



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 59 OF 2008

GEORGE ATITO

FWAYE.....PLAINTIFF

VERSUS

JOSHUA OUMA

OGWANG.....DEFENDANT

RULING

The application by the plaintiff dated 23rd June 2008 is for the basic order that pending the hearing and determination of this suit the defendant be restrained from entering, cultivating, developing or encroaching upon the parcel number **KISUMU /BORDER /3977**.

The application is made under Order 39 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act on grounds that the plaintiff is the registered owner of the suit parcel of land and that without his consent, the defendant entered into the land and commenced construction works thereon. The plaintiff therefore stands to suffer irreparable loss if the defendant's acts are allowed to flourish. The grounds are supported by the facts deponed in the affidavit by the plaintiff dated 23rd June 2008 and were argued on behalf of the plaintiff by the learned Counsel **Mr. Kowinoh**.

In opposition to the application, the defendant filed a replying affidavit dated 23rd July 2008 in which he contends that he is utilizing and developing his own parcel of land number **KISUMU /WAWIDHI A11/831 and 947** which do not border the plaintiff's parcel number **KISUMU/BORDER A11 /3977**. Learned counsel, **Mr. Njoga**, argued the defendant's case at the hearing of the application.

From the arguments presented in this court by both sides, it is apparent that there is uncertainty with regard to the boundaries relating to land parcel number **KISUMU /BORDER /3977** belonging to the plaintiff and land parcel numbers **KISUMU /BORDER A11/831 and 947** belonging to the defendant. Whether or not there is an overlap in the boundaries respecting the said parcels of land or whether or not there was an error in the registration of the parcels of land, the actual position cannot be decided at an interlocutory stage and has to await a full trial of the suit. The true status of the material parcels of land will be disclosed after full trial. It is then that the respective rights of the two parties in relation to the parcels of land will be determined.

In the circumstances, it is doubtful whether the plaintiff has established a "**prima facie**" case with a probability of success for the grant of a temporary injunction. It is also doubtful whether the plaintiff will suffer irreparable loss if stay is not granted.

The balance of convenience would be in favour of both the plaintiff and the defendant since a determination on the boundaries respecting the three parcels of land and on the validity of the registration thereof will have to await the full trial of the suit.

Consequently, the “**status-quo**” existing prior to the filing of this application must be maintained. So that the hearing of the suit is not unnecessarily delayed in view of the current circumstances and to prevent further anxiety on the part of the two parties they must today and herein agree on a hearing date prior to the end of the year.

Ordered accordingly.

Delivered, dated and Signed at Kisumu this 9th day of November 2010

J. R. KARANJA

J U D G E

JRK/aao