 and 14796 were transferred to the Defendant. Each measured 0.05 Ha. Parcel 14676 was transferred to Asha Awino Kuloba who transferred the whole of it to the Defendant. It measures 0.045 Ha. It follows that when the Defendant claims that he bought 50 x 100 ft from Asha Awino Kuloba to be parceled out of 14676 that cannot be

true. From the measurement 14676 was less than 50 x 100 ft and there was, therefore, no way one would get 50 x 100 ft plot from it and be left with a balance. Further, if the Defendant bought part of 14676 which belonged to Asha Awino Kuloba the title that he got should be a subdivision of the parcel. He has to explain why he became the registered owner of 14676.

Thirdly, the Defendant exhibited a sale agreement to show he bought part of 14676 from Asha Awino Kuloba. Yet he did not produce agreements for 14796 and 14677. It is for these reasons that the Plaintiff doubts the titles that the Defendant is holding.

The Plaintiff argues that if the Defendant's parcels are out of 8830 that belonged to Cresters and he has parcels that came out of 1596, and these two original parcels are separated by a road, then the Defendant has no business coming onto his parcels. It means, he says, the Defendant does not know the physical locations of his parcels. He claims that, infact, 8830 is intact and has never been subdivided.

I have considered the affidavits filed by the parties and the annexures therein. After I listened to Mr. Onyando for the Plaintiff and Mr. Ombito for the Defendant, my preliminary view is that the Plaintiff is the registered owner of the parcels he says the Defendant has moved on and is constructing on. Registration gives him a *prima facie* absolute claim to the parcels. Such claim includes the right to own, possess, occupy and use the parcels to the exclusion of other parties. This is the right he seeks to protect by an interlocutory injunction. I find there is merit in the application as the Plaintiff has shown a *prima facie* case with a probability of success (**Giella v. Cassman Brown & Co. Ltd [1973] EA 358**).

If the Defendant is allowed to continue with occupation and construction, both of which are *prima facie* illegal acts, the Plaintiff's parcels will be wasted and damaged and no amount of damages may reasonably compensate the situation.

I allow the Plaintiff's application in terms of prayers 3 and 4 of the motion dated 8/3/2012.

Dated, signed and delivered at Bungoma this 9th day of May, 2012.

A. O. MUCHELULE

JUDGE