

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO.10 OF 2004**

OBADIA KIPRUTO KIRUI PLAINTIFF

-VERSUS

PETER KIPKEMBOI RONO DEFENDANT

RULING

This is an application dated 21st January, 2004 brought under Order 39 rules 1, 2, 2, 3 and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The applicant seeks for orders that the defendant be restrained from entering, demarcating, taking possession, selling, charging or in any other way dealing with land parcel number **Nandi/Chepterit/856** or any part of that land formerly known as parcel number **Nandi/Chepterit/292** pending hearing of the application interpartes and thereafter pending hearing and determination of the suit. The application was made under certificate of urgency. When it came before Gacheche .J. on 21st January, 2004, the judge fixed a hearing dated for 3rd February, 2004, for interpartes hearing and granted interim orders up to that date. When this matter came before me on 3rd February, 2004 at about 9.30 a.m. the defendant or his counsel were not present. There was on the file a return of service dated 29th January, 2004 by Hezron Getuma Onsongo swearing that service had been effected on the respondent on 24th January, 2004. The application therefore proceeded for hearing exparte, even though the defendants had already filed grounds of opposition. At around 12.40 pm the advocate for the defendant Mr. Karanja Mbugua appeared before me and stated that he was not present at the hearing of the application as the matter was not in the cause list and he had been informed at the court civil registry that he had to find the advocate for the plaintiff/applicant so that they could get direction from the judge who was in Eldoret. When he got the applicant's advocate on phone, he was advised that the application had already been heard in his absence.

The advocate for the respondent on 5th February, 2004 filed a Chamber Summons under certificate of urgency seeking to set aside the exparte proceedings of 3rd February, 2004. I certified the application as urgent and fixed it for hearing on the 10th February, 2004. On that date the parties agreed that I should deliver my ruling on the application heard on 3rd February, 2004 first and therefore the latter application was marked as SOG. The application dated 21st January, 2004 has on its face the grounds on which the application is based. It is also supported by an affidavit sworn on 21st January, 2004 by the applicant Obadia Kipruto Kirui.

Counsel for the applicant submitted that their application is for orders that the respondents, servants or agents be restrained from entering, demarcating, taking possession, selling, charging or in any other manner dealing with the land number parcel **Nandi/Chepterit/856** or any part of that land formerly known as parcel number **Nandi/Chepterit/292** pending hearing of the suit. He submitted that the plaintiff was the registered owner of plot number **Nandi/Chepterit/292** having purchased the same. The defendant's father sued the plaintiff together with the seller of the land claiming part of the land. The matter was referred to the Land Disputes Tribunal which found in favour of the defendant's father (now deceased) and awarded him 6.4 acres of the land. The plaintiff applied for judicial review to this court under Miscellaneous Civil Application No.7 of 1997 at Eldoret and obtained orders quashing the Land Disputes Tribunal's decision. Prior to filing the miscellaneous cause he obtained leave, which operated as a stay. Both orders were registered against the title No.292 in the Land's office. In spite of this registration, the defendant's father went and mischievously obtained title for part of the land which was given plot No.256 and plot No.855 remained in the name of the plaintiff. This was contrary to the court orders.

Thereafter the plaintiff went to Kapsabet and applied to set aside the Land Disputes Tribunal's reference and applied that the two titles issued be quashed and cancelled. Those orders were granted by the

Principal Magistrate Kapsabet. When the District Land Registrar moved to enforce the order, the defendant's father filed a Miscellaneous Civil Application in Nakuru High Court to quash the decision of the Land Registrar to deregister plot No. 856. Justice Visram at Nakuru upheld the contention of the defendant's father that the Registrar did not serve him with notice to cancel the title. However, the judge refrained from commenting on the merits of cancellation of title. After the defendant's father died the defendant attempted to gain entry on plot No.292 on 16th January, 2004 with the help of the District Commissioner. On 19th January, 2004 the defendant mobilized youths to invade and take possession of the disputed land, which has always been in the possession of the plaintiff. He argued that the plaintiff has a prima facie case because the cancellation of title number 292 and the creation of plot number 856 was done against court orders that were registered on the title.

Secondly, the defendant cannot enter the land without seeking court orders for eviction. The balance of convenience was also in favour of the plaintiff.

Perusing through the documents filed, I find that though the court order in Eldoret High Court Miscellaneous Civil Application 7 of 1997 was given on 4th October, 1999, the Deputy Registrar issued the order on 20th March, 2000 which order was registered in the Lands' Office on 4th April, 2000. The certificate of Official Search dated 19th January, 2004 shows that Kiprono Arap Tegerei was registered as the proprietor of 2.55 hectares on 18th January, 2000, which was before the court order from the Eldoret High Court was registered. I see in the continuation sheet of the card in the Lands Office – sheet 3 an entry No.12 of 9th September, 1996 for stay of execution vide Eldoret High Court Miscellaneous Application 265 of 1996 which granted a stay of the judgement in SRM Kapsabet Civil Case No.133/95. I however, have not seen copy of the court order that says how long that stay was to have effect. On perusing the ruling of Justice Visram in Nakuru High Court Miscellaneous Civil Application No.240 of 2002, the orders sought by Kiprono Tegerei was very clear, and the judge did allow the application with costs, which means that he granted the orders. The order sought was that the court issue an order for certiorari, bring and quash the decision of the Land Registrar Nandi District made on 19th November, 2001 to cancel the Title Deed in L. R. **Nandi/Cheptiret Block 856** and subsequent registration of the said land in the name of the interested party as **Nandi/Cheptiret Block 292**. As I have said the application was allowed by the judge with costs.

On whether I should grant an injunction in this matter pending the hearing of the suit, I have to consider the probability of success of the case for the applicant, whether the applicant will suffer irreparable loss or the balance of convenience for the affected parties. Considering that the ruling of Justice Visram is the latest ruling on this matter, having been given on 29th July, 2003, and there being no indication of any challenge having been filed on that ruling, I consider that this is not an appropriate case for granting the injunction sought. The decision of Justice Visram was in favour of the respondent. I therefore dismiss the application. As the respondent did not attend court at the hearing of the application, I make no order as to costs.

Dated and delivered at Eldoret this 11th day of February, 2004.

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George Dulu

Judge