



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 241 of 2011

JARED OTIENO AOKO (*Suing as a Legal Representative of the estate of*

ELIZAPHAL AOKO GOMBO **PLAINTIFF**

-VERSUS-

ELISHA OKOTH OTIENO **DEFENDANT**

RULING

By notice of motion dated 1st November, 2011 the applicant sought orders that:-

1. *That this application be certified urgent and fit to be heard exparte in the first instance.*
2. *That pending the hearing and determination of this application, the defendant either by themselves, their servant, agent or otherwise be and are hereby restrained by an injunction from selling, alienating, subdividing, trespassing or from any other way interfering with the parcel of land known as Kamagambo/Kongudi/111.*
3. *That pending the hearing and determination of this suit, the defendant either by themselves, their servant, agents or otherwise be and are hereby restrained by an injunction from selling, alienating, subdividing, trespassing or from any other way interfering with the parcel of land known as Kamagambo/Kongudi/111.*
4. *That the cost of this application be provided for.*

The application is made by the plaintiff in his capacity as legal representative of the estate of one **Elizaphal Aoko Gombo** (deceased) whose estate the defendant is alleged to have alienated and is in the process of putting up buildings thereon. It is brought under Order 40 Rule 1, 2 and 3 **Civil Procedure Rules** and Section 1A, 1B, 3A and 63(e) of the **Civil Procedure Act**.

Simultaneously the applicant has filed a suit in which he seeks a permanent injunction restraining the defendant from trespassing, alienating and encroaching the parcel of land known as **Kamagambo/Kongudi/111**. He has stated in the plaint that the defendant illegally caused the suit land to be registered in his name to the exclusion of the lawful beneficiaries of the estate and without the consent of the Land Control Board. He has further alleged that the defendant has proceeded to erect structures and to sub-divide the suit land with the objective of transferring it to other parties.

In written submission, the applicant has urged the court to consider the criteria for the grant of injunctions as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd (1973) E. A 358**. He has

submitted that he has a prima facie case and that the balance of convenience tilts in his favour as he is the owner of the land. He has displayed a grant of letters of administration to support his contention of ownership of the land.

In his reply to the application, the respondent has denied being a trespasser on the suit land claiming instead that he is the legal owner having obtained title to the said parcel. He claims to have acquired the title following a valid court order. He has displayed both a decree issued by the Senior Resident Magistrate's court at Rongo and a certificate of official search showing under the proprietor's section that a title deed was issued to him on 28th October, 2011. He has also displayed the title deed. In written submissions the respondent has claimed that the applicant has approached the court with unclean hands and tried to disinherit the respondent by taking out letters of administration so as to succeed the estate of the deceased to the exclusion of the respondent.

Both the applicant and the respondent admit in their respective pleadings that the suit land originally belonged to their grandfather and that by extension they were entitled to a share thereof. Their respective submissions further demonstrate that either party has been trying to steal a watch on the other, with the applicant holding letters of administration and the respondent holding a title deed to the suit property. Prima facie therefore there is a case capable of trial. It is the trial that will determine the allegations of fraud in the acquisition of the title and respective entitlement of the parties. It is for this reason that I find merit in conserving the suit property.

I therefore allow the application in the following terms:-

- i. *That the parties preserve the status quo pending the hearing and determination of the suit.*
- ii. *There shall be no further sub-division, alienation, sale or charge over the suit parcel No. Kamagambo/Kongudi/111 pending hearing and determination of the suit.*
- iii. *Costs of this application will follow the outcome of the suit.*

Ruling dated, signed and delivered at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE