



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Suit 104 of 2008

WILLIAM NDEGE ONYIEGO.....LAINTIFF/RESPONDENT

-VERSUS-

DENNIS MOSETI.....FENDANT/APPLICANT

RULING

The plaintiff/respondent was the registered owner of land parcel Central Kitutu/Mwamosioma/995 when on 3/9/2008 he filed this suit against the defendant/applicant whom he alleged had unlawfully trespassed upon the land, cut trees growing thereon and begun to cultivate. He sought declaration that he was the lawful owner of the land and prayed for a permanent injunction to restrain the applicant and those acting under him from re-entering, trespassing onto, cutting down trees interfering with and/or in any other manner, whatsoever, dealing with the suit land. With the suit was filed an application under *Order 39 rules 1, 2A and 9 of the Civil Procedure Rules, sections 3A and 63(e) of the Civil Procedure Act and sections 27 and 28 of the Registered Land Act, (Cap .300 of the Laws of Kenya)*. The orders were granted.

The applicant filed a Statement of Defence in which he alleged he and his siblings have been on the land since and before 1993 and that the cut trees were theirs which they had planted. He alleged they got the land, through their parents from their grandfather who was the original owner. It was then alleged that the respondent had brought a similar suit, that is *Kisii HCCC .no 140 1995*, against the applicant's late mother which suit had been dismissed on 13/3/2004 for lack of prosecution.

The respondent answered these claims in reply to Defence.

On 3/12/2008 the applicant filed the present Chamber Summons application under *Order 39 rule 1 (a) of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act* in which he claimed that the respondent had since subdivided the parcel into several parcels, that is Central Kitutu/Mwamosioma/2320, 321, 2322,2323, and 2324, which he was selling to unknown people. He sought the suit's subject matter to be preserved and hence an order for temporary injunction to restrain the respondent from selling or in any other way disposing of the land until the suit was heard and finalized.

The respondent filed grounds of opposition to meet the application.

Mr. Masese represented the applicant and Mr. Oguttu the respondent. This court heard them on the application.

I agree with Mr. Oguttu that under *Order 39 of the Civil Procedure Rules* an injunction can only be issued in an existing suit. The present application was brought under *Order 39 rule 1(a) of the Civil Procedure Rules*. The Order provides as follows:-

“Where in any suit it is proved by affidavit or otherwise.

- a) That any property in dispute in a suit is a danger of being wasted, damaged, or alienated by any party to the suit or wrongfully sold in execution of a decree, or
- b)

The court may by order grant a temporary injunction to restrain such act.....”

The applicant has no counterclaim and will not be seeking any permanent injunction against the respondent. The sought interlocutory relief cannot be granted in vacuum. (See *Southern Credit Banking Corporation Ltd .V. Charles Wachira Ngundo, HC (Milimani Commercial Courts) C.C.no. 1780 of 2000*). The application is thus incompetent.

Even if the application is competent, the applicant has to demonstrate a *prima facie* case before the interlocutory injunction is issued. In this case, however, it is admitted the respondent is the registered proprietor of the former and present parcels of land. *Sections 27 and 28 of the Registered Land Act* confer on such proprietor rights that cannot be defeated. Once again, the applicant has no counterclaim. The power of the court in an application for an interlocutory injunction is discretionary. This is a judicial discretion that should be exercised on basis of the law and evidence. (See *Mrao Ltd .V. First American Bank of Kenya LTD.[2003] KLR 125*). The law is on the side of the respondent. It would be extremely difficult in the circumstances of this case to injunct such owner of land. Mr. Masese submitted that his client has been on the land since 1993. However, the Title Deed annexed to the respondent’s affidavit in support of his application for injunction indicates that the respondent has been the registered proprietor of the land since 17/8/1988. That is earlier than 1993. Another annexure is the decree in High Court Civilcase no. 140 of 1995 at Kisii in which it was declared that the respondent was the owner of the land. The suit was between the respondent and the mother of the applicant.

I find that the applicant has not demonstrated any *prima facie* case, or that he stands to suffer any irreparable loss nor capable of being compensated in damages if the sought injunction is not granted. The balance of convenience would tilt in favour of the respondent who is the registered owner of the land.

The result is that the application is dismissed with costs.

Dated, signed and delivered at Kisii this 27th day of November, 2009

A.O.MUCHELULE

JUDGE

27/11/2009

Before A.O.Muchelule-J

Mongare court clerk

Mr. Masese for Defendant

Mrs. Asati for Mr. oguttu for plaintiff

Court: ruling in open court.

A.O.MUCHELULE

JUDGE

27/11/2009