



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII**

Civil Suit 27 of 2009

OMBUHI ONYANGO.....PLAINTIFF

VERSUS

KUNGA MURUMBASIDEFENDANT

RULING

The plaintiff is the sole registered proprietor of a parcel of land known as South Mugirango/Boikanga/618, hereinafter referred to as **“the suit land.”** The register in respect of the suit land was opened on 11th November 1970 and the applicant was issued with the land certificate in respect of the suit land on 27th February 1979. It is a first registration. On 16th February 2009 he filed a suit against the defendant, stating that the defendant had unlawfully and without any justification invaded a part of the suit land and annexed about 2 acres of the same. He had also started construction of a semi permanent house thereon. He sought a permanent injunction to restrain the defendant, his agents and/or servants from annexing, occupying, developing or cultivating any part of the suit land. He also sought eviction orders against the defendant.

Pending hearing and determination of the suit, the plaintiff filed an application and sought the following orders:

“(a) ...

(b) That pending the hearing and determination of this application, a temporary order of injunction do issue restraining the defendant/respondent, his agents and/or servants from whatsoever interfering with any part of the plaintiff’s parcel No. South Mugirango/Boikanga/618.

(c) That pending the final determination of this suit a mandatory injunction do issue against the respondent, his agents or servants directing them to vacate from the applicant’s parcel No. South Mugirango/Boikanga/618.

(d) That pending the final determination of this suit the respondent/defendant, his agents and/or servants be restrained by temporary injunction from whatsoever interfering with the plaintiff’s quiet use, occupation and enjoyment of his parcel No. South Mugirango/Boikanga/618 and more particularly from constructing any illegal structure on the same.

(e) That costs of this application be provided for.”

In his affidavit in support of the application the plaintiff stated that between the suit land and the defendant’s parcel of land known as **South Mugirango/Boikanga/608**, there are three parcels of land belonging to three different people. The plaintiff could not understand why

the defendant is encroaching onto the suit land.

The defendant filed a replying affidavit and admitted that he is the registered proprietor of the parcel of land known as South Mugirango/Boikanga/608. The defendant added that prior to filing of this suit there was another suit, **Misc. Applic. No. 49 of 2006** in the Chief Magistrate's court at Kisii that related to the suit land and which was heard and determined, having been referred to the Gucha Land Disputes Tribunal. The said tribunal gave its award on 22nd February 2006. Subsequently the decision of the tribunal was filed in court and was adopted a judgment of the court. The defendant stated that in the aforesaid proceedings the plaintiff was a party and therefore the present proceedings are *res judicata*.

On 19th November 2009, this court delivered a ruling following a preliminary objection raised by the defendant to the effect that the suit is *res judicata*. The court, having considered the aforesaid matters stated, *inter alia*:

“The parties to the dispute that was before the tribunal were Mokomo Motania, Nyandoro Onyango and Sikia Onyiego as the claimants and Kunga Morumbasi, Akuma Momanyi and Ombati Oire as the objectors. The plaintiff was therefore not a party to the said dispute.”

The court held that the suit is not *res judicata* and dismissed the preliminary objection. No appeal was preferred against the said ruling. That being the case, no new issue has arisen to warrant any revisit to the arguments that were canvassed during the hearing of the preliminary objection.

Mr. Sagwe for the defendant, submitted that the plaintiff had not established that the defendant had trespassed on the suit land. He stated that the plaintiff ought to have filed a surveyor's report or photographs to demonstrate that the defendant had actually encroached onto his land. He urged the court to dismiss the plaintiff's claim and more so because the plaintiff had stated that the suit land and the defendant's land do not share a common boundary.

The plaintiff stated that the defendant's acts of trespass commenced in February 2009 whereas in his submissions, the defendant stated that since 1970 the parties have been living in harmony. I note that the two parcels of land do not have a common boundary and so this is not a boundary dispute, unless one of the parties has settled on the wrong parcel of land. It is therefore important to hear the case before I make any findings that may affect the defendant's occupation.

This is moreso considering that one of the prayers sought by the plaintiff in his application is a mandatory injunction to compel the defendant to vacate the portion of the suit land that he is said to have unlawfully occupied. The court is being urged to grant that order pending hearing and determination of the suit.

However, the reliefs sought in the plaint are a permanent injunction to restrain the defendant from trespassing onto the suit land and eviction therefrom. If the mandatory injunction is granted at this stage then the entire suit will have been determined.

It is trite law that a mandatory injunction at an interlocutory stage is rarely granted; only when the plaintiff's case is clear and incontrovertible. See **MALINDI AIR SERVICES & ANOTHER –VS- HALIMA ABDINOOR HASSAN**, Civil Application No. 202 of 1998.

As regards prayer (d), apart from the plaintiff's depositions in his affidavit, there is no other evidence to support his contention that the defendant has indeed encroached into the suit land. A surveyor's report or photographs would have been necessary because the defendant has stated that he is living on his land.

In the circumstances, I decline to grant the prayers as sought by the plaintiff and dismiss his application. The costs of the application shall abide the outcome of the suit.

Having reached the conclusion as herein above, I am willing to hear this suit on priority basis and counsel may take hearing dates right away.

DATED, SIGNED AND DELIVERED AT KISII THIS 12TH DAY OF MARCH, 2010.

D. MUSINGA
JUDGE.
12/3/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Onyancha for the Plaintiff

Mr. Sagwe for the Defendant

Court: Ruling delivered in open court on 12th March, 2010.

D. MUSINGA
JUDGE.