NO. 312
REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 82 OF 2010

SAMWEL OKACH ANDINGLI……PLAINTIFF

-VERSUS-
YUNIA AOKO MIYOGI……...DEFENDANT

RULING

The plaintiff was initially the registered proprietor of all that piece or parcel of land known as **KAMAGAMBO/KABUORO/503**. The same was subsequently subdivided into two (2) portions giving rise to **LR.NO. KAMAGAMBO/KABUORO/1485 & 1486**, respectively, hereinafter referred to as ***"the suit premises".***

The subdivision notwithstanding, the plaintiff still retained the suit premises in his name. However, in July, 2009, the Defendant lodged a complaint with Rongo Land Disputes Tribunal, claiming ownership and or title over a portion measuring 2 acres of the said suit premises on account of the same having been sold to the Defendant's husband, now deceased. Pursuant to the proceedings filed as aforesaid, the tribunal rendered its verdict whose net effect was that the Defendant was entitled to a portion of 2 acres out of the suit premises. That verdict was subsequently lodged by the defendant, in the Senior Resident magistrate's court at Rongo for adoption. The same was duly adopted on the 23rd day of November, 2009. Apparently, the plaintiff was not happy with the turn of events. Accordingly, he mounted the instant suit, claiming various declarations and injunction orders to boot. Whilst the suit was pending hearing, the defendant threatened to take possession or occupy a portion of the suit premises measuring 2 acres on the basis of the court decree aforesaid. She also embarked on cutting down trees on the 2 acres and fencing the same. As a result of the actions of the Defendant, it became necessary for the plaintiff to file the instant application seeking orders of Temporary injunction against the Defendant . That application is the subject of this ruling. I have deciphered this background information to the dispute from the plaint, the application, the supporting affidavit and the annextures thereto filed by the plaintiff.

It would appear that the respondent on being served with the suit papers entered appearance and filed a defence. However, she did not file any papers in opposition to the application.

When the application came up for interparties hearing before me on 21st October, 2010, **Mr. Oguttu** and **Mr. Owuor**, learned counsel for the plaintiff and defendant respectively agreed to canvass the same by way of written submissions. The said written submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

It requires no gain saying that the principles upon which a court grants a temporary injunction are well settled. Indeed they were so settled thirty seven (37) plus years ago in the celebrated case of **Giella .v. Cassman Brown &Co. Ltd (1973) E.A.353.**

Those principles are**:**

(i) To grant or not to grant an injunction is an exercise in judicial discretion.

(ii) An applicant must show a prima facie case with a probability of success.

(iii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(iv) When the court is in doubt, it will decide the application on the balance of convenience.

These principles have withstood the test of time. Attempts to add to or subtract from them have been met with recrimination and abhorrence. When considering such an application though, the court must be wary as not to make definitive findings at the interlocutory stage on issues which are best left for the full trial.

The case for the plaintiff is that he is the registered proprietor of the suit premises, the decision of the tribunal and subsequent adoption of the said decision as a judgment and decree of the court notwithstanding. Afterall the decision of the tribunal was null and void for want of and or excess jurisdiction. Despite the foregoing, the defendant had embarked on asserting her claim to the 2 acres on the basis of the impugned tribunal proceedings, the award and the resultant decree. That the threatened actions are in violation of his absolute and exclusive rights to possess and occupy the suit premises. On the basis of the foregoing he is of the view that he has established a prima facie case with overwhelming chances of success. Further in so far as the threatened actions of the defendant shall deprive him of a substantial portion of the suit premises, which forms his only source of livelihood, he was bound to suffer irreparable loss and damage. Finally, as the registered proprietor of the suit premises, the balance of convenience tilted in his favour.

On the other hand, the defendant from his skeletal submissions takes the position that she has been in occupation and possession of the suit premises since 1980. That portion was bought by her late husband in 1974. These facts are infact confirmed by the pleadings of the plaintiff. She sued the plaintiff in the land disputes tribunal. They were heard and an award made. That award was adopted as a judgment and decree of the court. No appeal was filed against the said decision nor has any other action been taken to set aside the said decree. In a nutshell, what the defendant is saying is that her activities are sanctioned by law. She has a decree giving her 2 acres out of the suit premises. That decree has not been recalled, varied, set aside or stayed. Thus her actions to enforce it cannot impugned. The defendant's further submission is that the Senior Resident Magistrate's Court at Rongo and Land Disputes Tribunal whose decisions are sought to be impugned in this suit have not been enjoined in these proceedings.

It is common ground that this suit in the main seeks a declaration that the decision of Rongo Land Disputes Tribunal and the Senior Resident Magistrate's Court at Rongo dated 13th August, 2009 and 23rd November, 2009 respectively, ordering amalgamation and or merging of the suit premises and transfer of a portion measuring 2 acres thereof to the defendant, on the basis that it was illegal, null and void. As it is therefore and in the meantime, there is a valid court decree in favour of the defendant. That decree was issued by a court of competent jurisdiction. It has not been recalled, vacated, varied or set aside. Until otherwise, it remains a valid court decree capable of execution. The plaintiff has sought to have the same declared illegal, null and void. Until such order is issued, that decree shall continue to be valid and alive. No doubt, the plaintiff is aware that he had a remedy under the Land Dispute Tribunals Act in the event that he was unhappy with the tribunal's award. The proceedings of the tribunal shows that the plaintiff was present throughout and did participate in the proceedings contrary to his submissions. Again the resultant decree issued by Rongo court shows that the award was read to the parties on 15th October, 2009 in the Resident magistrate's court. That goes to show that the plaintiff was present when the award was read out to the parties by court contrary to his submissions that the proceedings and decisions of both Rongo Land Disputes Tribunal and Senior Resident Magistrate's Court at Rongo were held secretly and contrary to the rules of Natural justice. Clearly this is a false and misleading statement. An injunction being an equitable and discretionary remedy, a party seeking it must tell the truth and be candid with the court. A litigant such as the plaintiff who deliberately misleads the court must of necessity oust himself from the exercise of the court's discretion in his favour.

As I have already stated, the plaintiff had remedies in the Land Disputes Tribunal Act, if he felt done in by the award. He could have appealed within thirty days of the decision to the appeals committee constituted for the province in which the suit premises, the subject matter of the dispute are situated. Indeed the tribunal did advise him thus ***"…..any party to this dispute under section 3 who is aggrieved by the decision of the dispute has right of appeal to land dispute committee at the Provincial Headquarters Nyanza Province Kisumu, but within thirty days (30) from the day award is read 13/8/2009….."*.** The plaintiff did not take up the free and unsolicited advice. Still, it was open to the plaintiff to take out judicial Review Proceedings to quash the proceedings. Again he never took this route. Reason, Judicial Review Proceedings, more particularly, the order of Certiorari is hedged round by limitation and hence same was not available to the plaintiff after the lapse of six(6) months. In other words the plaintiff did not pursue Judicial Review Proceedings because of time warp. The plaintiff having failed to pursue remedies which were readily available to him as aforesaid, can he say that this suit as filed is prima facie and has overwhelming chances of success? I have my own doubts.

The defendant's occupation of the suit premises is sanctioned by law for now. If the plaintiff succeeds in his suit, well and good. He will have the 2 acres back. If he fails, then the court will be confirming that the defendant is entitled to the 2 acres. In any event the defendant has been in occupation and possession of two acres of the suit premises since the death of her husband in 1978. This fact is not disputed by the plaintiff. The defendant has her homestead thereon. In those circumstances I do not see what irreparable injury will be caused to the plaintiff if the injunction is not granted. The situation on the ground is that the defendant only occupies 2 acres of the suit premises whereas the reminder is occupied by the plaintiff. Let that situation prevail until the hearing and final determination of this suit. In other words, the balance of convenience tilts in favour of the defendant.

The application is unmerited. It is dismissed with costs to the defendant.

Ruling dated, **signed** and **delivered** at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA

JUDGE