



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Civil Case 122 of 2007

THOMAS ONGWARE ONGENIPLAINTIFF

VERSUS

1. JUSTUS ONGERA ORINA

2. DISTRICT LAND REGISTRAR NYAMIRA

3. DISTRICT LAND SURVEYOR NYAMIRA

4. HON. ATTORNEY-GENERAL..... DEFENDANTS

RULING

The Plaintiff **Thomas Ongware Ongeni** is the registered owner of parcel number **Mwongori Settlement Scheme/555** which measures 5.42 Hectares. His neighbour is the 1st Defendant **Justus Ongera Orina** whose land is **Mwongori Settlement Scheme/50**. The Plaintiff states that before 12th June 2006 the 1st Defendant's land measured 0.7 Hectares. On that date, it is alleged, the 1st Defendant conspired with 2nd Defendant District Land Registrar, Nyamira and 3rd Defendant District Land Surveyor, Nyamira by rectifying the register of land parcel **Mwongori Settlement Scheme/50** and thereby increased its size by 1 Hectare to 1.07 Hectares, thereby depriving the Plaintiff of his one 1 Hectare. The Plaintiff states he had no notice of the rectification until it was done. The rectification, he contents, was unlawful and has caused him loss and damage. Since 2nd and 3rd Defendants are Government employees, the 4th Defendant the Attorney General has been sued.

The suit was brought for a permanent injunction restraining the 1st Defendant by himself or his agents and/or servants from alienating or entering/cultivating/developing the one (1) Hectare alienated from **Mwongori Settlement Scheme/555**; an order to issue canceling the rectification of register and the Title Deed to read 0.7 Hectares; a declaration that the purported rectification of the register and the subsequent issuance of the Title Deed were null and void; and, an order of eviction against the 1st Defendant in regard to the 1 Hectare.

Presently, the Plaintiff has applied for an injunction to restrain the Defendants either by themselves or their agents/servants or otherwise whatsoever from transferring/disposing off and/or dealing with the 1 Hectare in the name of the 1st Defendant until the suit is heard and finalized.

The 2nd, 3rd and 4th Defendants filed a Defence denying the claim, but did not defend the application. It was just as well since no injunction can issue against the Government. **Section 16** of the **Government Proceedings Act, Cap. 40** of the **Laws of Kenya** refers. That leaves only the 1st Defendant in relation to the injunction application.

The Plaintiff acknowledges that parcel **Mwongori Settlement Scheme/50** is in the name of the 1st Defendant. *Prima facie*, the registration confers on the 1st Defendant title that is indefeasible. This is provided under **sections 27 and 28** of the **Registered Land Act, Cap 300** of the **Laws of Kenya**.

In the Replying Affidavit the 1st Defendant denied that the Hectare was excised from the Plaintiff's parcel and given to him. He stated that all that happened was rectification of the registry land map for the acreage thereon to conform to the actual size of his land on the ground. He went on that the rectification did not affect the rights of the plaintiff or change the quantity of **Mwongori/Settlement Scheme 555**, and that is why the Plaintiff's Title Deed was not recalled and the size of his land is still 5.42 Hectares.

The Plaintiff annexed his Title Deed to the Supporting Affidavit and it shows it is still intact as to the amount of land. The Title Deed was not recalled. This would mean that the Plaintiffs is still the owner of 5.42 Hectares comprised in **Mwongori Settlement Scheme/555**, and that no loss has at this stage been demonstrated.

The conditions for grant of interlocutory injunction were laid down by the East African Court of Appeal in **Giella v Cassman Brown & Co. [1973] EA 358** and have been reiterated in many subsequent decisions. The applicant must show a prima facie case with a probability of success; secondly, that normally an injunction will not issue where the injury complained of would be adequately compensated in damages, and thirdly, if the court is in doubt it should decide the matter on a balance of convenience.

In light of the availed evidence and the submissions made thereon by counsel, I am unable to find that this case merits the grant of an injunction. The application is consequently dismissed with costs.

Dated, signed and Delivered at Kisii this 12th Day of July 2009

A. O. MUCHELULE

JUDGE

12.6.2009

Before A. O. Muchelule Judge

Mongare cc.

Mr. Ogari for Applicant.

Mr. Soire for 1st Respondent.

Court: Ruling in open court.

A. O. MUCHELULE

JUDGE