



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 80 of 2009

MZEE KIBARISHO.....PLAINTIFF/APPLICANT

-VERSUS-

SAYIANGE OKESETEK

JULIUS MENGERE

WILSON LEINA KURAU.....DEFENDANTS/RESPONDENTS

R U L I N G

Land parcel Transmara/Olalui/65 measuring about 20.23 Hectares was on 29/7/2005 registered under the Registered Land Act Cap 300 of the Laws of Kenya to belong to the plaintiff/applicant as absolute proprietor. The applicant on 29/4/2009 filed this suit against the defendants/respondents whom he claimed are on the land making claim to it and have refused and /or neglected to vacate despite requests. The suit sought declaration that the applicant was the sole and exclusive owner of the land. He also sought a permanent injunction against the respondents and those acting under them. Lastly, eviction was requested. When the suit was filed an application was made for temporary injunction to restrain the respondents by themselves, or agents, servants and/or any one claiming under them from interfering, harassing, evicting, intimidating the applicant and members of his family and /or in any manner howsoever and/or whatsoever, interfering, alienating or further alienating occupation of the land measuring one acre. The application was by summons under *Order 39 rules 1,2 and 2A of the Civil Procedure Rules and sections 3A and 63(e) of the Civil Procedure Act*.

The Supporting Affidavit revealed the history of the dispute between the parties. The applicant swore that about 1998 he invited and allowed the 1st respondent to settle on about one acre of this land. Both were members of Olalui Group Ranch whose Committee was in the process of allocating each member his parcel. The understanding between the two was that once the 1st respondent had got his allocation he would move to it and leave the applicant's acre. About 2005 the Committee had completed the exercise and allocated the 1st respondent his own land, parcel no. Transmara/Olalui/445. The 1st respondent was asked to move to his land. He sought for time to be able to get money to put up a house. He has since not vacated, despite requests and the intervention of the provincial administration. On 17/4/2009 the 2nd and 3rd respondents confronted the applicant, claiming they had bought the suit land from the 1st respondent and sought that he (applicant) vacates for them. They threatened to forcefully evict the applicant. The applicant ran to the elders and to Kilgoris Police Station for assistance. Even then, the respondents have continued to be on the land and to even invite prospective buyers. On 21/4/2009

2nd and 3rd respondents threatened to put up temporary structures on the land. The applicant seeks temporary injunction to stop these acts until the case is heard and finalized.

The respondents filed a Defence and Replying Affidavit. The Affidavit was sworn by 1st respondent on his behalf and that of the other respondents. The 1st respondent states that he occupied what is now the suit land in 1976 and has remained here to date. The applicant is his cousin and came onto the land in 1985. He denies he came to the land in 1998, or that he was invited here by the applicant. As far as he is concerned, adjudication and demarcation process at OLALUI area is ongoing and the purported registration of this land in the name of the applicant was fraudulent and illegal. He deponed that as a result of the registration of parcels of the Group Ranch when the process was incomplete the Committee of the Group Ranch have sued Hon. Gideon ole Konchella and others in HCCC.no.129 of 2004 at Nakuru. His case is that his entitlement to the land in dispute is adverse to the applicant's claim. He stated that whatever registration that may have occurred in favour of the applicant under the Registered Land Act was subject to his interests in the land, and therefore that the applicant is holding the land in trust for him. Regarding 2nd and

3rd respondents, their defence is that they did not buy any land from the 1st respondent. They claim that the 1st respondent is their aging uncle whom they have come to take care of. They have no claim to the land.

Mr. Otieno prosecuted the application for the applicant and the same was defended by Mr. Oguttu for the respondents. I have considered what each had to say on the matter and the authorities each was relying on.

The principles guiding the grant of injunctions were settled in the case of *Giella .V. Cassman Brown & Co. Ltd [1973] E.A. 358*. An applicant must show a *prima facie* case with a probability of success. The injunction will not normally be granted unless the applicant might otherwise suffer irreparable damage. When the Court is in doubt, it will decide the application on balance of convenience.

The applicant is the registered owner of the land in dispute. The 1st respondent claimed that the registration was fraudulently obtained. Under *section 143(1) of the Registered Land Act* a first registration cannot be impeached even if it has been obtained by fraud. (See *Ambale .V. Masolia [1986]KLR 241*). However, the proviso to *section 28* of the Act which grants to the registered owner indefeasible title states as follows:-

“Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The registration in this case was in 2005. The 1st respondent was living on this land, although the applicant states it was only one acre of it. The applicant states that the 1st respondent came here in 1998, and on invitation to be here until his land was ready. 1st respondent states he occupied this whole land in 1976 and remained in occupation and possession until 1985 when the applicant, his cousin, joined him. He denied that he was invited here in 1998, or at all. The applicant denies the claims by the 1st respondent. The 1st respondent claims the registration of the land in the name of the applicant was fraudulent as this was his land, and the applicant knew he was in occupation. This is why he claims that the applicant is a trustee for him in regard to the land. Alternatively, the applicant's title was issued in the face of his occupation and hence the same stands extinguished.

The result is that, although the applicant is the registered owner of the land there is a competing claim to the same by the 1st respondent who has been here for a considerable length of time. It is also not in dispute that the titles issued to members of the Group Ranch who include the applicant are being questioned in the High Court at Nakuru. All these claims will have to be subjected to oral evidence and cross examination during the hearing of this case. One cannot therefore at this stage say that the applicant has demonstrated a *prima facie* case.

The other way of looking at this application is as follows. The order sought in this application was:

“Pending the hearing and determination of this suit the Honourable Court be pleased to grant an order of Temporary Injunction restraining the Defendants, by themselves, agents, servants and/or anyone

claiming under them (defendants) from interfering, harassing, evicting, intimidating the plaintiff and his members of the family from the suit land and/or in any manner howsoever and/or whatsoever, interfering, alienating further alienating the suit land to evict, a portion of LR No. Transmara/Olalui/65, measuring approximately 1 acre.”

It is clear the order was directed at the one acre portion of the land in question. In applicant's own words, the 1st respondent has been on the land since 1998. The other respondents joined him subsequently. He was here on invitation and was asked to vacate in 2005 when he got his own land. According to the applicant, the 1st respondent then became a trespasser. He wants the 1st respondent to be restrained from claiming this acre or in any other manner interfering with it. Prohibitory injunction is issued to prevent the occurrence of an event that has not occurred on that is threatened to occur that would likely injure an applicant and is not issued where such an event has taken place as in such case the remedy for an aggrieved party is either to seek a mandatory injunction or to ventilate his case in a full trial. (See *Jane Kemunto Mayaka .V. Municipal Council Of Nakuru And Others, Hccc. No. 124 of 2005 at Nakuru*). The applicant is not seeking a mandatory injunction. He has to ventilate his case during the trial.

After the finding that a *prima facie* case has not been demonstrated, it would be a futile exercise to consider the other principles. The result is that this application cannot be allowed. The same is dismissed with costs.

Dated, signed and delivered at Kisii this 19th day of October, 2009

A.O.MUCHELULE

JUDGE

19/10/2009

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Minda for applicant

Mr. Oguttu for respondent

COURT: Ruling in open court.

A.O.MUCHELULE

JUDGE

19/10/2009