



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CIVIL SUIT NO. 92 OF 2010.**

**KIMAIYO RONO.....PLAINTIFF.**

**VERSUS**

**SUSAN JELAGAT.....DEFENDANT.**

**R U L I N G.**

1. The plaintiff is the registered proprietor of parcel No. **CHEPSIRO/KIBUSWA BLOCK 2/KIPTENDEN 452**. He was issued with the title on 6<sup>th</sup> February, 2008. He filed this suit against the defendant who is his daughter in law seeking for an order of eviction of the defendant from the suit premises. He also sought for a temporary order of injunction restraining the defendant, her agents or servants from ploughing, developing or in any way dealing with the suit land pending the determination of this suit. This application is supported by the grounds that the plaintiff is the registered owner of the suit land. The defendant is forcefully using the plaintiff's land without permission.

2. According to the affidavit in support of the application, the plaintiff invited the defendant to stay on his land while looking for alternative premises. The defendant is now forcefully trying to take 6 acres of plaintiff's land. The defendant has even gone to the Land Disputes Tribunal to stake her claim over the plaintiff's land. The tribunal had purported to give the plaintiff 4.8 acres of the plaintiff's land. However, that decision of the tribunal was quashed by the ruling of this court in Misc. Civil Application No. 64 of 2008. **Ms. Arunga**, learned counsel for the plaintiff submitted that the plaintiff cannot forcefully demand land from the plaintiff through hostility. She urged the court to grant the order of injunction as the plaintiff has established a prima facie case with a probability of success.

3. This application was opposed; The defendant relied on the replying affidavit sworn on 10<sup>th</sup> March, 2011. It is contended that the defendant is the widow of the late Daniel Rono, a son of the plaintiff as evidenced by a marriage certificate of the marriage between the defendant and the plaintiff's late son. The defendant has three children with the late Daniel Rono who are also the grandchildren of the plaintiff. The defendant's husband died in 1995 and sometimes in 2003, the plaintiff subdivided the suit land and the defendant was given 4.8 acres. The same way with the other sons of the plaintiff. In the year 2004, the plaintiff changed his mind and started harassing the defendant which prompted the defendant to file a dispute before the Cherangani Land Disputes Tribunal. The tribunal determined that the defendant should get 4.8 acres but that decision was quashed by the High court due to technical irregularities.

4. In further argument to support the defendant's position, Mr. Wanjala, learned counsel for the defendant submitted that although the suit land is registered in the name of the plaintiff he holds it in trust of the defendant's three children. This being an ancestral land. Moreover, the defendant with her three children reside on the suit land if they are enjoined from occupying this land, they will lose their livelihood and suffer irreparable damages. Counsel urged the court to consider the proportionality and the wider interest of justice and trying to grant the injunction as the balance of convenience tilts in favour of the defendant.

5. This application principally seeks for an order of injunction. The elements to guide the court on whether to grant the injunction are well established in a long line of authorities by the Court of Appeal. The applicant has to establish a prima facie case with a probability of success. Secondly, the court has to establish whether the applicant will suffer irreparable harm which cannot be compensated for in damages. Lastly, if in doubt, the court is supposed to determine the matter on a balance of probability. The Court of Appeal has provided guidance on what constitutes a prima facie case in the case of;

**MRAO LTD. VS. FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS [2003] KLR 125** in that case the Court of Appeal explained what constitutes a prima facie case in the following words :-

***“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

6. I have taken into consideration the rival arguments for and against this application. It is not in dispute that the defendant is the daughter in law of the plaintiff. The defendant has also been in occupation of the suit land together with her children and according to the replying affidavit that is where she derives her livelihood with her three children since she lost her husband. It is also on record that there has been a long standing dispute which was taken before the Land disputes Tribunal, the tribunal's order was set aside by this court because the tribunal acted in excess of its jurisdiction. At this interlocutory stage, I find there is a dispute regarding the defendant's claim that the plaintiff holds the title to the suit premises in trust of her children.

7. At this stage this claim which is perhaps based on customary trust over ancestral land cannot be determined. What is clear to me is that the defendant is in occupation of the suit land with the three children who are the grandchildren of the plaintiff. Although the plaintiff is the registered proprietor there are matters which can only be determined at the trial. For instance the plaintiff claims to be the absolute registered proprietor of the suit land a perusal of the title shows that it was issued to the plaintiff on 6<sup>th</sup> February, 2008 when the defendant was already in occupation. According to the provisions of section 30 of the Registered Land Act. Under the provisions of section 30 of the Registered Land Act (Cap 300), it makes provisions of what constitutes an overriding interest regarding a registered title as follows:-

***“Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same without their being noted on the register –***

***(a) ...***

***(g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where an enquiry is made of such person and the rights are not disclosed.”***

8. It is for the above reasons that I find the balance of convenience tilt in favour of the maintaining the status quo so that the issues raised by the defendant in a replying affidavit can be determined by way of viva voce evidence. It will not serve the interest of justice to restrain the defendant who has been in occupation of the suit land deriving her benefits as the widow of the plaintiff's son. Accordingly, I disallow the application for injunction and direct that the parties should comply with the provisions of the Civil Procedure Rules and prepare the suit for hearing. Costs of this application shall be in the cause.

**Ruling read and signed this 22<sup>nd</sup> day of July, 2011.**

**MARTHA KOOME.**

**JUDGE.**