



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

**AT KISII**

**Civil Case 184 of 2009**

**WILSON KERAGITA MORURI (suing as personal representative of the estate of**

**MORURI ONGETA-DECEASED).....PLAINTIFF/APPLICANT**

**VERSUS**

**ZAKAYO MAIKO MOGAKA.....DEFENDANT/RESPONDENT**

**RULING**

Before court was an application dated 22<sup>nd</sup> September, 2009 brought under order XXXIX rules 1, 2, 2A of the civil procedure rules and sections 3, 3A and 63(c),(E) of the civil procedure Act and other enabling provisions of the Law. Wilson Keragita Moruri, the applicant in the said application sought from Zakayo Maiko Mogaka, the respondent, in the main two orders:

“ *Injunction to restrain the respondent by his agents, servants and or employees from transferring, alienating, selling, demarcating or interfering in any manner with land parcel number west Kitutu/Mwakibagendi/2830, “the suit premises” pending the hearing and determination of this application.*

- *Pending the hearing and determination of the suit, injunction should issue restraining the respondent by his agents, servants and or employees, from transferring, alienating, selling, demarcating or interfering in any manner with the suit premises.”*

Finally, the applicant also sought that the costs of the application be provided for.

The grounds advanced in support of the application were that the applicant was the legal representative of the estate of the late Moruri Ongeta, deceased, who was the registered proprietor of the land parcel West Kitutu/Mwakibagendi/1161. The respondent however caused the said parcel of land to be subdivided into two parcels namely, the suit premises and West Kitutu/Mwakibagendi/2829 pursuant to the decision of the land disputes tribunal to which the applicant and other beneficiaries of the estate of the deceased were not party to. As a result of the subdivision the interest of the legal representative and other beneficiaries has been compromised. Thus unless the injunctive orders are issued the estate of the deceased will be greatly prejudiced. On the other hand the respondent will not suffer any loss or damage if the orders are granted and finally that the application had been made timeously.

In support of the application, the applicant swore an affidavit. That affidavit was to a large extent a mere repeat and or reiteration of the grounds aforesaid.

Through Messrs Minda & Company Advocates, the respondent countered the application. In a replying affidavit filed in court on 26<sup>th</sup> October, 2009, the respondent in pertinent paragraphs deponed that the deceased was a brother of his deceased father, Samuel Kubencha. In 1968 his late father migrated to Tanzania and stayed there for sometime. When he came back he found that his deceased's brother's son, Moruri Ongeta had sold his land. He commenced the process of reclaiming the same but passed on before he could do so. The respondent then presented his father's case to Marani Land Disputes Tribunal. The tribunal having heard the dispute returned a verdict in favour of the respondent. Thereafter the award was adopted as a judgment of the court in Kisii Chief Magistrate court, Miscellaneous Civil case number 102 of 2008. The respondent then presented the court order to the lands office for enforcement having already obtained consent to subdivide the original West Kitutu/Mwakibagendi/116 into West Kitutu/Mwakibagendi/2829 and the suit premises. Whereas the suit premises were registered in the name of the respondent the other parcel was registered in the name of the applicant. From the foregoing, it is the Respondent's case therefore that the suit premises were registered in his names in accordance with the law. In the premises an injunction cannot issue. In any event there was no evidence that he was bent on transferring, alienating, selling or demarcating the suit premises. The respondent therefore prayed for the dismissal of the application.

At the hearing of the application interpartes, the applicant was represented by Mr. Nyambati whereas the respondent appeared by Mr. Minda, both learned counsel. Mr. Nyambati urged only prayers 3 and 4 of the application as prayers 1 and 2 had initially been dealt with by court ex-parte as well as by the consent letter dated and filed in court on 30<sup>th</sup> September, 2009. Counsel submitted that the respondent had subdivided the parcel of land belonging to a deceased person in the absence of a grant of letters of administration and in purported execution of a court decree. The applicant was not a party to those proceedings that culminated in the decree.

In response, Mr. Minda stated that the suit premises were now registered in the name of the respondent. That being the case, Sections 27 and 28 of the Registered Land Act come into play. The acquisition of the suit premises was pursuant to a decree of the court. Settled conditions for granting of an injunction had not been demonstrated. Accordingly the application should be dismissed with costs.

Conditions for the grant of interlocutory injunctions which the applicant is seeking herein are settled. The applicant must show a prima facie case with a probability of success, the possibility of the applicant suffering irreparable loss which would not be adequately compensated for by an award of damages and if the court is in doubt it will decide the application on the balance of convenience. Of course the doubt referred to above must in logic refer to the existence of a prima facie case. The remedy of injunction being equitable in origin, the court must decline to exercise its discretion in favour of an applicant whose conduct is shown not to meet the approval of a court of equity; delay, acquiescence and unclean hands would disqualify an applicant from equitable relief. See generally *Kenya Projects and Investments Ltd V Kenya Posts Office Saving's Bank Ltd. NBI.HCCC.NO. 2811 of 1995(UR)*.

Applying the above principles to the circumstances of this case, I have no doubt at all in my mind that the applicant has not satisfied me on the first condition. The suit premises are currently registered in the name of the respondent. The respondent got so registered pursuant to a legal process. It was as a result of a court decree arising from an award of Marani Division Land Disputes Tribunal. It matters not for now that at the time of the said proceedings, the owner of the original parcel of Land West Kitutu/Mwakibagendi/1161 that resulted into the

suit premises following the subdivision was deceased. The court decree that led to the subdivision had not been set aside nor was it the subject of an appeal. Section 27 and 28 respectively of the Registered Land Act, confers on the respondent the absolute ownership of the suit premises with all rights and privileges belonging or appurtenant thereto. Those rights are not liable to be defeated and are held free from all other interest and claims whatsoever. Section 32(2) of the Registered land Act also provides that a title deed shall be only prima facie evidence of the matters shown therein. In this case, the title deed shows that the respondent is the registered proprietor of the suit premises and therefore, entitled to possession and occupation thereof. Until the title deed is cancelled and or revoked, his proprietorship is not subject to challenge. The applicant has sought a declaration in the plaint that the subdivision of the original parcel of land aforesaid into two portions of land without letters of administration was illegal, null and void. He has also prayed for cancellation of the two titles. The suit premises thus remains the property of the respondent until the applicant if successful can get any of the above prayers. I cannot see how the respondent can be enjoined in whatever manner with dealing with his own parcel of land for now. In any event, the applicant is seeking an injunction to restrain the respondent from transferring, alienating, selling or demarcating the suit premises. However he has not tendered any evidence that is satisfactory to court that the respondent is indeed bent on doing any of the above things. This court cannot therefore issue an injunctive order based merely on unsupported assertions and speculations.

Will the applicant suffer any irreparable loss incapable of being compensated by an award of damages? I do not think so. No such loss has been demonstrated by the applicant. According to the affidavit in support of the application, the loss that the applicant alludes to is in relation to the estate of the deceased, Moruri Ongeta. However he does not say that such loss is irreparable and or incapable of being satisfied by an award of damages.

The suit premises being in the name of the respondent, the balance of convenience obviously tilts in his favour. The effect of the injunction granted will be to deny the respondent the use of his own parcel of land. The respondent has deponed that following, the subdivision he occupies the suit premises whereas the applicant is in occupation of the other portion, the resultant of the subdivision. This assertion has not been challenged nor countered. That being the case it must be taken to be true. What prejudice then will the applicant suffer if the application is denied. I cannot think of any. On the other hand if the injunction is granted in the way it is framed, it will have the effect of impugning the respondent's right to the suit premises. In my view and on the overall therefore the balance on convenience tilts in favour of the respondent.

Finally on the issue of discretion, I have not seen anything in the conduct of the respondent as would tilt my hand in favour of granting the application.

The upshot of all the foregoing is that the application is unmerited. Accordingly it is dismissed with costs to the respondent.

RULING DATED, SIGNED and DELIVERED at KISII this 14<sup>th</sup> May, 2010.

**ASIKE- MAKHANDIA**

**JUDGE.**