



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL SUIT NO. 124 OF 2009

VINCENT KIPSONGOK ROTICH :::::::::::::::PLAINITFF

=VERSUS=

ORPHAH JELAGAT NGELECHEI ::::::::::::::: DEFENDANT

RULING

Vincent Kipsongok Rotich, (hereinafter “**the applicant**”) has sued **Orphah Jelagat Ngelechei** (hereinafter “**the respondent**”) seeking three (3) main orders namely, a declaration that the applicant is the legal owner of land parcel number **Nandi Komobo/4106** (hereinafter “**the suit land**”), an order of eviction of the respondent from the suit land and a permanent injunction restraining the respondent, among others, from occupying, staying or in any other way interfering with the suit land.

The respondent has delivered a defence denying that the applicant is entitled to any of the reliefs sought. He has also counter-claimed for specific performance of an agreement of sale dated 5/8/2002; an order compelling the applicant to surrender the original Title Deed over the suit land and a permanent injunction restraining the applicant among others from entering , remaining upon, working on or in any manner whatsoever dealing with a portion comprising 0.2 of an acre of the suit land.

The applicant has filed a reply and a defence to the said counterclaim. The respondent’s claim is denied. It would appear that the respondent has set in motion, Kapsabet Senior Resident Magistrate’s Court Land Disputes Tribunal Case No. 45 of 2007 in which by his Notice of Motion dated 9/2/2009, he seeks an order that the court does execute an application for consent to transfer and transfer of land forms in respect of the suit in satisfaction of a decree issued in that suit. That application triggered this application by the applicant by which he seeks the following main order:-

“ That there be a stay of proceedings and/or further proceedings in Kapsabet PMCC LDT No. 45 of 2007 pending the hearing and determination of Eldoret HCC No. 124 of 2009.”

The main reasons for the application as expressed in the Notice of Motion, is that unless the stay is allowed, the respondent will proceed with the Kapsabet case which event is likely to cause the applicant loss and damages. The application is supported by an affidavit sworn by the applicant in which it is deposed, *inter alia*, that he is the legal owner of the suit land and seeks various reliefs in this suit which suit even if it were to end in his favour the success would be rendered nugatory unless the Kapsabet case

is stayed.

The application is opposed and there is a replying affidavit sworn by the respondent. In the affidavit it is deponed, *inter alia*, that the respondent has been in occupation of 0.2 of an acre of the suit land since 2002 and has extensively developed the same; that the Land Disputes Tribunal had jurisdiction to entertain his claim and no appeal was preferred against its decision nor was any judicial review application commenced to quash its decision and that the present application is a mere delaying tactic and ought to be dismissed.

The application was canvassed before me on 1/12/2010, by Mr. **Barasa**, learned counsel for the applicant and **Mr. Kamau**, learned counsel for the respondent. Counsel reiterated the stand-points taken by their clients in their respective affidavits.

I have considered the application, the affidavits filed and the submissions made to me by counsel. Having done so, I take the following view of the matter. It is not necessary at this stage to determine with definitiveness, whether the Land Disputes Tribunal had jurisdiction to entertain the respondent's claim. What is plain is that unless the Kapsabet Land Disputes case is stayed, the applicant's case even if it were to eventually succeed would be rendered nugatory. On the other hand, if there is stay and the suit is lost, the respondent will still proceed with the said case. It is also, significant that the respondent has himself raised a counter-claim in this suit, which counter -claim seeks to achieve the same result as the Kapsabet case. He will therefore not be prejudiced by an order of stay. The applicant has therefore demonstrated sufficient cause for the court to order a stay of further proceedings of the Kapsabet case. He has also moved the court without undue delay given that his application was lodged before the Kapsabet application dated 9/7/2009 was heard. Finally, the subject matter of the two causes remains intact and will be available to whoever succeeds at the end of the day. If this were an application under order XLI, Rule 4 of the Civil Procedure Rules, the subject matter would constitute sufficient security as may ultimately be binding on the applicant.

If substantial loss had to be demonstrated, I am persuaded that the applicant would have succeeded in so demonstrating.

In the end, the applicant's application dated 16/11/2010 and filed on 17/11/2010 is allowed as prayed in terms of paragraph 3 thereof. Costs shall be in the cause. I give each party liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF JANUARY 2011.

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F. AZANGALALA

JUDGE

Read in the presence of:-

1. **Mr. Mwinamo** Advocate for Mr. Chumo & Co. Advocate for the Defendant
2. **Mr. Kalya**, holding brief for M/s Onyinkwa & Co. Advocate for the applicant.

F. AZANGALALA

JUDGE

18/1/2011