



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

Civil Appeal 307 of 2005

FRANCIS OLODARO NANKUSEYO
APPELLANT

VERSUS

1. MARY GATHONI DAVID)

2. PETER KAMAU KARANJA)
RESPONDENTS

3. GEOFFREY KAMAU DAVID)

RULING

The appellant/applicant filed Civil Suit No.12 of 2005 before Senior Resident Magistrate Kilgoris on 14th March 2005 seeking to be declared the bona fide owner of plot No.6 Majengo in Kilgoris. He also sought for a permanent injunction against the respondents restraining them from alienating, selling or trespassing in the suit plot as well as mense profit. Simultaneously with filing of the suit he filed an application seeking for temporary injunction until the suit was heard. This application was heard by the court and in a ruling delivered on a date not shown the learned magistrate dismissed the application. The applicant being dissatisfied with the ruling preferred this appeal.

He simultaneously filed this appeal seeking for orders of the temporary injunction pending the hearing and determination of the appeal.

Mr. Otieno who prosecuted the application submitted that if the orders are not granted the applicant will suffer irreparable loss and if the plot is disposed off he will suffer irreparable loss. He submitted that after the dismissal of the application the respondents having been visiting the plot wanting to evict the appellant and sell the plot to another person. If plot is sold it will render the suit at Kilgoris Court nugatory.

He said the applicants have developments on the plot and there are also tenants there.

He submitted that plot was allocated to the applicant in 1991.

Mr. Karanja opposed the application and stated that the respondents are the widow and children of

the late Gatuto. The deceased had filed a suit in the High Court which was decided in his favour. By then the applicant had given the Plot to one Damaris, also a widow of Gatuto to use. Succession cause was filed before Nyahururu court and the property in dispute given to the 1st respondent. The grant has not been set aside.

It was further submitted that applicant has never been in occupation of the plot as structures there were built by the deceased in 1978. He therefore said there is no prima facie case proved.

I have considered the rival submissions and the annexures. As stated the appeal is against the ruling of the learned magistrate in refusing to grant injunction.

I will therefore abstain from dealing with the merits or otherwise of that ruling otherwise to do so would prejudice the appeal. My consideration is only whether there are good reasons to grant an injunction pending the hearing of the appeal or not.

In the first place the appeal has already been filed and is pending to be heard.

The suit in Kilgoris court is still pending. The reasons given in support of the application are almost similar to the ones given in the lower court. I think the court will need to exhaustively consider those reasons when dealing with the appeal. What I would say at this stage is that I feel that it would be fair and just to preserve the suit plot and status quo until at least the appeal has been heard and disposed off.

The applicant has deponed that he is the owner of the plot and annexed the documents to show that while on the other hand the plot was bequeathed to the 1st respondent vide a Succession Cause in Nyahururu court. Both issues will be addressed during the appeal. Applicant has stated that he has tenants on the plot which has not been seriously challenged. I feel that the balance of convenience tilts in favour of the applicant from the time being till the appeal is heard and determined. If the plot was to be sold and the appeals case in lower court succeeds the same will be rendered nugatory.

Applicant submitted that even if paid damages he cannot get another plot similar to that one.

In the circumstances I allow the application and order that the Respondent, their agents and servants are hereby restrained from alienating, selling or trespassing on the suit plot until the appeal is heard and determined. The Applicant should deposit in court shs.10,000/= as security to costs of the appeal within 30 days.

Costs of the application in the appeal.

Dated 27th day of September 2006.

KABURU BAUNI

JUDGE

Delivered in presence of

cc. Mobisa

Mr. Otieno for Applicant.

N/A for Respondent.

Respondent present