



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 188 of 2011

JOSEPH PIUS OGWORA PLAINTIFF

-VERSUS-

SOPHIA TURUNGI DEFENDANT

RULING

The plaintiff/applicant and the defendant/ respondent have a dispute over land parcel No. **Central Kitutu/Monyerero/1744**. The suit land was hived out of LR No. **Central Kitutu/Mmonyerero/127** previously owned by one **Francis Ogwora Maraga** (now deceased) who was the father of both the plaintiff and the respondent's deceased husband. It is stated from the pleadings on record that **Francis Ogwora Maraga** sub divided his land into four portions and gave the same to his sons, with the plaintiff coming into possession of LR No. **Central Kitutu/Monyerero/1744** wherein he is now the registered proprietor, having been issued with a Title Deed on 24th November 2010.

The plaintiff's case is that the respondent has disregarded his proprietary rights and trespassed on the suit land. He states that she has laid claim and began picking tea amongst other acts of trespass. He has consequently filed suit against the defendant seeking a declaration that he is the registered and lawful owner of the suit land, a permanent injunction against the defendant, general damages for trespass, and costs of the suit. Contemporaneously, he has filed the instant application under Order 40 Rules 1, 2, 3, 4 and 10 of the **Civil Procedure Rules**, section 1A, B, 3A and 63 (e) **Civil Procedure Act** and Sections 27 and 28 of the **Registered Land Act** amongst other enabling provisions of the law. The application seeks the following orders:-

- 1. The application herein be certified urgent and the same be heard exparte in the first instance.*
- 2. Pending the hearing and determination of the instant application, the honourable court be pleased to grant an interim order of injunction restraining the defendant/respondent either by herself, agents, servants and/or anyone claiming under the defendant/respondent, from entering upon, re-entering, trespassing onto, laying a claim to, building on, cultivating, plucking tea leaves, interfering with and/or in any other manner, whatsoever, dealing with the suit land, that is LR No. Central Kitutu/Monyerero/1744 and/or any portion thereof.*
- 3. The honourable court be pleased to grant an order of temporary injunction restraining the defendant/respondent either by herself, agents, servants and/or anyone claiming under the defendant/respondent from entering upon, re-entering, trespassing onto, laying a claim to, building on, cultivating, plucking tea leaves, interfering with and/or in any other manner, whatsoever, dealing with the suit land, that is LR No. Central Kitutu/Monyerero/1744 and/or any portion thereof, pending the*

hearing and determination of this suit.

4. Costs of this application be borne by the defendants/respondents.

5. Such further and/or other orders be made as the court may deem fit and expedient.

The respondent has filed both a replying affidavit opposing the application and a defence to the suit. Her case is that the applicant who is her brother-in-law fraudulently acquired title to the suit parcel and evicted her from the place she has known as her matrimonial home. In what she styled as 'verifying affidavit' which the court is minded to treat as a replying affidavit, she has detailed occasions of harassment by the plaintiff's family over the suit land including acts of violence visited upon her.

When the application came up for hearing before me on 16th November 2011 **Mr. Nyambati** advocate offered at the prompting of the court to act for the respondent on pro bono basis the court having observed her inability to present her case. Parties subsequently agreed to canvass the application by way of written submissions.

I have carefully considered the rival pleadings, submissions and the authorities on record. I have also considered the principles of injunction as set out in **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358**. For the applicant to succeed in getting an injunction he must demonstrate that he has a prima facie case with probability of success; will suffer irreparable injury which would be incapable of compensation by damages; and, that if the court is in doubt it will decide on a balance of convenience.

This is a dispute pitting the applicant who holds title against the respondent who resides on the land. Both parties are laying claim to a portion of the land which was originally family land which has been divided amongst the beneficiaries of their deceased father and father-in-law respectively. In the circumstances of this case, it cannot be said that the applicant has a clear cut case capable of success. Either party may at the end of the trial prove their claim over the suit land.

On the second principle regarding loss, I am of the view that such loss has not been proved. The respondent is alleged to have picked tea from the suit land. To my mind such loss is quantifiable and capable of compensation. Besides, the applicant is seeking an order for damages for trespass in the main suit.

In my considered view, the circumstances of this case militates against the grant of an injunction. The ends of justice will instead be served by facilitating an expeditious hearing of the suit. I direct that the suit be set down for hearing.

Consequently I dismiss the application with no order as to costs.

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