



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 303 of 2010

JOSHUA JAOKO OKETCH PLAINTIFF

-VERSUS-

ERUSTUS OPIYO OTIENO DEFENDANT

RULING

The applicant/plaintiff herein **Joshua Jaoko Oketch** filed originating summons on 15th November, 2010 seeking to enforce his right of entitlement to land parcel No. **Sakwa Kanyamgony/1063** which he claims to have accrued to him through adverse possession. He claims to have been in occupation of the land for a period of time exceeding 40 years. He further claims that land parcel No. **Sakwa/Kanyamgony/1063** arose out of sub division of parcel No. 538 which was his ancestral land registered in his late father's name, one **Kilion Mbogo Rabu**. The Originating Summons was served upon the defendant. There is no evidence on record that the defendant entered appearance. He however filed a replying affidavit dated 28th February, 2011. In the affidavit he denies that the plaintiff has any valid claim over the suit land. The land is currently registered in the names of the defendant one **Erastus Opiyo Otieno**.

Before directions could be taken on the Originating Summons, the defendant filed the present notice of motion on 12th April, 2011 seeking the following orders:-

- 1. This application be certified as urgent and it be heard exparte in the first instance.*
- 2. Pending the hearing and determination of this application, the plaintiff/respondent, his servants and/or agents or anybody claiming through him otherwise/howsoever be restrained from being/trespassing or remaining or entering upon all that piece of property situate in Awendo and known as LR No. North Sakwa/Kanyamgony/1063 ("the suit property").*
- 3. Pending the hearing and determination of this application, the respondent, his servants and/or agents or otherwise howsoever be restrained from further cultivating, damaging, wasting, destroying, the applicants suit property or in any other manner howsoever, degrading the suit property and/or interfering with the plaintiff's peaceful occupation thereon.*
- 4. Upon inter-partes hearing of this application this honourable court be pleased to confirm prayer 2 and 3 above pending the hearing and determination of this suit.*
- 5. The costs of this application be awarded to the applicant.*

In the Notice of Motion, he has set out several grounds foremost of which is that he is the sole registered owner of the suit property which he has occupied and utilized for over 30 years and that sometimes in February, 2011 the respondent forcefully entered the suit premises. In his supporting affidavit, he avers that the suit property **North Sakwa/Kanyamgony/1063** was registered in his name on 16th December, 1982 and he was issued with a title deed. He has displayed copies of both land certificate and green card in respect of **North Sakwa/Kanyamgony/1063** which show his registration. To demonstrate his prior control and use of the land, he has displayed an outgrowers cane agreement signed between one **Gadd Opiyo** (his son) and South Nyanza Sugar Company Ltd dated 2nd February, 2000.

The applicant avers that there has been a boundary dispute between the respondent and himself for which he sought intervention of the District Lands Registrar in 2006 which intervention was circumvented by the respondent when he filed a dispute with the Awendo Lands Dispute Tribunal (No. 38 of 2006). The dispute was determined in favour of the respondent and the award subsequently adopted by the Resident Magistrate's court at Rongo. Subsequently the applicant moved to court in Judicial Review No. 150 of 2006 and obtained judicial review orders in his favour quashing the decision of the Land Disputes Tribunal and the subsequent order of the court. The decision was rendered by **Musinga J.** on 17th September, 2010.

On 14th July, 2011 the respondent filed a replying affidavit together with the notice of preliminary objection. In the replying affidavit he avers that the applicant has never occupied, used and/or controlled the suit land namely **North Sakwa/Kanyamgony/1063** but only had the same registered in his name by fraudulent means. The land is said to be ancestral land belonging to the respondent's father one **Kilion Mbogo Rabu** (deceased).

The respondent has also issued notice of preliminary objection to the effect that:-

- 1. The application cannot stand since directions have not been taken as per order 37 Rule 16 and 17.*
- 2. The provisions of injunctions under Order 40 Rule 1 and 2 are clear that it is only the plaintiff in a suit who can injunct a property UNLESS the defendant has a counter claim which in this case no counter claim has been filed.*

The application first proceeded before **Makhandia J.** on 20th July, 2011. Directions on the notice of motion dated 14th July, 2011 were taken to the effect that the same be canvassed by way of written submissions. A subsequent mention date of 23rd September, 2011 was given. On 23rd September, 2011 parties confirmed before **Makhandia J.** that submissions had been filed. Further directions were taken to the effect that since the application had been canvassed through submissions a ruling on the same would be delivered by any other Judge other than **Makhandia J.** who was proceeding on transfer to Machakos.

I have considered the pleadings so far on record and the submissions by respective parties. On record is an Originating Summons by the plaintiff and a replying affidavit by the defendant on which directions have not been taken so as to pave way for the hearing and determination to the dispute in accordance with Order 37 rule 16 and 17. The respondent has raised preliminary objection to the effect that the application is not grounded on a counter-claim. Indeed there is no counter claim on record that would allow the applicant to pursue a temporary relief pending hearing and determination of the suit.

Further, my perusal of the rival affidavits and submissions shows that there has been a long standing dispute between the parties over the ownership of the suit land. The same can only be resolved on hearing the main suit. For the above reasons, the application dated 14th July, 2011 lacks merit and is dismissed with costs.

In the interests of justice, I order that the Chamber summons dated 21st October, 2010 be set down for directions and expeditious disposal on priority basis.

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