



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

Civil Case 108 of 2009

**PETER
ONGORI)**

SIMARKO OREKEIRE NYAMBOGA).....PLAINTIFFS/APPLICANTS

-VERSUS-

MARY KEMUNTO OKUMU).....DEFENDANTS/RESPONDENTS

HON.ATTORNEY GENERAL)

R U L I N G

Land parcel no. *West Kitutu/Bogeka/2871* measuring 0.42 hectares is now registered in the name of the 1st defendant/1st respondent. This followed a decision by the Moscho Land Disputes Tribunal. Previously, the registered owner was the 2nd plaintiff/ 2 nd applicant, having bought it from the 1 st plaintiff/1st applicant. The 1st respondent took the applicants to the Tribunal claiming the land. Her case was that she bought the land from the 1st applicant in 1990 and paid for it. The land was in the name of the applicant's late father and he was in the process of succeeding the estate. When he succeeded it he instead sold it to the 2 nd applicant.

The Tribunal heard the case and determined that the 1st respondent gets the land which the 2 nd applicant now owned. The award was filed at the Chief Magistrate's court at Kisii which adopted it.

This suit was brought by the applicants against the respondents for a declaration that the proceedings and award of the Tribunal were a nullity as the Tribunal lacked jurisdiction to hear or determine the dispute. The adoption was attacked for the same reasons. The applicants further sought a permanent injunction.

Filed with the plaint was a motion under *section 128 of the Registered Land Act (Cap 300) and Order 39 rule 1(a) of the Civil Procedure Rules* for temporary injunction and inhibition directed at the respondents and those acting under them.

The 1 st respondent filed defence and responded to the application. The respondent is basically saying that this dispute was properly heard and determined by the Tribunal whose award was adopted as

judgment of the court whose decree has been executed leading to her title. She denied the Tribunal or the court lacked jurisdiction in the matter.

Mr. Soire for the applicants urged the application which Mr. Bigogo for the 1st respondent opposed. Mr. Bigogo's position was that the suit was not legally tenable; that what was open to the applicants was either to appeal the decision of the Tribunal as provided under the Land Disputes Tribunal Act (Act no. 18 of 1990) or they move the High Court by way of judicial review to annul the proceedings and decision.

The conditions for the grant of interlocutory injunction are settled. The applicant has to demonstrate a *prima facie* case. He has to show that he will suffer irreparable loss which damages may not compensate if the injunction is not granted. If the court is in doubt, it will decide the application on balance of convenience. (See *Guella .V. Cassman Brown & Co. LTD [1973] EA 358*). I carefully listened to Mr. Soire. He will have to persuade the court that, despite the procedure for appeal provided under the Act above, this court has jurisdiction to entertain this claim and make the sought declaration. Until he succeeds in that bid, the fact on the ground is that the 1st respondent is now the registered owner of the land in dispute and *sections 27 and 28 of the Registered Land Act* give her indefeasible title. It is not usual to injunct a registered owner of land. In other words, the applicants have not demonstrated a *prima facie* case. If there is doubt, the balance of convenience can only tilt in favour of a registered owner.

Mr. Bigogo attacked the suit and application on many other grounds. I do not find it necessary to deal with those issues, in view of the finding above.

The result is that the application is dismissed with costs.

Dated, signed and delivered at Kisii this 6th Day of November, 2009.

A.O.MUCHELULE

JUDGE

6/11/2009

6/11/2009

Before A.O.Muchelule-J

Mongare court clerk

Mr. Onyari for Mr. Soire for plaintiffs

Mr. Bigogo for Respondents

COURT: ruling in open court

A.O. MUCHELULE

JUDGE

6/11/2009