



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CIVIL CASE NO. 7 OF 2011**

ANTHONY KIPKOSKE KIMETO ..... APPLICANT

VERSUS

MICHAEL CHESUSWA .....1<sup>ST</sup> RESPONDENT

SANG MARGARET MAKOMA .....2<sup>ND</sup> RESPONDENT

**RULING**

Pending the determination of the suit herein, **Anthony Kipkoske Kimeto**, the Plaintiff, has sought an order of injunction to restrain **Messrs Michael Chesuswa** and **Sang Margaret Makoma**, the Defendants, from selling and/or interfering with the subject matter of the suit, to wit, Land Parcel No. **L.R. Narok/Transmara/Ololmasani/9**.

The Defendants who were served with the application did not file either grounds of opposition or a replying affidavit. The application therefore proceeded to hearing unopposed.

In the Plaint filed by the Plaintiff, the latter has averred that the suit land was his property until the 1<sup>st</sup> Defendant caused it to be registered in his (first Defendant's name) as proprietor and that the latter procured the registration through fraud. The Plaintiff seeks orders for a declaration that the suit land **No. Narok/Transmara/Ololmasani/9** is his property and an order that the registration of the name of the 2<sup>nd</sup> Defendant as proprietor should be cancelled and the name of the Plaintiff as Proprietor be restored.

The 2<sup>nd</sup> Defendant entered appearance to the suit on 18<sup>th</sup> February, 2011 when a Memorandum of Appearance was filed by **M/S Oboso & Company** on his behalf. However, no defence has hitherto been filed.

The 1<sup>st</sup> Defendant has neither appeared nor filed defence.

After adjudication, the land was on first registration registered in the name of the 1<sup>st</sup> Defendant but the Plaintiff avers that he protested and lodged appeal against that decision. He also lodged a restriction against the title. The land is registered under the **Registered Land Act, Chapter 300** of the laws of Kenya.

It is averred by the Applicant that while his appeal was pending and restriction was in place, the 1<sup>st</sup> Defendant transferred the land to the 2<sup>nd</sup> Defendant after causing the restriction to be removed. The Applicant has also averred that although he has been in occupation of the suit land since 1950s, the 2<sup>nd</sup>

Defendant has now moved onto the land and is now in the process of erecting a permanent structure thereon thereby denying the Plaintiff the use and occupation of the said land. As a result of the 2<sup>nd</sup> Defendant's occupation of the land, tension between the latter and Plaintiff's family has heightened resulting in the Plaintiff's children being charged with forcible detainer, a misdemeanour, contrary to **section 91** of the **Penal Code** and assault causing actual bodily harm contrary to **section 251** of the **Penal Code**.

The relief the Plaintiff now seeks is an equitable one. It is discretionary. Injunctions are issued to protect legal or equitable rights. Interlocutory injunctions are granted to "*protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial...*" See the speech of **Lord Diplock in American Cyanamid Co. V. Ethicon Ltd (1975) AC 396 at pg 406 and 408**.

To succeed in interlocutory injunction, an Applicant must show that he has a prima facie case with chances of success, and that he will suffer irreparable loss unless it is granted. He must also show that damages will not be an adequate compensation. In case of doubt, it is said that the court must decide on the balance of convenience (**See Spry V.P. in Giella V. Cassman Brown & Co. Ltd (1973) EA 358 at page 360**).

The Plaintiff has made full disclosure in this application, as he should. He has not however established that he has any legal or equitable right in the suit land. The adjudicating team seems to have ignored his claim and instead adjudicated the 1<sup>st</sup> Defendant as the person entitled to the land on first registration. The appeal he lodged against the adjudication team seems to have been overtaken by events as the title to the 1<sup>st</sup> Defendant has been passed to a third party, namely the 2<sup>nd</sup> Defendant.

Under **Section 27(a)** of the **Registered Land Act**, "*the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto*". But under **Section 28** of the said Act, the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court "shall not be liable to be defeated except as provided in the Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to ... leases and charges etc and to liabilities rights and interest declared to be overriding interests under **Section 30** of the **Registered Land Act** and nothing shall relieve a proprietor from any duty or obligation to which he is subject as a trustee.

The Plaintiff does not plead existence of trust. He alleges fraud by the 1<sup>st</sup> Defendant who has passed the title to the 2<sup>nd</sup> Defendant. The Plaintiff does not allege overriding interest either within the meaning of **Section 30** of the **Registered Land Act (RLA)**. In the circumstances of this case, there is no power on the part of the court for cancellation of the title to the land which after the 1<sup>st</sup> registration was transferred to a third party.

After a careful consideration of the application, it is my finding that the order sought cannot be granted. The law is against the Applicant. The application must fail. It is dismissed with no order as to costs.

**DATED at KERICHO this 13<sup>th</sup> day of April, 2011**

**G.B.M. KARIUKI, SC**  
**RESIDENT JUDGE**

**COUNSEL APPEARING**

Mr. E.M. Orina Advocate for the Applicant/Plaintiff

No appearance by 1<sup>st</sup> Respondent/Defendant

No appearance by the 2<sup>nd</sup> Respondent/Defendant

Mr. Koech - Court Clerk

