



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 29 OF 2010

ALFRED SAGERO OMWERI PLAINTIFF/APPLICANT
VERSUS

KENNEDY OMWERI ONDIEKI DEFENDANT/RESPONDENT

RULING

The plaintiff's application dated 3rd February, 2010, seeks a temporary injunction to restrain the defendant and/or his servants and agents from wasting, damaging, using, occupying, disposing of or entering or interfering in any manner with a parcel of land known as **Ekerubo Settlement Scheme/12**, hereinafter referred as the "**the suit land**" pending hearing and determination of this suit. In the alternative, the court was urged to make an order inhibiting any dealing with the suit land pending hearing and determination of the suit.

In the affidavit sworn by the plaintiff in support of the application, he deposed that he is the registered proprietor of the suit land measuring 18.5 hectares. A title deed thereto was issued to him on 3rd August 2004. He is the first registered proprietor.

On or about the 14th day of February, 2009, the defendant commenced proceedings before Borabu Land Disputes Tribunal claiming ownership of a portion of the suit land. The said Tribunal decided that a portion of the suit land measuring 5 acres be transferred to the defendant. The plaintiff deposed that the tribunal had no jurisdiction to make such an order. The decision was also delivered in his absence and without any notice, he added. The decision has since been adopted by the Keroka Senior Resident Magistrate's Court as a decision of the court. On 28th September, 2009, the plaintiff filed judicial review proceedings seeking, *inter alia*, orders of certiorari to quash the decision made by Borabu Land Disputes Tribunal. The application was dismissed on the ground that it was time barred.

In the plaint filed herein, the plaintiff sought, *inter alia*, a declaration that the decision of Borabu Land Disputes Tribunal aforesaid is null and void. He further sought an order directing the District Land Registry, Borabu District, to reject and/or cancel any documents executed to effect transfer of any portion of the suit land

to the defendant as ordered by the said tribunal.

The defendant filed a replying affidavit and stated that in the year 2000 the plaintiff approached him and sought financial assistance towards legal fees and expenses in various cases between him and one **Truphena Obonyo Mogeni** over the suit land. It was agreed between them that the plaintiff would in consideration of the defendant meeting the said legal costs be given 5 acres out of the suit land. The agreement was acted upon and the defendant was put in occupation of the 5 acres. In or about the year 2006 the plaintiff developed a change of heart and to safeguard the earlier arrangement an agreement dated 6th December, 2006 was entered into between the parties. In the said agreement the defendant lawfully acquired the 5 acres from the plaintiff. But when the defendant noticed that the plaintiff was developing a change of heart toward the defendant's occupation and use of the 5 acres, the latter lodged a claim with the Borabu Land Disputes Tribunal. The defendant's claim was upheld by the tribunal. The decision of the tribunal was adopted as a judgment on 18th June, 2009. A decree was issued and subsequently executed resulting to subdivision of the suit land. The defendant was issued with a title deed in respect of the 5 acre parcel of land which is now known as **Ekerubo Settlement Scheme/159**. The title deed was issued on 12th August, 2009.

The plaintiff filed a supplementary affidavit and denied having entered into the agreement dated 6th December, 2006 that was exhibited by the defendant in his affidavit. He further stated that the subdivision of the suit land was done without his knowledge. He added that the proper procedure was not followed in

subdividing the suit land since the original title deed was deposited in court in terms of an order issued on 11th December, 2006 and the same had not been surrendered to the land registry at Nyamira. The plaintiff further stated that there is an appeal No. 66 of 2006 pending before the Court of Appeal at Kisumu involving the suit land. The appeal is between Truphena Obonyo Mogeni and himself as the appellant. He could not therefore have subdivided the suit land because there was an order issued on 11th December, 2006 that the status quo on the ground be maintained.

On 8th June 2010 the advocates for the parties herein entered into a consent to the effect that this application be disposed of by way of written submissions. I have carefully perused the submissions that were filed by counsel.

The conditions for grant of an interlocutory injunction are well settled, see **GIELLA –VS- CASSMAN BROWN & COMPANY LIMITED** [1973] E.A. 258. An applicant must show that he has a *prima facie* case with a probability of success. Such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. When the court is in doubt it will decide the application on a balance of convenience.

In this case the plaintiff sought an interlocutory injunction, *inter alia*, to restrain the defendant from using, occupying, or entering into the suit land, Ekerubo Settlement Scheme/12, pending hearing and determination of this suit. As at 5th February, 2010, when the said application was filed, there was no parcel of land registered as **Ekerubo Settlement Scheme/12**. The title had been closed following subdivision of the land to create **Ekerubo Settlement Scheme/158** and **159**. The defendant is the registered proprietor of the latter. At this interlocutory stage of the proceedings, the court cannot determine whether the subdivision was done procedurally or otherwise. That can only be dealt with when oral evidence is taken. Suffice to say that the defendant is so far the registered proprietor of Ekerubo Settlement Scheme/159. The court cannot therefore grant orders in respect of a non-existent parcel of land. Court orders do not issue in vain.

The defendant was put into possession of the 5 acre parcel of land by the plaintiff way back in the year 2006 or thereabout. The plaintiff did not take any action against the defendant if his occupation of the land was without his consent and/or approval. The defendant stated in his affidavit that he was forced to file his case before the Borabu Land Disputes Tribunal when he realized that the plaintiff was uncomfortable with his occupation and use of the 5 acres of the land. Whereas it is doubtful whether the said Land Disputes Tribunal had jurisdiction to make the orders that it did in respect of the suit land, the plaintiff did not prefer an appeal against the said decision and neither did he institute judicial review proceedings within the statutory period of time. However, it is instructive of note that the plaintiff did not deny that he sought financial assistance from the defendant to defray the legal costs incurred in the various suits over the suit land.

All these issues point to the fact that the plaintiff has not demonstrated a *prima facie* case with a likelihood of success as against the defendant.

But even if such a case had been demonstrated, the plaintiff has not shown that he will suffer irreparable loss unless the orders sought are granted. That being the court's view regarding the first two principles, I need not consider the third condition of granting an interlocutory injunction, that is, balance of convenience, because I am not in doubt as regards the first two tests.

All in all, I dismiss the plaintiff's application with costs to the defendant.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF JULY, 2010.

D. MUSINGA

JUDGE.

29/7/2010

Before D. Musinga, J.

Mobisa – cc

N/A for the Plaintiff

N/A for the Defendant

Court: Ruling delivered in open court on 29th July, 2010.

D. MUSINGA

JUDGE.