



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 75 of 2009

MARTHA ACHIENG ODHIAMBO.....1ST PLAINTIFF/APPLICANT

LUKE KOMONDI ORETI.....2ND PLAINTIFF/APPLICANT

(The legal representative of the late JOHN ODHIAMBO AKUKU)

VERSUS

ELIJAH KOGI GICHAGA.....1ST DEFENDANT/RESPONDENT

LABAN MWANGI GICHAGA.....2ND DEFENDANT/RESPONDENT

RULING

The applicants in the notice of motion dated 3rd March, 2009 seek orders of this court, inter alia, as follows:

- 1. A mandatory injunction directing the defendants/respondents, their agents and or servants to vacate the parcel of land known as NYANDARUA/NGORIKA/347 pending the hearing and determination of the application.*
- 2. A temporary injunction restraining the defendants/respondents either by themselves, their agents or servants from selling, attaching, auctioning, transferring, alienating, disposing, tilling, cultivating or in any way interfering with the applicant's quiet possession of the subject parcel of land pending the hearing and determination of the suit.*

The applicants also pray that the OCS, Nyahururu Police Station be served with the orders of the court to ensure the effective compliance therewith.

The applicants are the legal representatives and administrators of the estate of the registered owner of the suit land and have annexed to the affidavit in support of the application (*sworn by the 1st applicant*), a copy of the Title Deed and a certificate of confirmation of grant issued to them on 7th May 1998, by virtue of which, the suit land was awarded to the 1st applicant to hold in trust for the minor children of the deceased owner.

In her affidavit, the applicant depones that her late husband purchased the subject parcel from one

Samwel Munyua Gichanga way back in 1991 and that they were both in occupation thereof prior to the husband's demise. The two had also put up permanent structures thereon. She depones further that, prior to the respondents moving onto the land early 2008, during the post election violence, she was carrying out farming activities therein. The 1st applicant also depones that the respondents have constructed temporary structures on the parcel of land and have violently resisted her attempts to move back into the land, thereby displacing her while they continue to be in possession.

The application is opposed on the strength of a replying affidavit sworn by the 1st respondent on his own behalf and that of the 2nd respondent. The only issue raised in the replying affidavit is that the applicant's suit is an abuse of the process of court in that the applicants have been enjoined as interested parties in a previous suit, namely, **RMCC No. 883 of 1989** pending before the subordinate court, in which the applicants have sued the person who sold the suit land to the 1st applicant's husband. The respondents contend that the issues sought to be determined in the present suit and the applicants' notice of motion are the same ones in issue in the pending suit and that no grounds exist for the granting of the injunction orders sought herein.

Submitting on behalf of the applicants, learned counsel Mr. Mongeri argued that the respondents have no right whatsoever, proprietary or otherwise, to remain on the suit land and that the defence to the present suit, having raised the issue of a fraudulent sale between the 1st applicant's deceased husband and the said Samuel Munyua Gichaga clearly shows that the issue arising in the present suit is not one which can be determined in the lower court.

Opposing the application learned counsel Mr. Karanja Mbugua, for the applicants, submitted that the said Samuel who is the defendant in the lower court's suit sold the land in breach of a trust, having been registered proprietor thereof as a trustee for the respondents. Counsel argued further that the present suit is bad for duplicity and that no exceptional and/or special circumstances exist for the court to grant the mandatory injunction sought. He argued that the applicants should await the outcome of the suit pending before the subordinate court.

The applicants' claim and/or legal interest over the suit land is clearly supported by documentary evidence. The respondents have not denied that they moved into the parcel of land during the post election violence that rocked Kenya early 2008 and dispossessed the applicants of the same. The suit they rely on to deny the applicants claim herein was filed 20 years ago and they have not shown why the same has not been concluded. That the applicants have been enjoined as interested parties in the suit before the lower court or that the respondents seek to have the sale of 1991 avoided does not, in my considered view, confer upon the respondents any right as would entitle them to enter the suit land as they have done, taking advantage of the post election turmoil of 2008.

The proceedings in the lower court have not been shown to this court to enable the court ascertain whether, indeed, the issues raised in the present suit are the same ones before the subordinate court. It is clear, however, from the facts before me, that the respondents do not deny having entered the suit parcel of land in disregard of the applicants' undisputed right of claim and possession. Unless and until the respondents obtain orders declaring the sale to the 1st respondent's husband fraudulent and the applicant's ownership and/or possession declared null and void, the respondents have no right to enter into the suit land or to remain thereon. Prima facie, their position is that of trespassers. I find that a prima facie case has been established against them and I have no doubt that there is a real likelihood that the applicants will suffer irreparable loss if the injunction orders sought herein are not granted.

The respondents do not deny that they are on the suit land illegally. A court of law cannot and must never condone an illegality. In the circumstances, I am of the view that special circumstances do exist for the granting of the mandatory injunction sought under prayer 3 of the notice of motion. The same is hereby granted together with the temporary injunction sought under prayer 4. I order and direct that the OCS Nyahururu Police Station be served with the orders herein to ensure the effective enforcement thereof.

Accordingly the notice of motion dated 3rd March 2009 is allowed with costs to the applicants.

Dated signed and delivered at Nakuru this 23rd day of October 2009

M. G. MUGO

JUDGE