



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

CIVIL SUIT 86 OF 2004

ISAAC AYAKO ONGANI PLAINTIFF

VERSUS

THOMAS GUTO NYAMORA DEFENDANT

RULING

This application is brought under Order 35 rules 1 & 8 CPR and seeks for summing judgment to be entered against the respondent/defendant for recovery of land parcel known as plot No.18A Keumbu Market together with mesne profits. Applicant also prays for costs.

It was submitted that the applicant/plaintiff is the registered owner of the plot in question. The plot initially belonged to his deceased father one SAMSON ONGAKI. After the death of the father he and his other brothers shared his property among themselves. Applicant was given plot No.18A Keumbu Market as his share. He caused it to be registered in his name.

It was further said that the Respondent was a tenant of the applicant's father in the plot paying shs.2000/= a month. However after the applicant's father's death he refused to pay rent and started to build on the plot. He claimed to have bought the property from a brother of the applicant one FRANCIS AYAKO ONGAKI. The said Francis Ayako was sued together with the Respondent by the applicant and his other brothers but they withdrew the issue.

Applicant said he had been paying rent and he has a card for the County Council showing that he is the owner of the said plot. He said the defendant has no defence.

The defence which was filed on 22/6/04 was after an inter locutory judgment had been applied for.

Application was opposed. It was submitted there are issues to be resolved. The Respondent says he bought the property from one Francis Ayacko a brother of the applicant. The said Francis Ayacko has sworn an affidavit confirming this.

The applicant had also filed KISII HCCC.NO.156 of 1989 over the same property against the Respondent and others. That suit was never determined.

Also raised was the issue of how the applicant got registered as the owner of the plot. It was transferred to him after the death of his father. He is not the administrator of his father's Estate and the registration was therefore through fraud.

Respondent submitted that he had been in occupation of the said plot since 1976 and he has developed it.

I have carefully considered the application. The defendant filed his defence on 22nd June 2004. By then the applicant had on 18th June 2004 applied for inter locutory judgment but it had not been entered. The court can't ignore the defence. In fact it has not been attacked as having been filed out of time. The applicant is only stating that it raises no triable issues.

The dispute has a long history. As submitted the applicant and his brothers had sued the Respondent and their other brother over the said plot in KISII HCCC.NO.156 of 1989. In that suit the applicant and his other two brothers were complaining that the brother Francis Ayacko who was the 1st defendant had sold plot No.18A Keumbu Market to the present Respondent who was the 4th defendant in that suit. Their complaints were that he did so without the knowledge of the other brothers.

It is therefore clear that as early as 1989 – some 15 years ago; the issue of Respondent having bought the plot was in the knowledge of all the parties. By then the plot was still registered in the name of applicant's father. It was only in 1992 that registration changed to that of the applicant. This registration has been attacked as being done fraudulently.

It is therefore clear that there are issues to be resolved one being whether indeed the Respondent had bought the plot and the other issue of registration of the plot into applicant's name. These are not issues which can be misled away or determined in a summarily manner. There is need for both parties to call evidence for the court to reach a proper decision. One notes that Francis Ayacko, the applicant's brother has sworn an affidavit confirming that he sold the plot to the Respondent.

All in all I find application has no merit. The defendant is at liberty to defend the suit brought against him as he has raised serious issues.

The application is therefore dismissed with costs.

Dated this 26th November 2004.

KABURU BAUNI

JUDGE

Mr. Mogire for Mr. Ombachi for applicant.

N/A for Respondent

KABURU BAUNI

JUDGE