



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 94 of 2011

ANTONY NYANDIGA ORINA PLAINTIFF

-VERSUS-

GABRIEL OTIENO OGELO DEFENDANT

RULING

The plaintiff and the defendant have had a long standing dispute over land parcel no. **Kamagambo/Kanyauok/1295**, the suit land. It is the plaintiff's case that he bought the suit land from the defendant's father, one **Ogele Njwere** (now deceased). The sale agreement was entered into sometimes in 1984. In 2002, the plaintiff acquired title to the suit parcel. According to the plaintiff, he has been in possession of the suit land and enjoying quiet possession thereof until sometimes in March 2011 when the defendant entered upon the same and chased him away. The plaintiff has now brought the instant proceedings by filing suit against the defendant on 23rd May, 2011. He seeks to assert his proprietary rights over the suit land and has sought the court's declaratory order that he is the lawful owner of the suit parcel, a permanent injunction against the defendant, general damages for trespass and costs of the suit.

Contemporaneously with the filing of suit, the plaintiff (hereinafter application) has filed the instant application seeking a temporary order of injunction to restrain the defendant (hereinafter respondent) from claiming, entering, trespassing onto, cultivating or in any way dealing with the suit land pending the hearing and determination of the suit. In his supporting affidavit, the applicant has deposed that the suit parcel had been subject of claim before the Rongo Land Dispute Tribunal which made an award in his favour and that notwithstanding the respondent has continued with acts of trespass in total disregard to his rights as the registered owner.

The respondent has filed both a statement of defence to the suit and a replying affidavit to the instant application. His defence is that the suit land was the property of his deceased father's estate and that the applicant acquired the title fraudulently. He has sought to impugn the title by stating that the transfer documents were signed in 2002 and the title was issued the same year long after his father died in the year 1992.

The respondent has deposed in his replying affidavit that the dispute over the suit property has once been ventilated before the Rongo Land Disputes Tribunal and that the applicant filed an appeal with the Provincial Land Disputes Appeals Committee which appeal was still pending. He has further deposed that the applicant occupies and works on a portion of the suit property measuring 0.2 ha and that he the respondent occupies and works on the rest of the suit property.

The application came up for hearing before **Sitati J.** on 18th July, 2011. Parties agreed to canvass the same by way of written submissions which I have carefully read and considered.

The principles to be followed by a court in granting an injunction have succinctly been set out in **Giella –vs- Cassman Brown & Co. Ltd (1973) E. A 358**. The applicant must show that he has a prima facie case with probability of success, that he will suffer irreparable loss not capable of compensation; and if a court in doubt it will decide on a balance of convenience.

The applicant had demonstrated that he is the legally registered owner of the suit parcel having been so registered in 2002. The respondent however has no title but claims that the title held by the applicant was fraudulently obtained and that he (the respondent) is in occupation of the land, the same having been previously owned by his father. These are issues to be determined after the hearing of the case. What is apparent at this point is that either party may as well have a valid claim to the land. From the pleadings on record and the supporting documents tendered by both parties, it is apparent to me that the dispute has been long standing with each party trying to steal a march at the other at different times. For this reason alone the application cannot meet the test of a prima facie case. The standard as stated by the Court of Appeal in **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 138**, “*is higher than an arguable case*”.

It is the applicant’s case that the respondent has interfered with his proprietary rights over the suit parcel by invading it. The respondent on the other hand has both in his reply and submissions argued that he lives on the suit parcel. He has further conceded that a portion of the suit parcel rightly belongs to the applicant. I am inclined to believe the fact of occupation of the suit land by both parties. In the circumstances therefore I find and hold that the balance of convenience does not favour the grant of an injunction at this stage.

Rather I find that an order of status quo would best serve the interests of justice in this particular case and so I order. Further and in order to expeditiously determine the issue of ownership, I direct that the suit be set down for hearing on priority basis upon compliance with the rules by the parties. I make no order as to costs.

Ruling dated, signed and delivered at Kisii this 20th day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE