



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CIVIL SUIT NO. 248 OF 2014

JUVENALIS PIUS OTTARO ALIAS OTARO ORERO....PLAINTIFF

VERSUS

1.OTARO GICHANA.....DEFENDANT

2.MOGOTU OTARO.....DEFENDANT

3.STELLA KWAMBOKA.....DEFENDANT

4.OMBUYA OTARO.....DEFENDANT

RULING

The parties herein are members of the same family. The 1st defendant is the plaintiff's father. The 2nd and 4th defendants are the plaintiff's step mother and brother respectively while the 3rd defendant is the plaintiff's sister in law. This dispute relates to the ownership of a parcel of land known as **Central Kitutu/Mwabundusi/103**(hereinafer referred to as the "suit property") which was registered in the plaintiff's name on 18th October 2013. In his plaint, the plaintiff averred that the suit property was given and transferred to him by the 1st defendant as his share of the family land sometimes in the year 1974. The plaintiff averred that on 20th May, 2014, the defendants forcibly entered the suit property and buried the body of one, George Morara Otaro, deceased("the deceased"), thereon without his consent. The plaintiff averred that the defendants' invasion of the suit property was illegal. The plaintiff has sought among others an order for the eviction of the defendants from the suit property and the exhumation of the body of the deceased therefrom.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 24th June 2014 seeking an order of temporary injunction restraining the defendants from trespassing onto, occupying, selling or disposing of any part of the the suit property pending the hearing and determination of this suit. The plaintiff also sought an order directing the defendants to exhume the body/remains of the deceased from the suit property under the supervision of the OCS Nyamira Police Station. The application was premised on the grounds set out on its face and on the affidavit sworn by the plaintiff on 24th June 2014 in which the plaintiff reiterated the contents of the plaint which I have highlighted above.

The application was opposed by the defendants. The 1st defendant in a replying affidavit sworn on 17th November 2014 stated that he had four wives/houses and that the plaintiff was his son with the first wife. The 1st defendant stated that he had distributed his land amongst his four wives/houses who were supposed to allocate to each of their sons their respective shares. He stated that he had allocated the suit property to the house of his deceased fourth wife, Moraa Otaro. He averred that the plaintiff developed an interest in the suit property because his fourth wife had no son and proceeded to fraudulently register

the suit property in his name without his (the 1st defendant's) authority acting in collusion with land officers.

The application was argued through written submissions. The plaintiff filed his submissions on 26th May 2015 while the defendants filed theirs on 30th June 2015. The plaintiff submitted that he is the lawful proprietor of the suit property and that the burial of the body of the deceased on the property was unlawful. The plaintiff submitted that he had met the conditions for granting a temporary injunction that were laid down in the case of **Giella vs Cassman Brown & Co. Ltd. [1973] E.A 358**. The plaintiff submitted further that the circumstances of this case are exceptional and as such justifies the issuance of an order of mandatory injunction for the exhumation of the body of the deceased from the suit property. The plaintiff argued that he was the sole registered owner of the suit property which he had occupied peacefully and exclusively since the year 1974. He submitted that the defendants had land elsewhere and that their actions were intended to dispossess him of the suit property in breach of his constitutional rights enshrined under Article 40 of the Constitution.

The plaintiff submitted that the defendants' acts aforesaid had denied him the use and enjoyment of the suit property and that the burial of the deceased on his property was intended to offend his rights. The plaintiff submitted that he had established a prima facie case against the defendants and that the loss and damage he would suffer if the orders sought are not granted cannot be compensated in damages. The plaintiff submitted that even if the matter is considered on a balance of convenience, the same would favour him. The plaintiff cited the cases of **Kamau Mucuha vs. The Ripples Ltd CA No. 126 of 1992** and **Peter Mburu Echaria & another vs. Priscilla Njeri Echaria Civil Application No. 149 of 1997** in support of his submissions.

The defendants submitted in reply that the 1st defendant is the plaintiff's father and that he was at all material times the owner of the suit property which the plaintiff fraudulently caused to be transferred and registered in his name. They submitted that the 1st defendant is still having in his possession the original title to the suit property. They submitted that the ownership and the circumstances under which the plaintiff acquired his title to the suit property are in issue. The defendants argued that since the ownership of the suit property is in dispute, the orders sought for the exhumation of the remains of the deceased cannot be granted.

The defendants submitted that the plaintiff has not established a prima facie case with a probability of success since the process through which he acquired title to the suit property is questionable. The defendants submitted that the plaintiff had never occupied or utilized the suit property which was at all material times in the possession of the 1st defendant's fourth wife. The defendants submitted further that the plaintiff had not demonstrated that he stood to suffer irreparable loss and damage which could not be compensated in damages. They argued that the plaintiff lives in Nairobi and that he would not suffer any loss since he was not using or occupying the suit property.

I have considered the plaintiff's application and the opposition thereto by the defendants. I have also considered the respective submissions by the advocates for the parties. There is no dispute that the plaintiff is the registered owner of the suit property. It is also not in dispute that the suit property originally belonged to the 1st defendant. What is disputed is how the plaintiff came to be registered as the owner of the said property on 18th October 2013. Although the plaintiff has claimed that he was first registered as the owner of the suit property in 1974, there is no convincing evidence of this fact before the court. The plaintiff has contended that the suit property was given and transferred to him by his father the 1st defendant herein. The 1st defendant has denied this contention and has claimed that the suit property was transferred to the name of the plaintiff fraudulently without his knowledge or involvement. The 1st defendant contended that he had allocated the suit property to his fourth wife and that the plaintiff who is from the house of his 1st wife has already been allocated his share of the family land through his mother.

There is no doubt from the foregoing that the plaintiff's title to the suit property has been seriously challenged. I am of the view that in situations such as this one, it was incumbent upon the plaintiff to

adduce some evidence that would have enabled the court to trace the root of his title. The Court of Appeal in the case of Munyu Maina vs. Hiram Gathiha Maina, Nyeri CA No. 239 of 2009 stated as follows in this regard:

"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."

For the foregoing reasons, I am not satisfied that the plaintiff has established a prima facie case with a probability of success. I am also not convinced that the plaintiff would suffer irreparable harm unless the orders sought are granted. With regard to the order sought for for the exhumation of the body of the deceased, I am once again not persuaded that special circumstances do exist in this case that would justify the granting of an order of a mandatory injunction. I am of the view that justice would be better served if the prevailing status quo is maintained pending the hearing of the main suit. In the case of **Ougo & another vs. Otieno**[1987] KLR 364, it was held that **"The general principle is that where there are serious conflict of facts, the trial court should maintain the status quo until the dispute has been decided at the trial."**

Due to the foregoing, the plaintiff's application dated 24th June 2014 is disallowed. The costs of the application shall be in the cause.

Signed at Nairobi this.....Day of2016

S. OKONG'O

JUDGE

Delivered, Dated and Signed at Kisii this 8th day of April 2016

J.M.MUTUNGI

JUDGE

In the presence of

.....**for the Plaintiff**

.....**for the Defendants**