



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 70 of 2012

ODOYO OSODO.....PLAINTIFF

VERSUS

RAEL OBARA OJUOK.....1ST DEFENDANT

BENARD OPIYO OJUOK.....2ND DEFENDANT

MOSES OCHIENG MATINDE OJUOK.....3RD DEFENDANT

ELLY MATINDE OJUOK.....4TH DEFENDANT

DICKENCE ONYANGO MATINDE.....5TH DEFENANT

RULING

1. The Notice of Motion coming up before me is dated 23rd February, 2012. The plaintiff/Applicant seeks orders of temporary and mandatory injunctions against the defendants/Respondents in terms of prayers 3 and 4 of the application. The applicant also prays for costs of the application.
2. The application is premised on 11 grounds set out on the face thereof, the main ground being that the applicant is the sole and absolute registered owner of parcels of land known as LR. No. Rusinga/Waware/1108, 1113, 1302 and 1552 (hereinafter referred to as the suit lands) which ownership was acquired pursuant to full demarcation and adjudication process after purchase. The applicant avers that the respondents/defendants herein have without any basis and/or colour of right whatsoever, encroached onto parcel numbers 1113 and 1302 by fencing off a portion thereof and constructing a temporary structure thereon and have threatened to move into the two remaining parcels namely numbers 1108 and 1552. The applicant is apprehensive that if the respondents/defendants are not enjoined as prayed, he will suffer irreparable loss not capable of being compensated by way of damages so far as the same may permanently alter the physical character of the suit lands, by having permanent structures constructed thereon. The application is also based on the supporting affidavit sworn by Odooyo Osoro the plaintiff/applicant.
3. The application is opposed vide the grounds of opposition filed in court on 22nd March, 2012. These grounds are that:-
 1. *The application is without basis and no grounds are shown to warrant an interlocutory temporary injunction being granted.*

2. *The applicant, other than being registered as the proprietor of the suit lands had never entered into or occupied the same and therefore he shall not suffer any loss or damage that cannot be compensated for in monetary terms.*
 3. *The 3rd defendant has duly erected his homestead on the land and his stay thereon shall not cause irreparable damage to the suit land.*
 4. *The suit property is not in danger of being wasted, damaged or alienated by any party and for preventing alienation a restriction can be registered against the title pursuant to section 136 (1) of the Registered Land Act.*
 5. *The Title to the property is in the plaintiff's name and therefore cannot be alienated by the defendants.*
 6. *There is no buildings, plants or any property belonging to the plaintiff on the land and therefore no property of his is at risk of being damaged.*
 7. *The defendants are not threatening or intending to remove or dispose any property that may obstruct the execution of any decree that may be passed.*
4. Alongside the application, the applicant filed a plaint dated 23rd February, 2012 in which he prays for judgment against the Defendants in the following terms:-
- (a) *A declaration that the plaintiff is the sole and exclusive owner and/or proprietor of the suit lands herein otherwise known as LR NO. RUSINGA/WAWARE/1108, 1113, 1302 and 1552, by way of first registration.*
 - (b) *Permanent injunction restraining the Defendants herein, their agents, servants and/or servants, either jointly and/or severally from, trespassing and/or interfering with the suit land or the plaintiff's activities over the suit land over LR NO. RUSINGA/WAWARE/1108, 1113, 1302 and 1552, by way, in any manner whatsoever and/or howsoever.(sic)*
 - (c) *Mandatory injunctions do issue compelling the defendants to remove any fence and/or structures of whatsoever nature which has since been erected over the suit land.*
 - (d) *An order of eviction do issue against the Defendants and/or their agents or servant in the event that any of them has taken occupation of any portion of the suit land at the date of judgment in the suit herein.*
 - (e) *Costs of the suit and interests.*
 - (f) *Any such further and/or other relief as the Honourable court may deem fit and expedient so to grant.*
5. When the application came up for hearing, I heard submissions from counsel for both parties. Counsel for the applicant submitted that in view of the fact that the applicant is the registered sole proprietor of the suit lands, he is entitled to uninterrupted occupation and possession of the suit lands as provided under sections 28, 29 and 143 of The Registered Land Act (RLA) (now repealed). The applicant contends that he bought the suit lands from the late father of the respondents herein, and that in the circumstances, the respondents cannot purport to rescind the sale of the suit lands by their late father in the absence of letters of Administration authorizing them to stand in their father's shoes. Counsel for the applicant submitted that the 3rd respondent has purported to fence off land parcel No. 1113 and 1302 without the consent of the applicant.
6. In response to the applicant's submissions, counsel for the respondents contended that none of the

respondents has threatened or intends to carry out the acts complained of and further that the applicant has not demonstrated that the suit lands are likely to be wasted. Counsel also submitted that the 3rd respondent who is alleged to be a trespasser actually lives on the suit lands together with his family.

7. In reply, counsel for applicant submitted that the respondents' submissions on matters factual should be disregarded because the respondents did not file a Repeating Affidavit to bring out such issues.

8. The respondents filed their statement of Defence and counterclaim in which they deny the applicant's claims against them. They aver that the agreement by which the applicant purports to have bought the suit lands was fraudulent as the signature on the documents belongs to a person who was not a chief in the years between 1982 and 1991. The respondents also allege that the sizes of the various suit lands were not indicated in the agreements and that all in all the transactions leading to the registration of the applicant as proprietor of the suit lands were fraudulent.

9. The application before court being one seeking injunctive orders must satisfy the conditions for the granting of an injunction as set out in the case of **Giella –vs- Cassman Brown Co. Ltd [1973] EA 358**, these conditions are that:-

1. *The applicant must demonstrate to court that he has a prima facie case with a probability of success.*

2. *The applicant must also demonstrate that unless the orders sought are granted he will suffer such loss as cannot be compensated by way of damages and*

3. *If the court is in doubt it will decide the case on a balance of convenience.*

10. In the instant case, there is no doubt that the applicant is in possession of the Title deeds issued on 4th February, 2009 showing that he is registered as absolute proprietor of the suit lands. On the other hand, the Respondents contend that the said title deeds were fraudulently obtained and that the signature appearing on the Agreement forms purporting to be that of the area does not belong to the area chief. The respondents are also counter claiming a beneficial interest in the suit lands and other lands which they allege were owned by one OJUOK MATINDE before the adjudication.

11. In my considered view, the matters raised by both parties can only be resolved during the full hearing of this suit. It thus appears that this is not a clear case as between the applicant and the respondents. The balance of convenience would however tilt in favour of the applicant by dint of the provisions of **sections 28, 29 and 143** of the **RLA**. The applicant has shown copies of title deeds in his name for the suit lands. The respondents have not availed any document in support of their ownership claims.

12. In the circumstances, I find there is merit in the Notice of Motion dated 23rd February, 2012. Accordingly, I grant an order of temporary injunction restraining the defendants by themselves, agents, servants and/or anyone claiming under them (Defendants) from interfering, harassing evicting intimidating the plaintiff and his members of the family from the suit land and/or in any manner howsoever and/or whatsoever, interfering, alienating parcel numbers LR No. Rusinga/Waware/1108, 1113, 1302 and 1552 pending hearing and determination of this suit.

13. Prayer 4 of the application is declined pending taking of evidence during the hearing of the main suit. Costs of this application shall await the outcome of the main suit.

14. It is so ordered.

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

**RUTH NEKOYE SITATI
JUDGE**

In the presence of

Mr. O.M. Otieno (absent) for plaintiff/applicant

Mr. G.S. Okoth for 1st to 5th Defendants/Respondents

Mr. Bibu - Court clerk

**RUTH NEKOYE SITATI
JUDGE.**