



REPUBLIC OF KENYA

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

Civil Case 110 of 2007

LEKAKENYA OLO SONGIRIAN

ALSO KNOWN AS OLOOSOGIRIAN DANIEL) PLAINTIFF

VERSUS

BENSON OLE SOIT TASUR DEFENDANT

RULING

The plaintiff filed a suit against the defendants alleging that he was the registered owner of all that parcel of land known as TRANSMARA/SHARTUKA/38 measuring 20.64 hectares or thereabout (hereinafter referred to as “*the suit land*”) where he was living with his family. He claimed that on 11th September 2007 the defendant unlawfully entered into the land and committed various acts of waste. He prayed for an order of permanent injunction to restrain the defendant from such acts of trespass.

Together with the plaint; the plaintiff also filed an application seeking interlocutory injunctive orders pending hearing and determination of the suit.

The defendant filed a statement of defence and counterclaim and denied that the plaintiff was the registered owner of the suit land. He alleged that the title documents held by the plaintiff in respect of the suit land were fraudulently obtained. The defendant also filed a replying affidavit to the plaintiff’s affidavit.

Before the plaintiff’s application for interlocutory injunction could be heard, the defendant filed a notice of Preliminary Objection, stating that the application was incompetent because:

“1. *The subject matter of this suit is a parcel of land registered under the Registered Land Act, however the Attorney General had not been made a party to this suit nor has the prerequisite thirty (30) days notice has not (sic) been issued nor is one exhibited.*

2. *The suit upon which the application being fatally defective (sic) the application can thus not be said to have met the conditions set out in the oft relied upon case of GEILA (sic) CASSMAN*

BROWN & CO. LTD [1973] E.A. 358.”

In his submissions in support of the Preliminary Objection, Mr Ogwen, who held brief for Mr. Mutua for the defendant/respondent, stated that since the suit land was registered under the Registered Land Act, the Attorney General had to be made a party thereto. Since that was not done, the suit ought to be struck out. He sought to rely on NEMCHAND LAGHIR SHAH & 2 OTHERS VS APOLLOS HIRAM MUNA & ANOTHER.

In that case, the main issue for determination was as to who was the right person to be sued where land claims were being made against various senior land officials like the Commissioner of Lands and the Chief Land Registrar. Under the **Registered Land Act**, it was held, the person to be sued was the Attorney General for and on behalf of such persons and the requisite notice under **Section 13A** of the **Government Proceedings Act** had to be served.

Mrs. Asati for the plaintiff opposed the Preliminary Objection and submitted that the same was misplaced and merely calculated to delay the hearing of the suit. She added that in a suit as the one before the court which was purely between two civilians, there was no requirement in law that the Attorney General be made a party.

As to whether the plaintiff's application satisfies the requirements as set out in the celebrated case at **GIELLA VS CASSMAN BROWN & CO. LTD.** (supra), Mrs. Asati submitted that this could only be determined when the application is argued.

I have considered the Preliminary Objection along side the suit herein and the authority cited by the defendant's advocate. The plaintiff's suit against the defendant is based on trespass upon the suit land by the defendant. Nothing has been alleged against the Chief Land Registrar, the Commissioner of lands or any other government official.

I do not see how the Attorney General can be made a party to the proceedings. **Section 12** of the **Government Proceedings Act** Cap 40 Laws of Kenya provides that civil proceedings by or against the Government shall be instituted by or against the Attorney General. The title deed in respect of the suit land was issued by the Land Registrar, Transmara District Land Registry but no allegations of fraud or trespass have been made against the said officer to warrant inclusion of the Attorney General on behalf of the Public Officer into the proceedings. I find the first limb of the Preliminary objection lacking in merit and reject the same.

The second limb is equally unmeritorious. Whether the plaintiff's application for injunction meets the requirements as enunciated in **GIELLA V CASSMAN** case can only be determined upon hearing the application and not before.

All in all, the preliminary objection is unfounded in law and is dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED at KISII this 22nd day of April 2008.

D. MUSINGA

JUDGE

Delivered in the open court in the presence of

Mrs. Asati for the plaintiff

N/A for the respondent

D. MUSINGA

JUDGE