



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE 74 OF 2009

EVALINE ROSAPLAINTIFF

-VERSUS-

CATHERINE KORIKO

BENJA KORIKO

DANIEL KORIKO

FELIX KORIKO.....DEFENDANTS

RULING

The applicant seeks a mandatory injunction directed at the respondents by themselves, agents, servants and /or anyone claiming under them, to yield and /or grant vacant possession of *LR No. Transmara/Oloiborsoito/12*, pending the hearing and determination of this suit. The application was brought under *Order 39 rules 1,2A and 9 of the Civil Procedure Rules, sections 3A and 63(e) of the Civil Procedure Act and 27 and 28 of the Registered Land Act, Cap 300* of the Laws of Kenya.

The parcel measures about 1.5 Hectares and was originally registered in the name of the deceased *Kimaiyio Ole Ntirra Nampuchi* . Following the death of the deceased, the applicant was issued with a Grant which was confirmed and certificate issued to her on 22/5/2006. She became registered as the absolute owner of the land on 26/11/2007.

This suit was filed on 20/4/2009 for declaration that she was the registered owner of the land and for permanent injunction to restrain the respondents and all those acting under them from trespassing or in any other manner interfering with the land. General damages were also sought for trespass. The plaintiff pleaded that on or about November, 2007 the respondents had without any colour of right or without any lawful cause or basis commenced cultivating on 2 acres of the land. This was the substantial portion of the land which the applicant claimed he had been deprived of by the acts of the respondents.

The respondents filed a Statement of Defence denying knowledge that the applicant was the registered owner of the land and went on to state that if indeed the applicant was so registered that registration was fraudulent as the applicant had acted in excess of her duties and responsibilities as the administrator of the estate . The other particular of the alleged fraud was that the applicant had concealed to the court that the respondents had an interest in the estate and failed to provide for them. The respondents pleaded they have been on the land since 1985 to the full knowledge of the applicant. They counterclaimed for 2 acres of the parcel which they stated they bought for 5000/= in 1985 from the deceased who had,

however, not transferred the same to them by the time he died. They stated they have had a continuous and uninterrupted occupation of the land since then.

It should be mentioned that the respondents have applied in *Kisii HCC Succ.Cause no 474 of 2009* to have the Grant to the applicant revoked.

The affidavits sworn by either side indicate the factual positions of the parties. I have considered these affidavits, the submissions on them by Counsel and the authorities cited.

The law in regard to the grant of mandatory injunctions is now settled. (See *Kenya Breweries Ltd and Another .V. Washington O.Okeyo [2000] 1 EA 109* or *Locabail International Finance LTD .V. Agroexport and others [1986] 1 ALL ER 901*). A mandatory injunction can be granted in an interlocutory application only in special circumstances. The case has to be clear and one in which the court thinks it right to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march of the plaintiff. Moreover, before granting the injunction the court has to feel a high degree of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than was required for a prohibitory injunction. The requirements for the grant of mandatory interim injunctions are very strict as the grant of such an injunction almost decides the whole suit on affidavits, which is not to be encouraged. (See *Belle Maison .V. Yaya Towers Hccc.NO. 2225 of 1992* at Nairobi).

The applicant has to show that she is at this interlocutory stage entitled to a mandatory injunction. In the plaint she sought a declaration that she is the lawful owner of the land. She is the registered proprietor and it is true, as submitted by *Mr. Oguttu*, that *sections 27 and 28 of the Registered Land Act* give her indefeasible title. However, the respondents are saying (which of course she denies) that they have been on this land to her knowledge and without interruption since 1985. They are saying they bought the 2 acres of the land from the deceased in 1985 and since then they have been in occupation. They have counterclaimed for the land. It would appear that the purchase of the land by the respondents did not receive the blessings of the land control board *under section 6 of the Land Control Act*. Such a transaction would be null and void for lack of consent. But that happened in 1985. The deceased herein died on 27/3/93. The respondents are saying he died and left them on the land and that they have so remained on the land until this suit. They are saying that whatever registration to the applicant in 2007 was subject to their claim to the land. I note the proviso to *section 28 of the registered Land Act* and fact that adverse possession may be used as a weapon and as a shield. I know that regarding the pending application for revocation of the Grant issued to the applicant, the respondents can only be wished luck. I find that the title of the applicant to the land is being seriously challenged by the respondents in this case and it is a matter that should await full hearing for resolution.

Secondly, the applicant states that the respondents came to the land in November, 2007. The respondents say they have been on the land since 1985 when they allegedly bought it from the deceased and have produced Agreement to support the said purchase. At this stage and before hearing the parties in full trial, it is difficult to find for the applicant as against the respondents as to when the alleged trespass begun.

In short, I do not find that this application presents special circumstances that would invite an order for a mandatory injunction. The result is that the application is dismissed with costs.

Dated and delivered at Kisii this 13th day of October,2009

A.O.MUCHELULE

JUDGE

13/10/2009

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Nyasimi for Defendants/respondents

Court: Ruling in open court.

A.O.MUCHELULE

JUDGE

13/10/2009