



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 151 of 2009

BOSIRE JULIUS OTWORI.....PLAINTIFF/APPLICANT

-VERSUS-

GEORGE ALFANUS ONYARE...DEFENDANT/RESPONDENT

RULING

Title deeds “BJO “and “BJO2” show the applicant has been the registered owner of parcel of land no. *Nyaribari Chache/Keumbu/1301 measuring 1.2 acres* and *Nyaribari Chache/Keumbu/1264 measuring 1.2 Hectares* since 7/11/2008. He stated that the two parcels are adjacent to each other and share a common boundary. He came to court complaining that on 27/7/2009 the respondent without any reason or cause entered the parcels, removed the boundary and put up a barbed fence around them. He also begun to dig in the said parcels and was preparing ground for temporary structures. The suit was filed seeking permanent injunction, and with it was filed application under *Order 39 rules 1,2 and 3 of the Civil Procedure rules and sections 3,3A and 63(e) of the Civil Procedure Act* for temporary injunction restraining the respondent, his agents and or servants from interfering in any manner with the suit land pending the hearing and determination of the suit.

The respondent filed a Defence and swore a Replying Affidavit. His case was that on 30/4/2004 he bought the two parcels of land from Alfred Otwor, the father of the applicant, for kshs. 1.4 million. He paid kshs. 300,000/= on the date and entered into occupation. He was since paid Kshs. 1.3 million towards the purchase price. The agreements are “GAO-01 and 02(a) to (f)”. The seller wanted the money to pay for the applicant’s university education at Kenyatta University. Otwor was then the registered owner of the parcels. The respondent has structures on the lands and is cultivating the same. He has also fenced the lands with posts and barbed wire.

When the application came for hearing Mr. Okenye for the applicant was present. Mr. Nyariki for the respondent was absent. I heard Mr. Okenye.

In the Supplementary Affidavit, the applicant admits he was not the original owner. The owner was his father at the time of agreement. This agrees with the respondent that the applicant became the registered owner subsequent to the sale agreement above. The respondent had claimed that the transfer was fraudulently done to defeat this interest. This was denied by the applicant.

Mr. Okenye raised the issue that the purported purchase by the respondent did not receive he blessings of the Land Control Board and was therefore null and void and no interest could issue to the respondent on account of such transaction. In the special conditions in “GAO-01” (Sale Agreement) the transaction was

subject to the consent of the Land Control Board. This is the respondents' document. There is no indication that such consent was sought or obtained.

The parties had entered into controlled transaction and since no consent had been obtained, the agreement was void for all purposes under *section 6 of the Land Control Act [Cap 302]* (See *Shamalla –V- Chibey [1988] KLR 251*). It follows that the respondent cannot base his claim to the land on the transaction. I must find, therefore, that the applicant has demonstrated a *prima facie* case (See *Giella –V- Cassman Brown and Company LTD [1973] EA 358*).

The balance of convenience must tilt in favour of the registered owner of land.

I allow the application with costs

Dated, signed and delivered this 23rd day of October, 2009

A.O. MUCHELULE

JUDGE

23/10/2009

23/10/2009

Before A.O. Muchelule-J

Court clerk-Mongare

Mr. Nyariki for the respondent

COURT: Ruling in open court

A.O.MUCHELULE

JUDGE

23/10/2009