



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE 36 OF 2011

JANE MORAA MIYOGO PLAINTIFF/APPLICANT

VERSUS

CHARLES MAINA ONCHARI DEFENDANT/RESPONDENT

RULING

1. The plaintiff filed the instant application under certificate of urgency dated 10th March 2011 seeking the following prayers against the defendant/respondent.

(a) 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 from entering into, cultivating and/or in any other manner dealing with suit land L.R. NORTH MUGIRANGO/BOISANGA/4774.

(b) The honourable court be pleased to grant an order of temporary injunction restraining the defendant/respondent by himself, agents, servants and or anyone claiming under the defendant/respondent from entering into, cultivating, interfering with and/or in any manner whatsoever dealing with the suit land North Mugirango/Boisanga/4774 pending hearing and determination of this suit.

(c) Costs of this application be borne by defendant.

(d) Such further and/or other orders that may be made by the court.

2. At first instance, the court issued an interim order of injunction restraining the defendant/respondent by himself, agents and servants and or anyone claiming under the defendant/respondent from entering trespassing, cultivating and or in any other manner dealing with land parcel No. North Mugirango/Boisanga/4774 for 14 days.

3. The defendant filed defence and counter claim dated 19th April 2012 by stating that if at all the plaintiff is registered owner of the suit land, then the said registration is unlawful and fraudulent and the same ought to be cancelled. The defendant also filed a Replying Affidavit sworn by himself on 26th April 2011 in opposition to the application. He depones therein that he bought the suit land in the year 2009 from one Zipporah Nyambega, wife of the late Zachary Nyambega Isaka who had in turn bought the suit land from one Joseph Ongeru Ondicho who was the registered owner of land parcel No. North Mugirango/Boisanga/2675. The deponent says that the suit land was originally part of LR NO. North Mugirango/Boisanga/2675. The deponent therefore claims that the registration of the suit land in the name of the applicant was fraudulent. Further that before Zachary Nyambega Isaka died, he had been given the original title deed to LR NO. North Mugirango/

Boisanga/2675 after consent of the Land Control Board had been given. Copies of the cancelled original title deed in the name of Charles Ongeri Ondicho and copy of consent dated 22nd May 2011 are annexed to the Replying Affidavit.

4. By consent of the parties, this application proceeded by way of written submissions. I have read through the respective submissions and considered the relevant authorities cited.
5. It is the plaintiff's case that on or about the 10th, 13th, 15th, and 16th February 2011, the defendant trespassed upon the suit land and while thereon planted nappier grass and picked tea leaves. To confirm ownership of land parcel number North Mugirango/Boisanga/4773 the plaintiff has annexed copies of official search and title deed.
6. The defendant on his part has annexed the title deed of parcel Number North Mugirango/Boisanga/2675, which he says had been surrendered to Zachary Nyambega Isaka by the original owner, one Joseph Ongeri Ondicho.
7. Upon file perusal, it seems the plaintiff and the defendant are not dealing with the same piece of land. The plaintiff has shown ownership *prima facie* of land Parcel No. North Mugirango/Boisanga/4774 while

the defendant has annexed documents of Land Parcel Number North Mugirango/Boisanga/2675.

8. Under **sections 27 and 28** of the Registered Land Act Chapter 300 (now repealed by Act No. 3 of 2012), the plaintiff has proved that she is an absolute owner of North Mugirango/Bisanga/4774. The constitution pursuant to **Article 40** also guarantees protection of the right to property.
9. From the above, it seems clear to me that the plaintiff/applicant has satisfied the conditions for the granting of an injunction as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**. The plaintiff has thus demonstrated that he has a prima facie case with a probability of success and further that unless the order sought is granted, he is likely to suffer irreparable loss and damage that cannot be adequately compensated by payment of damages. Land in this part of the world is scarce and if the suit land is taken over by the defendant before the dispute herein is resolved, the plaintiff may never be able to recover it.

10. IN the result, I allow the Notice of Motion dated 10th March 2011 and order that the defendant herein be and is hereby restrained by himself, his servants and/or anyone claiming under him from re-entering, trespassing, cultivating and/or in any other manner dealing with the suit land known as North Mugirango/Boisanga/4774 until the suit herein is heard and determined.

11. The plaintiff shall have the costs of this application.

12. It is so ordered.

Dated and delivered at Kisii this 12th day of September. 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Mbeche (absent) for Plaintiff/Applicant
Mr. Muchiri h/b for E. Asati for Defendant/Respondent
Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.