



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Case 94 of 2006

DR. WILSON MAKONGO MARWA APPLICANT

VERSUS

TOMA ROBI MAGIGE

SAMWEL MAGIGE..... DEFENDANTS

RULING

The applicant/Plaintiff seeks for an order of temporary injunction restraining the defendants, their agents and or servants from entering into or erecting any structures or interfering with land Parcel No.NYABASI/BUSONGA/54 until the suit is heard and disposed off. In prayer (d) he sought O.C.P.D. Kuria to implement the said order of granted.

The applicant deponed and it was submitted by Mr. Soire on his behalf that he is the registered owner of the land in question.

In June 2006 the respondent, their agents and servants invaded the applicants land and are subjecting it to waste and their stay there is unlawful.

The application was opposed. There was a replying affidavit and with the leave of the court a further of the court a further affidavit was also filed. It was deponed also submitted by Mr. Ondari for the respondents that the land in dispute belongs to their father.

The father never sold it to the applicant and he got registered as the owner by fraud. DANIEL MAGIGE WAMBURA deponed that he did not sign any documents to have the land transferred to the applicant. They said that they have been staying in the land since their father died in 1973.

I have considered the application, affidavits annexures and submission. I am satisfied that the applicant has shown that there is need to grant the orders sought. It is not in dispute that the applicant is currently the registered owner of the land. He has exhibited a copy of Title deed issue to him in 1978. Eighteen years have gone by since then. True the applicant are claiming that the registration was through fraud but this is an issue to be addressed during the main hearing. As of now the only tangible evidence placed before the court is that of registration. The application is the registered proprietor and as such balance of convenience tilts in his favour. He deponed that the respondent trespassed into the land on 24th June 2006.

This was not seriously contested. The respondent only stated that they have been living there. I am satisfied that the applicant has established a prima facie case. If the orders sought are not granted he will no doubt, as the registered owner suffer loss which may not be easily quantified for compensation by way of damages.

Lastly I do note that the respondents, though they state their father died in 1973 have not taken any letters of Administration to his Estate.

In the defendant filed, though there are allegations of fraud there is no counterclaim which has been framed properly. It is not enough to ask court to cancel the registration when there is no proper counterclaim set out in the defence. The original owner of the land is already dead and nobody seems to have taken steps to administer his Estate. There is therefore the issue of locus standi and whether any of the respondent can pray for cancellation of the title. All these are issues to be addressed during the hearing of the main suit.

The upshot of the matter is that I find the application has good merit and it is allowed.

The respondents are hereby restrained by themselves, their agents and/or servants from entering into, erecting structures or interfering with parcel No.NYABASI/BUSONGA/54 until the suit is heard and finalized.

They will also pay costs of this application to the applicant.

Dated 17th November 2006.

KABURU BAUNI

JUDGE

Delivered in presence of:

cc. Mobisa

Mr. Ondari for Respondent.

N/A for Applicant.