



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Case136 of 2007

JAMES JAMWA NDEDA PLAINTIFF

VERSUS

DORINE ALUOCH OLUOCH DEFENDANT

RULING

The plaintiff James Jamwa Ndeda has filed this suit against the defendant Dorine Aluoch Oluoch praying for an order of permanent injunction to restrain the defendant, her agents, licensees, servants and/or any other person or persons authorised by her from trespassing, defacing boundaries dealing or in any manner whatsoever interfering with the plaintiff's peaceful enjoyment and possessory rights of land Parcel Number Siaya / Ramba / 1484. The plaintiff claims that at all times relevant to the suit he is the registered owner and proprietor of the suit land. The defendant disputes the claim and says that if the plaintiff is truly registered as the proprietor thereof then he obtained the registration by fraud.

At the time of filing the suit on 9th October 2007, the plaintiff also filed a chamber summons under Section 3A of the Civil Procedure Act and Order 39 Rules (1) (2) & (3) of the Civil Procedure Rules seeking temporary injunction orders against the defendant firstly, pending the hearing and determination of the application and secondly, pending the hearing and determination of the suit.

The application is dated 8th October 2007, and is grounded on two factors viz:-

- (a) That the plaintiff is the absolute registered proprietor of land parcel number SIAYA/RAMBA/1484
- (b) That the respondent has entered and infringed on the plaintiff's possessory and ownership rights and in the process trespassed on to the said parcel of land

The grounds are enhanced by the facts contained in the plaintiff's supporting affidavit dated 8th October 2007, and are opposed on the basis of the facts contained in the respondent's replying affidavit dated 18th December 2007.

The basic issue for determination is whether the plaintiff is entitled to an order of temporary injunction

against the respondent pending the hearing and disposal of this suit. The plaintiff's contention is that he is the owner of the suit land but the respondent has trespassed into the land and proceeded to destroy the boundaries, cultivate the land and put structures thereon without the plaintiff's knowledge, permission or consent. The plaintiff says that he purchased the land from one Petro Oluoch Oloo between the 15th April 1972 and 8th August 1972 and that the respondent was a witness to the sale agreement (Annexure marked 'JMN 1'). He also says that he was registered as the absolute proprietor of the land and issued with a title deed on 3rd March 1980 (Annexure

'JMN 2').

The defendant's contention is that the alleged Sale Agreement is non-existent and what existed was an oral lease agreement, which expired in 1977. The defendant also contends that the purported sale agreement between her late husband Petro Oluoch Oloo is not executed by the plaintiff but his father Manase Ndeda Nyangar. She further contends that the dealings in respect of the land in dispute was between her late husband and the plaintiff's father and that the annexed translation of the agreement into the English language is false and misleading.

In the opinion of the court, the alleged Sale Agreement (Annexure marked JMN '1) whether rightly or wrongly translated does not appear to show that the plaintiff was a party to the alleged transaction unless of course his names have changed or he goes by other names. The land certificate (Annexure marked JMN 2) is in the name of the plaintiff which does not appear in the alleged Sale Agreement. If the issuance of the land Certificate was made on the basis of the alleged agreement then it is doubtful whether the plaintiff has established a prima facie case with a probability of success because the validity or invalidity of the title document comes into play. The validity or invalidity of the document cannot be affectively determined on affidavit evidence. It has to await the full hearing of the case. However, a party should not be allowed the benefit of a temporary injunction if the likelihood of a disputed document being declared null and void is high.

The plaintiff's main complaint is that his efforts to develop the suit land and enjoy his alleged right of ownership and quiet possession has been hindered by the defendant's alleged and unlawful acts. He does not make any effort to show that he stands to suffer irreparable damage if a temporary injunction is not granted. In any event, the claim is essentially based on the defendant's alleged trespass. This is capable of being compensated by an award of damages.

As to the balance of convenience, the defendant contends that she has been in occupation of the suit land since 1977. The plaintiff on the other hand contends that the defendant has not been cultivating the land since 1977 and that she only moved in last year prompting the filing of the suit. He says that the crops, trees, banana plantations and maize plantation growing on the land should not be used to demonstrate occupation by the defendant since he has also been growing maize on the land.

The plaintiff has annexed photocopies of photographs of maize and banana plantations to show that the defendant has trespassed and on the same breath is saying that such plantation and others are not demonstrative of occupation. This is a contradiction by itself. Whereas maize may grow within a short period of time, the same cannot be said of bananas and trees. The photos show mature banana plantations. This lends credence to the defendant's contention that she has been in occupation of the land since 1977. The balance of convenience would tilt in favour of the defendant who is in actual occupation of the suit land rather than the plaintiff who may be in occupation by "**remote control**".

It may thus be safely stated that the plaintiff has failed to satisfy the conditions for the grant of a temporary injunction as set out in the case of (**GIELLA =vs= CASSMAN BROWN LTD [1973] E. A. 358**). The application is therefore dismissed with costs.

Dated, signed and delivered at Kisumu this 2nd day of July 2008.

J. R. KARANJA

JUDGE

JRK/aao