REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.164 OF 2010

LIVINGSTONE K. ROTICH…..……APPLICANT/PLAINTIFF

VERSUS

ROSEMARY RONO………...…RESPONDENT/DEFENDANT

RULING

The cause of action in this matter is summarized in two paragraphs of the plaint.

In paragraph 3, the applicant has averred that:

"3. At all materials (sic) times to this suit, the plaintiff was and is still the registered owner of all that parcel of land known at NAKURU/OLENGURUONE/KIPTAGICH/1051.

4. During early in (sic) the month of June, 2010, the defendant without any colour of right and/or justification trespassed into the plaintiff's parcel of land and started cultivating the same and also staying there."

(Emphasis added)

It is the applicant's contention that he is the registered owner of NAKURU/OLENGURUONE/KIPTAGICH/1051(the suit property) and that the respondent has, without any right invaded it and is occupying it. The applicant is therefore seeking in the instant application that the respondent be restrained by an order of injunction from claiming, entering, digging, cultivating and planting crops on the suit property pending *interpartes* hearing of this suit.

Once again the applicant in his supporting and further affidavits at paragraph 2 has described himself as *"the legal owner"* of the suit property having purchased it from Prof. Francis D. Juma in January, 1999.

In reply, the respondent has deposed that she is in actual possession of the suit property having also purchased the same from the original owner Prof. Francis D. Juma on 9th June, 1999; that she has been residing on the suit property after putting up a house and has all along been cultivating it.

In support of the respondent's case, Prof. Francis D. Juma has sworn an affidavit in which he has contended that he is the present registered owner of the suit property; that he sold it to the respondent in January, 1999; that he has never sold the suit property to the applicant and that the sale agreement

annexed to the supporting affidavit is a forgery as the signature against his (Prof. Juma's) name is not his; that it follows from this that the title deed exhibited by the applicant is a forgery.

I have considered these rival arguments. It is not in doubt that the respondent is in occupation of the suit property after she purchased it from Prof. Juma. Two title deeds have been exhibited; one in the name of Prof. Juma, issued on 27th October, 1993 and the second one in the name of the applicant dated 18th June, 1999 as the 4th entry. No search was done to establish the ownership claim since first registration.

At this stage, I am only required to inquire whether or not what has been presented by the applicant constitutes *prima facie* case and also to bear in mind that a temporary injunction does not normally issue unless the applicant may suffer loss which is not capable of compensation. Finally, in case the court is in doubt, the matter must be decided on a balance of convenience. See **Giella** V. **Cassman Brown & Co. Ltd**. (19723) EA 358.

Prima facie, the applicant has a title that has not been shown, but is only alleged, to be a forgery. The applicant contends that he purchased the suit property in January, 1999 and five months later in June, 1999, the title was issued. Once again, there are only allegations that the sale agreement is a forgery. That agreement was executed before an advocate, P. Rodi Oyoo advocate and witnessed by two persons whose identification card numbers are disclosed. It is Prof. Juma who has alleged that the document is a forgery. It was incumbent upon him, even at this stage, to prove *prima facie* that assertion. In the same month and year, when the applicant's title was issued, Prof. Juma is alleged to have sold the same parcel of land to the respondent. There is no evidence in writing to signify the transaction contrary to **section 3(1)** of the **Law of Contract Act.**

Secondly, if indeed the sale was in June, 1999, even with the explanation that Prof. Juma, at some stage after signing the consent, fell ill, there is no justification why it took eleven (11) years to have the suit property transferred.

Finally, it is apparent from the pleadings and annextures that the suit property was subject to the Land Control Act. In terms of **section 6(1)** of that **Act** any sale or transfer or other disposal of or dealing with any agricultural land is void for all purposes unless the land control board for the area involved has given its consent in respect of that transaction.

It follows from all the foregoing reasons that the applicant has demonstrated *prima facie* case with a probability of success. In the result there will be a temporary injunction in terms of paragraph 3 of the chamber summons.

For the avoidance of doubt, prayer 3 is couched in a language which if granted would amount to issuing a mandatory injunction. That prayer, in part seeks that the respondent be restrained from, among other things "*entering……………………… or in any other manner trespassing on*" the suit land, yet there is evidence that she is in occupation. Although it is now settled that a mandatory injunction can be granted both at an interlocutory stage and at the trial, it will only be granted at interlocutory in very clear cases. There are contested issues which can only be resolved at the hearing of the suit. For now the order to be extracted shall be in terms of prayer 3 but excluding the words *"entering"* and *"in any other manner trespassing"*

Costs of the application to the applicant.

Dated, Delivered and Signed at Nakuru this 24th day of February, 2011.

W. OUKO
JUDGE