



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT 66 OF 2009

NYAKWARA MORURI PLAINTIFF

VERSUS

BARACK OPARA ALUOCH DEFENDANT.

RULING

In the plaint filed on 30th March 2009, the Plaintiff sought a permanent injunction restraining the Defendant by himself, his servants and/or agents from trespassing, interfering, tilling, transacting, ploughing planting, and/or in any other manner dealing with the land parcel **No.KAMAGAMBO/KANYAJUOK/975** prejudicial to his proprietary interests. It was pleaded that the Plaintiff is the registered owner of this suit parcel which measures 1 hectare which he bought about 1974 and in respect of which he obtained title on 8th September 1982. He had a quiet and peaceful enjoyment and use of the property until about August, 2007 when the Defendant, without any justification or color of right, unlawfully trespassed onto it and thereby damaged its boundaries and uprooted sugarcane crop growing thereon. It is these acts that the Plaintiff complains about.

With the plaint was filed on urgent **Chamber Application under Order 39 rule 1(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** for a temporary restraining order against the Defendant. The Plaintiff further sought a permanent injunction. A permanent injunction cannot be issued at this stage of the case, but that is something that may be taken up during the hearing of the application.

In the Supporting Affidavit, the Plaintiff deponed that the Defendant was destroying the boundary to the land and had entered the same land to plough with the intention of grabbing it, claiming that he (the Plaintiff) is a foreigner who is not supposed to own land in this area. That is why the defendant has stopped him from cultivating the land.

The Defendant filed a Notice of Preliminary Objection and raised the point that the suit was statute – barred and that leave of the court was never obtained to file it out of time. However, when it came to prosecuting the Notice, **Mr. Nyambati** appeared to have abandoned that point. This is because the issue he raised **was** that the court lacked jurisdiction to entertain the suit because it was a boundary dispute, and that under **Section 21(4) of the Registered Land Act Cap 300 Law of Kenya**, the Land Registrar had not fixed the boundary. **Mr. Minda** for the Plaintiff opposed the Objector by arguing that this was not a boundary dispute.

Section 21(4) of the Registered Land Act provides that the court has no jurisdiction to hear a matter relating to boundary dispute of registered land, unless the boundaries have first been determined by the Land Registrar (**Wamutu v Kiarie (1982) KLR 480**). From the pleadings by the Plaintiff, it is clear that his complaint is that the Defendant does not want him on this piece of land and that is why he has damaged the boundaries and uprooted the sugarcane crop growing on the land. He has gone ahead and taken possession of the land and he is using it as if it is his. The Plaintiff is not claiming that there is any boundary dispute between the two of them. Indeed, looking at the Statement of Defence and the Replying Affidavit by the Defendant, it is alleged that this land belongs to the Defendant but it was fraudulently obtained by the Plaintiff. This is not a boundary dispute and therefore the provisions of **Section 21(4)** of the **Registered Land Act** cannot be brought into play.

The consequence is that the Preliminary Objection is not sustained and the same is dismissed with costs.

Dated at Kisii this 25th day of May, 2009

A. O. MUCHELULE

JUDGE

25/5/09

A. O. Muchelule, J.

c/c. Mongare

Mr. Odero for the Respondent

Court: Ruling delivered in open court.

A. O. MUCHELULE

JUDGE