



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 470 OF 2014**

BOSIRE OMBWOCHI ..... PLAINTIFF

VERSUS

WILKISTER MORAA BOERA ..... DEFENDANT

**RULING**

1. The plaintiff is and was at all material times the registered proprietor of all that parcel of land known as LR No. Majoge/Boochi/1582 (hereinafter referred to as the suit property”). The suit property was registered in the name of the plaintiff on 21<sup>st</sup> November 1969 on first registration. The defendant is a sister to the plaintiff and has a son by the name, David Mageto Thomas. The plaintiff brought this suit against the defendant seeking; a declaration that the plaintiff is the registered and/or lawful owner of the suit property, an order for the eviction of the defendant from the suit property, a permanent injunction to restrain the defendant from entering upon, re-entering, trespassing onto, building structures on, cultivating, interfering with and/or in any other manner dealing with the suit property and general damages for trespass.
2. In his plaint dated 3<sup>rd</sup> December 2014, the plaintiff averred that by virtue of his registration as the owner of the suit property, he is entitled to exclusive and/or absolute rights over the property. The plaintiff averred that on 30<sup>th</sup> November 2014, the defendant entered the suit property without his permission and while thereon commenced the construction of a temporary structure on a portion thereof. In addition, the defendant also commenced cultivation on a portion of the said property. The plaintiff averred that as a result of the defendant’s said activities on the suit property, the plaintiff has been dispossessed of a substantial portion of the suit property and has thereby been deprived of the right to use, possess and/or benefit therefrom. It is on account of the foregoing that the plaintiff has sought the reliefs set out herein earlier.
3. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 5<sup>th</sup> December 2014 seeking a temporary injunction to restrain the defendant from entering onto, trespassing onto, building structures on, cultivating, interfering with and/or in any other manner whatsoever dealing with the suit property and/or any portion thereof pending the hearing and determination of this suit. The application was supported by the affidavit of the plaintiff in which he reiterated the contents of the plaint that I have highlighted hereinabove. The plaintiff reiterated that he is the registered proprietor of the suit property and that he was so registered on 21<sup>st</sup> November 1969. The plaintiff averred that he occupied the suit property peacefully from the time he acquired the same until sometimes in the month of June, 2010 when the defendant lodged a claim against him at Ogembo Land Disputes Tribunal (“the Tribunal”) with respect to the property in which claim, the defendant contended that she is the owner of the suit property. The tribunal heard the defendant’s claim and purported to award the defendant title to the suit property in a

- decision that was rendered on 6<sup>th</sup> August 2010. The plaintiff averred that he challenged the said decision by way of judicial review in the High Court at Kisii in, Kisii HC. Misc. Civil Application No. 6 of 2011 (JR) after it was adopted as a judgment of the court by the Principal Magistrate Court at Ogembo in Ogembo PMCC Misc. Application No. 16 of 2010 on 12<sup>th</sup> October 2010.
4. The plaintiff averred that the decision of the tribunal together with the decree that ensued upon its adoption as a judgment of the court were quashed by the High Court on 17<sup>th</sup> August 2012 in the judicial review application aforesaid. The plaintiff averred that even after the tribunal made a decision in her favour, the defendant did not enter the suit property and she had not done so by the time the said decision of the tribunal was quashed by the High Court as aforesaid. The plaintiff averred that after a lapse of about 2 years after the said decision of the tribunal was quashed, the defendant on or about 30<sup>th</sup> November 2014 entered the suit property without his permission and commenced the construction of a temporary structure on a portion thereof. The defendant also commenced cultivation on a substantial portion of the suit property. The plaintiff averred that the said activities by the defendant has deprived him of the use and enjoyment of the suit property and are likely to affect the character and/or texture of the suit property thereby subjecting him to irreparable damage if not restrained by this court. The plaintiff averred that in the circumstances, it is necessary that the orders sought be granted so as to preserve and/or conserve the suit property pending the hearing and determination of this suit.
  5. When the plaintiff's application came up for hearing on 24<sup>th</sup> February 2015, the defendant's advocate asked for adjournment to enable the defendant to file a replying affidavit in opposition to the application. The plaintiff's application was adjourned and stood over generally. In the meantime, the defendant was granted leave to file a replying affidavit within 14 days from 24<sup>th</sup> February, 2015. The plaintiff's application was re-listed for hearing on 11<sup>th</sup> May 2015. In the morning of 11<sup>th</sup> May 2015, the defendant's advocates filed a notice of preliminary objection in opposition to the application. The defendant did not file a replying affidavit in respect of which the court had granted to her leave on 24<sup>th</sup> February 2015; more than 60 days earlier.

In her preliminary objection, the defendant contended as follows:

- i. **That the court has no jurisdiction to entertain the plaintiff's application and the suit as a whole on account of the fact that there are a number of pending cases in which the parties herein are involved relating to the suit property namely:**
    - a. **Kisii High Court Petition No. 24 of 2014, Wilkister Moraa Boera –vs- Bosire Obwochi & 2 Others.**
    - b. **Ogembo SPMCC No. 68 of 2008.**
    - c. **Kisii High Court Misc. Civil Application No. 6 of 2011 (JR)**
  - ii. **That the application and the suit as a whole is an abuse of the process of the court.**
6. When the application was called out for hearing, Mr. Ochwang'i appeared for the plaintiff while Mr. Mokuia, advocate appeared for the defendant. In his submission in support of the application, Mr. Ochwang'i relied on the contents of the plaintiff's affidavit in support of the application together with the annexures thereto and urged the court to allow the application as prayed. He submitted that the defendant's notice of preliminary objection was filed out of time and as such should be ignored by the court. Without prejudice to that submission, he submitted that most of the cases cited by the defendant as a basis for her objection to the present application have been heard and determined. He gave the examples of, Kisii High Court Misc. Civil Application No. 6 of 2011 (JR) and Ogembo SPMCC No. 68 of 2008 which he submitted have been heard and determined. The latter case he submitted concerned the defendant's son, David Mageto Thomas and not the defendant. With regard to the High Court Petition No. 24 of 2014, Mr. Ochwang'i submitted that the same is not relevant to these proceedings.
  7. In his response to Mr. Ochwang'i submissions, Mr. Mokuia submitted that the defendant is occupying the suit property and the order of injunction sought if granted would keep the defendant from her residence. Mr. Mokuia submitted further that since the defendant has filed a

- constitutional petition to challenge the validity of the plaintiff's title, the defendant should be afforded an opportunity to vindicate her constitutional rights. Mr. Mokua submitted that the orders sought should await full trial of the suit. In his closing submissions, Mr. Ochwang'i submitted that the issues raised by Mr. Mokua were factual in nature and could only be raised in an affidavit which the defendant did not file.
8. I have considered the plaintiff's application together with the affidavit that was filed in support thereof. I have also considered the defendant's preliminary objection that was filed in opposition of the application notwithstanding the fact that it was filed out of time without leave of the court. What is before me is an application for a temporary injunction. The principles for granting a temporary injunction are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] E. A 358**, an applicant for a temporary injunction must demonstrate that he has a prima facie case with a probability of success against the respondent and that unless the order is granted, he is likely 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.
  9. Although the defendant's advocates filed a notice of appointment of advocates on 24<sup>th</sup> February 2015, they had not filed a statement of defence as at 11<sup>th</sup> May 2015 when the plaintiff's application for injunction was heard. The defendant also failed to file a replying affidavit in response to the plaintiff's application despite the leave that was granted to her to do so by the court on 24<sup>th</sup> February 2015. Instead, she chose to file a notice of preliminary objection in which she raised mainly issues of law which were centered on the jurisdiction of the court and the competency of the plaintiff's suit and the application. The consequence of the defendant's failure to file a replying affidavit in response to the present application is that all issues of fact that were raised by the plaintiff in his application are not controverted. It is therefore not in dispute that the plaintiff is the registered proprietor of the suit property. It is also not in dispute that the plaintiff was all along been in peaceful occupation of the suit property until sometimes in June, 2010 when the defendant lodged a claim against him at the tribunal with respect to the suit property which claim was determined in favour of the defendant by the tribunal. It is also not disputed that the decision of the tribunal was quashed by the High Court thereby restoring the ownership of the suit property to the plaintiff. It is also not disputed that the defendant entered the suit property on or about 30<sup>th</sup> November 2014 without the plaintiff's permission and started constructing a temporary structure thereon.
  10. Section 24 of the Land Registration Act, 2012 provides that the registration of a person as proprietor of land vests in that person absolute ownership of the land together with all rights and privileges associated with such ownership. I am fully in agreement with the plaintiff's contention that by virtue of his ownership of the suit property, he is entitled to exclusive occupation and/or possession of the same.
  11. Since the defendant has not challenged the plaintiff's title to the suit property, the onus was on her to justify her entry and occupation of the suit property. As I have stated above, the defendant neither filed a replying affidavit nor grounds of opposition. Her notice of preliminary objection raised mainly points of law and even that was limited only to the jurisdiction of the court and the competency of the suit. The defendant offered no explanation of any kind as to why she entered the suit property and commenced thereon the activities complained of by the plaintiff. The defendant's advocate had in his submission stated that the defendant has her residence on the suit property and that she has occupied the property since 1980. I am in agreement with the submission by the plaintiff's advocate that these are factual issues which cannot be raised at the bar. No weight can therefore be attached to the same. In any event, no justification was given in the said submission by the defendant's advocate for the defendant's entry and occupation of the suit property. It is therefore my finding that the defendant failed to justify her entry and occupation of the suit property. The plaintiff's claim against the defendant is based on trespass. Trespass is any unjustifiable intrusion by one onto the land in possession of another. From what I have stated above, I am satisfied that the plaintiff has established a prima facie case of trespass against the defendant. The notice of preliminary objection by the defendant does not cast any doubt on the merit of the plaintiff's case against the defendant. I am in agreement with the submissions by the plaintiff's advocate that two of the cases alleged to be pending between the parties herein over the suit property have in fact been heard and determined. The plaintiff has exhibited in his bundle of

documents the decrees issued in the said cases. With regard to the third case which is a constitutional petition, this court could not appreciate its relevance in view of that fact that a copy of the petition was not placed before the court for perusal. The other issue that was raised in the preliminary objection was that this suit is an abuse of the process of the court. In his submission, the defendant's advocate did not at all elaborate on this point. There is no basis therefore on which this court can find that the suit herein together with the interlocutory application based therein is an abuse of the process of the court.

12. Having found that the plaintiff has established a prima facie case against the defendant, the next issue to consider is whether the plaintiff would suffer irreparable harm if the orders sought are not granted. The plaintiff has claimed that the defendant entered the suit property on or about 30<sup>th</sup> October 2014 and commenced construction of a temporary structure thereon. In addition, the defendant commenced cultivation on a substantial portion of the suit property. All these averments by the plaintiff are not denied by the defendant. If the defendant continues with the aforesaid activities, the plaintiff would be deprived of a substantial portion of the suit property and he will no doubt suffer irreparable injury. I am satisfied therefore that the plaintiff stands to suffer irreparable harm if the orders sought are not granted.
13. In conclusion, it is my finding that the plaintiff has met the conditions for granting a temporary injunction. The orders sought by the plaintiff in the application dated 5<sup>th</sup> December 2014 are therefore merited. The application is allowed in terms of prayers 3 and 4 thereof. For the avoidance of doubt, the injunction granted herein shall not prevent the defendant from entering and leaving her residence or home if she has any on the suit property as at the date hereof.

**Delivered, Dated and Signed at Kisii this 3<sup>rd</sup> day of July, 2015.**

**S.OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Ayienda h/b for Oguttu      for the plaintiff

N/A                                      for the defendant

Milcent                                      Court Assistant

**S.OKONG'O**

**JUDGE**