



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 41 of 2006

SONOIYA SERSER PLAINTIFF

VERSUS

JOHN ROTICH & 17 OTHERS DEFENDANT

RULING

The applicant, Sonoiya Serser simultaneously with the filing of the plaint herein filed the application dated 20th February 2006 which is brought under **Order XXXIX of the Civil Procedure Rules**. The applicant has sought for restraining orders by way of an order of injunction against the eighteen (18) named defendants.

Specifically the applicant has prayed that the defendants either by themselves, their agents, servants or employers be restrained from cultivating, and or in any way from interfering or dealing with plaintiff's parcel of land number **MAU SUMMIT/SACHAGWANI BLOCK 10/137 (Borop)** pending the hearing and determination of this suit.

The grounds upon which this application is predicated on are stipulated in the body of the application and elaborated at length in the supporting affidavit of the applicant.

Briefly, the plaintiff is the registered owner of the suit premises. He is the absolute proprietor as per the copy of the title which was issued on 30th April 2002 and was annexed as an exhibit. Counsel for the plaintiff contends that the provisions of **Section 127 (b) of the Registered Lands Act**, the respondents are trespassers who have entered his client's parcel of land without any color of right and started cultivating. Although the respondents deny that they are cultivating the plaintiff's piece of land but claim to be occupying the society's adjusted land, they have no documents to support their claim thus the plaintiff urged this court to grant the orders sought.

On the part of the defendants, this application was opposed and dismissed on abuse of the court process and as a back door attempt by the plaintiff to obtain orders by filing another suit when there is another suit pending before this court and being HCCC NO. 102 of 2004 where the plaintiff is named as a defendant and part of the dispute is this same parcel of land.

The respondents argue that although the plaintiff is holding the title over the suit premises, the same belong to Borop Multipurpose Co-operative Society in which all the defendants are members and they allege the plaintiff did obtain the title fraudulently when there were court orders.

The respondents contend that the Borop Multipurpose Cooperative Society has been involved in leadership wrangles which led to an order by the Co-operative Tribunal in Tribunal case number 36 of 2002. The order directed that the society should hold elections and titles issued not to be released to the new members until a new management committee gives directions. These orders were issued on 3rd July 2002. The Counsel for the respondents argued that the titles were obtained fraudulently when the tribunal had issued an order against their issuance and or their release.

The respondents further denied that they are cultivating the plaintiff's land and states as follows:

“We together with other members Borop Multipurpose Co-operative Society do cultivate on our side of land which were shown by the D.O of Molo after the dispute arising from the boundary was solved and we have been cultivating our side for the last three years and even this season we have already cultivated and planted our side.”

The Respondents also alleged that the register of members attached to the applicant's application is forged by the applicant when he was the chairman of the society. The correct register of Borop Multipurpose co-operation Society members is the one they attached to their affidavit. The respondents deny that they were parties to the meeting held with the D.O Molo in April 2005 or of having any knowledge of a letter dated 11th January 2006 addressed to the D.O by the Chief.

I have carefully considered the issues raised in this application. The defendants claim that they are members of Borop Multipurpose Co-operative Society Ltd who are the plaintiffs in HCCC No.102 of 2004 and they have sued the plaintiff as the 1st Defendant. Part of the statement of claim in that suit is in respect of **MAU SUMMIT/SACHANGWANI/BLOCK 10/137** which is the subject matter in this suit.

The plaintiff has not responded to those allegations nor did he disclose to this court that he was involved with the defendants in another litigation. The plaintiff has sought for equitable order of injunction and it is my humble view that he had a duty to disclose this information.

Considering the averments contained in the defendants reply, in particular the fact that they are the same parties who are the plaintiffs in the earlier suit and the subject matter includes the suit premises, this suit is therefore a duplication of HCCC No. 102 of 2004.

Moreover there are several allegations of fraud made by the defendants against the plaintiff including the allegation that the title for the suit premises was obtained contrary to an existing court order.

The circumstances of how the applicant acquired the title are not given by the applicant. **Section 30 of the Registered Lands Act** provides for what are the recognized overriding interest over the rights on absolute proprietor.

According to **Section 30**;

“Unless the contrary is expressed in the register, all registered land shall be subject to sum of the following over-riding interests as may for the time being subsist and affect the same, without their being noted on the register –

(a) ...

(b) *The rights of a person in possession or actual occupation of land of which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”*

All the above issues require to be tried by way of oral evidence and it is inappropriate at this stage to grant the orders sought by the applicant.

In the circumstances, the applicant's application is dismissed and pursuant to **Order XI Rule 1 of the Civil Procedure Rules**, I hereby direct that this suit be consolidated with HCCC No. 102 of 2004 in order to avoid duplication and to save judicial time. Costs shall be in the cause.

It is so ordered.

Ruling read and signed on 26th May 2006.

MARTHA KOOME

JUDGE