



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**Civil Case 264 of 2011**

**WILLIAM GECHORE OREMO** (*Suing as a legal administrator of the Estate of*  
**DISMAS OREMO MOGUSU (DECEASED)** ..... **PLAINTIFF/APPLICANT**

**-VERSUS-**

**PACIFICA NYANCHAMA NYABOGA**

**MAURICE MOSE NYANGAU** ..... **DEFENDANTS/RESPONDENTS**

**RULING**

The plaintiff has sued the defendant over land parcel **LR No. Bassi/Bosingi/1027**, hereinafter the suit parcel. His claim is that the defendants have entered and laid claim on the suit parcel without any right whatsoever. The suit land is said to be registered in the name of one **Dismas Oremo Mogusu** (now deceased) who was the plaintiff's father and brother of the 1<sup>st</sup> defendant. The plaintiff is now the administrator of the estate of the deceased and has brought the suit in that capacity. He seeks a declaration that the land belongs to his late father's estate and a permanent injunction against the defendants as well as damages for trespass.

Through a Notice of Motion dated 15<sup>th</sup> November 2011, the plaintiff hereinafter applicant has asked this court for temporary injunctive orders pending the hearing and determination of both the application and the suit.

The 1<sup>st</sup> defendant's claim on the other hand is that the suit property though registered in her late brother's name, rightly belongs to her and her son, the 2<sup>nd</sup> defendant/ respondent. She claims that sometimes in the period 1968 – 1970, she invited her brother onto the land to help her plough and later during the adjudication process agreed that the land be registered in his name under some secret pact aimed at duping her in-laws on the true ownership of the land. She states that the deal went sour when sometimes in 2002, her late brother insisted that the land belonged to him. She sued him seeking a declaration that he was holding the land in trust for her and her children as per their earlier secret pact. It is not clear what became of the suit.

The pleadings on record however show that they had continued to live and work on the land hence the present suit and application filed by the applicant for the following specific orders:

- 1. The application herein be certified urgent and the same be heard ex-parte 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 defendants/respondents either by themselves, agents,*

*servants and/or anyone claiming under the defendants/respondents from entering upon, re-entering, trespassing onto, laying a claim to, cultivating, plucking tea leaves, interfering with and/or in any other manner, whatsoever, dealing with the suit land, that is LR No. Bassi/Bosingi/1027 and/or receiving any tea payments and/or benefits whatsoever, arising from the tea bushes on the suit land.*

*3. The honourable court be pleased to grant an order of temporary injunction restraining the defendants/respondents either by themselves, agents, servants and/or anyone claiming under the defendants/respondents 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. Bassi/Bosingi/1027 and/or receiving any tea payments and/or benefits, whatsoever, arising from the tea bushes on the suit land, 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 application has by consent of the parties been canvassed through written submissions which were duly filed and exchanged. I have carefully considered them along with the authorities filed.

In determining this application, I am guided by the principles set out in **Giella –vs- Cassman Brown 1973 E.A 358**. These are:

- i. Whether the applicant has demonstrated a prima facie case;
- ii. Whether the applicant will suffer irreparable loss not capable of being compensated for damages; and
- iii. Where there is doubt to decide on a balance of convenience.

The applicant's case as outlined above is that the suit land forms part of the estate of his deceased father which has not been administered and that the actions of the respondents amount to intermeddling. The respondents on the other hand have launched their claim on the existence of a trust hitherto perceived to have existed between the 1<sup>st</sup> defendant and her deceased brother. Both parties seem to have an arguable case: for the applicant it is a legal claim based on the fact of his deceased father having been the registered owner of the suit land hence enjoying the protection of Section 27 and 28 of the **Registered Land Act**, Cap 300 Laws of Kenya. The issue of trust on which the respondents base their claim can only be investigated and determined upon hearing of the suit and counterclaim if any. It is an issue which cannot be determined at this stage.

In his supporting affidavit, the applicant has stated that the respondents began trespassing on the suit land on 5<sup>th</sup> October 2011 and began picking tea and cultivating the land. The respondents on the other hand have denied that they began entering the land as they have always lived and worked on it. From the rival submissions of the parties it appears that both the applicant and the respondents live and work on the land by virtue of their respective relationship with the deceased owner. These peculiar circumstances of this case militates against the grant of an injunction. In the premises therefore, and in the interests of justice, I grant an order of status quo pending the hearing and determination of the suit. I further order that the suit be set down for hearing on priority basis. Costs of this application will be in the suit.

Orders accordingly.

**Ruling dated, signed and delivered** at Kisii this 20<sup>th</sup> day of September, 2012.

**R. LAGAT-KORIR**  
**JUDGE**

**In the presence of:**

..... for applicant

..... for respondent

..... court clerk

**R. LAGAT-KORIR**  
**JUDGE**