



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 494 OF 2013

SAMWEL NYAORA ONSONGO PLAINTIFF

VERSUS

BASIBICA KWAMBOKA ONSONGO 1ST DEFENDANT

ONSONGO OMENYI 2ND DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on 18th December 2013 seeking;

(a) Permanent injunction to restrain the defendants from trespassing onto, interfering with and/or in any other manner whatsoever dealing with the portion of land measuring 3 acres comprised in the land title LR .No. South Mugirango/Boikanga/1745 (hereinafter referred to as “the suit property”).

(b) Costs of the suit

(c) Any other relief the court deems fit to grant.

In his plaint dated 17th December 2013, the plaintiff averred that he was and still is the owner of the suit property which he purchased at a consideration of kshs.5,800/=. The plaintiff averred that in the month of December, 2013 the defendants entered onto the suit property without his authority and commenced cultivation on a substantial portion thereof. The plaintiff averred that the defendants had earlier lodged a claim against him at Etabo Land Disputes Tribunal (hereinafter referred to as “**the tribunal**”) in the year 2009 over the suit property which claim was determined in favour of the defendants. The plaintiff averred that he lodged an appeal against the said decision of the tribunal with the Provincial Appeal Committee at Kisumu in Appeal No. 23 of 2010 which appeal has not been heard because the file has gone missing and has not been traced to date. The plaintiff averred that the defendants have refused and/or neglected to cease the said acts of trespass even after a demand was made upon them to do so.

2. On 11th March 2014, the plaintiff filed an application by way of Notice of Motion dated 5th March 2014 seeking a temporary injunction to restrain the defendants from trespassing on, entering, cultivating, alienating and/or wasting “*the plaintiff’s portion of the suit property*” pending the hearing and determination of this suit. The application was brought on the grounds set out on the face thereof and in the supporting affidavit of the plaintiff sworn on 5th March 2014. The application was brought on the grounds that the plaintiff is a bona fide purchaser of the suit property and that the defendants have trespassed on the property and commenced cultivation thereon. In his affidavit in support of the application, the plaintiff stated that the suit property was owned by the plaintiff’s father who sold it to

one, Obinde in the year 1985. The plaintiff purchased the property from Obinde in the same year and has been cultivating the same since then. The plaintiff stated that the dispute with the defendants started in the year 2010 when the defendants lodged a claim against him with the tribunal with respect to the suit property as stated above.

3. The plaintiff stated that after he lodged an appeal against the decision of the said tribunal with the Provincial Appeal Committee, the parties were ordered to maintain the status quo pending the determination of the said appeal. The defendants however breached the said order in January, 2014 when they attempted to take possession of the suit property but were restrained by the District Officer, Etago Division. The plaintiff stated that the defendants did not give up on their desire to take possession of the suit property. On 28th February 2014, the defendants entered the suit property, destroyed the crops that the plaintiff had planted thereon and commenced cultivation on the same the protests from the plaintiff notwithstanding. It is on account of the foregoing that the plaintiff was constrained to file the present application.

4. The defendants opposed the plaintiff's application through grounds of opposition dated 27th May 2014. The defendants contended among others that the plaintiff has not established the grounds for granting the orders sought. The defendants contended further that this suit is *res judicata* and as such cannot form a basis for the orders sought in the application. On 28th May 2014, the parties agreed to argue the application by way of written submissions. Both parties filed their submissions on 17th November 2014. I have considered the application together with the grounds of opposition filed by the defendants in opposition thereto. I have also considered the parties' respective submissions and the authorities cited in support of the same. This being an application for interlocutory injunction, the plaintiff has to satisfy the well-established conditions that were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**. In that case, it was held that for an interlocutory injunction to issue, the applicant must establish a prima facie case with a probability of success and must also demonstrate that he stands to suffer irreparable injury which cannot be compensated in damages. If the court is in doubt as to the above, the application would be determined on a balance of convenience.

5. It is not very clear to me from the pleadings whether the plaintiff's claim is with respect of the entire parcel of land comprised in the suit property or only a portion thereof. In paragraph 3 of the plaint, the plaintiff averred that he is the owner of land measuring approximately 3 acres. The particulars of the land referred to in that paragraph are not given. In paragraph 7 of the plaint, the plaintiff averred that his claim against the defendants is for a declaration that he is the owner of land parcel number South Mugirango/Boikanga/1745 ("the suit property") measuring 3 acres. In the reliefs sought in the plaint, the plaintiff has sought a permanent injunction to restrain the defendants from trespassing on or interfering with or in any manner dealing with "*the portion of land measuring 3 acres*" of land parcel number South Mugirango/Boikanga/1745 ("the suit property").

6. In the present application, the plaintiff has sought a temporary injunction to restrain the defendants from trespassing on, entering, cultivating, alienating and/or wasting "*the plaintiff's portion*" out of land parcel South Mugirango/Boikanga/1745 "the suit property". In paragraph 2 of the supporting affidavit, the plaintiff has stated that he purchased from one Mr. Obinde "*land measuring 2 acres*" which the plaintiff's father had sold to Mr. Obinde from land parcel No. South Mugirango/Boikanga/1745 ("suit property"). In paragraph 4 of the said affidavit the plaintiff has stated that it is this land measuring 2 acres that was the subject of the dispute that he had with the defendants before the tribunal. In view of the foregoing, the subject matter of the plaintiff's claim against the defendants is not clear. The claim as set out in the application herein is at variance with the claim as pleaded in the plaint. As I have stated above, it is not clear whether the plaintiff is claiming the entire parcel of land comprised in the suit property or a portion thereof. If the claim is in respect of only a portion of the suit property, it is not clear whether the portion measures 3 acres as stated in the plaint or 2 acres as stated in the affidavit in support of the present application.

7. As I have stated above, the application before me seeks injunction to restrain the defendants from trespassing on *the plaintiff's portion* out of land parcel No. South Mugirango/Boikanga/1745. The so called "plaintiff's portion" of parcel of land No. South Mugirango/Boikanga/ 1745 ("the suit property") is

not defined. The court is left to wonder on what portion of the suit property the injunction sought would attach if granted.

8. The imprecise nature of the plaintiff's claim aside, the plaintiff had the onus of establishing his right over the suit property or a portion thereof as the case may be and the fact that the defendants have trespassed on the same. The plaintiff has placed no evidence before the court to show that he is the owner of the suit property. There is no evidence of whatsoever nature that the plaintiff had purchased the suit property from Obinde. There is also no evidence before me that Obinde had purchased the suit property from the plaintiff's father before the plaintiff purchased the same from him. No agreements have been exhibited to show that Obinde purchased the suit property from the plaintiff's father and subsequently sold the same to the plaintiff. There is no evidence of transfer of the suit property from the plaintiff's father to Obinde and from Obinde to the plaintiff. The plaintiff has not placed before the court any evidence as to the current registered owner of the suit property.

9. On the material before me, I am not persuaded that the plaintiff has established a prima facie case against the defendants with a probability of success. The plaintiff's cause of action is based on the tort of trespass. To establish trespass, the plaintiff had a duty to prove that he is either the owner of the suit property or that he is in possession thereof and that the defendants have entered thereon without his permission or justifiable cause. The plaintiff having failed to establish any right or interest in the suit property based on either ownership or possession thereof, I am not satisfied that a case of trespass has been established.

10. The plaintiff having failed to establish that he has any right over the suit property, I am not persuaded that the plaintiff stands to suffer irreparable harm if the orders sought are not granted. The upshot of the foregoing is that the plaintiff has failed to satisfy the conditions for granting the orders sought. Consequently, the plaintiff's application dated 5th March 2014 has no merit and the same is accordingly dismissed with costs to the defendants.

Delivered, Signed and Dated at Kisii this 17th day of April, 2015.

S. OKONG'O

JUDGE

In the presence of:

Mr. Moracha h/b for Sagwe for the plaintiff

Mr. Omwega h/b for Nyagesoa for the 1st and 2nd defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE