



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 346 OF 2013

GEOFFREY BOSIRE OCHENGEPLAINTIFF

VERSUS

ROBERT BURUNA MAGEMBE1ST DEFENDANT

RACHAEL OTUNDO2ND DEFENDANT

LAND REGISTRAR – KISII 3RD DEFENDANT

RULING

1. The plaintiff brought his suit against the defendants on 13th August 2013 seeking; a declaration that the 1st and 2nd defendants are trespassers on the ground(sic) occupied by the plaintiff and his two (2) brothers and registered as LR No. Kisii/Wanjare/Bogiakumu/ 1554, a permanent injunction to restrain the 1st and 2nd defendants from trespassing into LR No. Kisii/Wanjare/Bogiakumu/ 1554 and/or more specifically the ground(sic) possessed and occupied by the plaintiff and his two (2) brothers and an order directing the 3rd defendant to rectify the registers and maps involving LR No. Kisii/Wanjare/ Bogiakumu/1554 so that the land exists (sic) and appears (sic) on the ground occupied by the plaintiff and his two brothers and to indicate the acreage as 1.2 hectares and not 0.9 hectares.
2. The plaintiff brought this suit in his capacity as the legal representative of the estate of one, Joseph Maragia Momanyi, deceased (hereinafter referred to only as “**Momanyi**”). In his plaint dated 13th August 2013, the plaintiff averred that he is the son of Momanyi who had three brothers namely, Daniel Oluoch Momanyi (deceased), James Nyabwari Momanyi and Robert Buruna Magembe, the 1st defendant herein. The plaintiff averred further that the mother of Momanyi and his three brothers aforesaid, one, Nyakara Magembe (deceased) had allocated to each of his sons specific parcels of land with defined and marked boundaries. The plaintiff averred that Momanyi who died on 4th August 1985 was allocated and got registered as the owner of all that parcel of land known as **LR No. Kisii/Wanjare/Bogiakumu/ 1554** measuring 0.9 hectares (hereinafter referred to as “**the suit property**”).
3. The plaintiff averred further that the plaintiff and his two brothers namely, George Morara Maragia and John Kebaso Maragia occupy the suit property which on the ground measures about 1.2 hectares. The plaintiff averred that the plaintiff and his said two (2) brothers were born and brought up on the suit property. The plaintiff averred further that, Daniel Oluoch Momanyi (deceased) was registered as the owner of LR No. Kisii/Wanjare/Bogiakumu/1553, James Nyabwari Momanyi was registered as the owner of LR No. Kisii/Wanjare/Bogiakumu/ 1553 and Momanyi’s mother, the said, Nyakara Magembe was registered as the owner of LR No. Kisii/Wanjare/Bogiakumu/1210. LR No. Kisii/Wanjare/Bogiakumu/ 1210 which also measured

- 0.9 hectares was later registered in the name of, Robert Buruna Magembe, the 1st defendant upon the death of Nyagata Magembe sometime in the year 1989.
4. The plaintiff averred further that the way in which LR Nos. Kisii/Wanjare/Bogiakumu/1552, 1553, 1554 and 1210 appear on the Registry Index Map for Kisii/Wanjare/Bogiakumu Registration Section (hereinafter referred to only as “**RIM**”) is not consistent with way in which the said parcels of land exist on the ground. The plaintiff averred that on the RIM, the suit property appears where LR No. Kisii/Wanjare/Bogiakumu/1552 is located on the ground while LR No. Kisii/Wanjare/Bogiakumu/1552 appears on the RIM at a location which on the ground is occupied by a third party whose parcel of land is adjacent to the said property. The plaintiff averred further that LR No. Kisii/Wanjare/Bogiakumu/1210 has since been subdivided by the 1st defendant and portions thereof sold to third parties.
 5. The plaintiff averred that one of the parcels that resulted from the said subdivision was LR No. Kisii/Wanjare/Bogiakumu/4967 (hereinafter referred to as “**Plot No. 4967**”). The plaintiff averred that Plot No. 4967 as it appeared on the RIM corresponded on the ground to the whole of that parcel of land comprised in LR No. Kisii/Wanjare/Bogiakumu/ 1554 (“the suit property”) which is registered in the name of the plaintiff’s father Joseph Maragia Momanyi (Momanyi). The plaintiff averred that Plot No. 4967 existed only on the RIM and that in reality it did not exist on the ground. The plaintiff averred that the 1st defendant has since subdivided Plot No. 4967 into two portions, namely LR No. Kisii/Wanjare/ Bogiakumu/5222 (**Plot No. 5222**) and LR No. Kisii/Wanjare/ Bogiakumu/5223 (**Plot No. 5223**).
 6. The plaintiff averred that whereas Plot No. 5222 remained in the name of the 1st defendant, Plot No. 5223 was transferred and registered in the name of the 2nd defendant. The plaintiff averred that the 1st and 2nd defendants have unlawfully trespassed and entered the parcel of land which is occupied by the plaintiff and his brothers in the pretext of taking possession of LR No. Kisii/Wanjare/Bogiakumu/5222 and 5223. It is on account of the foregoing that the plaintiff has sought the reliefs set out in this suit.
 7. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 13th August 2013 seeking a temporary injunction to restrain the 1st and 2nd defendants from trespassing into and/or interfering with the suit property and/or more specifically with the land or ground (sic) possessed and occupied by the plaintiff and his two (2) brothers. The plaintiff’s application was brought on the grounds set out in the body thereof and in the supporting affidavit of the plaintiff sworn on 13 August 2013. In his affidavit in support of the application, the plaintiff reiterated the contents of the plaint which I have highlighted hereinabove and deposed that the plaintiff’s father, Momanyi (deceased) is the registered proprietor of the suit property which measures 0.9 hectares and which property is about 1.2 hectares on the ground.
 8. The plaintiff deposed further that on the RIM, the suit property is located in an area which on the ground is occupied by Momanyi’s brother, Daniel Oluoch Momanyi (deceased) while Plot No. 5222 and Plot No. 5223 which are registered in the names of the 1st and 2nd defendants are located in the said RIM in the area which on the ground is occupied by the plaintiff and his two (2) brothers aforesaid. In effect therefore, the 1st and 2nd defendants are claiming the parcel of land which is occupied by the plaintiff and his two (2) brothers as part of Plot No. 5222 and 5223. The plaintiff has deposed that it is necessary in the circumstances that the 3rd defendant does rectify the RIM aforesaid so as to align it with the ground location of the various parcels of land appearing thereon. The plaintiff has deposed that the 1st and 2nd defendants have threatened to evict the plaintiff and his brothers from the parcel of land under their occupation. The plaintiff has contended that in view of the prevailing circumstances it is necessary that an order of injunction do issue to restrain the 1st and 2nd defendants from evicting them from the suit property pending the hearing and determination of this suit.
 9. The plaintiff has deposed that in the event that they are evicted from the suit property by the 1st and 2nd defendants they are likely to suffer irreparable loss. The plaintiff annexed to his affidavit in support of the application, a certificate of official search dated 6th August 2013 in respect of Plot No. 4967 which shows that the same was registered in the name of the 1st defendant on 19th June 2013. The plaintiff has also annexed a copy of the land certificate dated 13th March 1974 in

- respect of the suit property which shows that the same is registered in the name of Momanyi. The plaintiff has also annexed a certificate of official search dated 28th September 2011 in respect of the suit property which is of the same effect.
10. The plaintiff's application for injunction was opposed by the 1st and 2nd defendants who swore replying affidavits sworn on 21st August 2013 and 26th August 2013 respectively. In his affidavit in opposition to the plaintiff's application, the 1st defendant admitted that the plaintiff is his nephew being the son of his elder brother Joseph Maragia Momanyi, deceased (Momanyi). The 1st defendant deposed that Momanyi is registered as the owner of the suit property which measures approximately 0.9 hectares while the 1st defendant was registered as the owner of Plot No. 4967 which he has since subdivided into Plot No. 5222 measuring 0.644 hectares and Plot No. 5223 which measures approximately 0.27 hectares.
 11. The 1st defendant deposed further that Plot No. 5222 is registered in his name while Plot No. 5223 was transferred by him to the 2nd defendant at consideration of Kshs. 2.4 million. The 1st defendant deposed that there was no relationship whatsoever between Plot No. 4967 that gave rise to Plot No. 5222 and Plot No. 5223 with the suit property. The 1st defendant denied the plaintiff's allegation that the said parcels of land do not appear on the ground as they appear in the RIM. The 1st defendant termed the said contention as untrue and baseless. The 1st defendant deposed that the way Plot No. 1552, 1553 and 1554 appear on the RIM is the same way in which they appear on the ground. The 1st defendant has termed the plaintiff's application as cheeky and contended that the same is intended to deprive the 2nd defendant of her parcel of land namely Plot No. 5223.
 12. The 1st defendant has deposed that the plaintiff's likely loss if any is compensable in damages. The 1st defendant annexed to his affidavit in reply a copy of the adjudication record in respect of the suit property to show that the same was a first registration. The 1st defendant also annexed to his affidavit in reply a copy of the mutation form which shows how Plot No. 4967 was subdivided to give rise to Plot No. 5222 and 5223. The 1st defendant annexed also copies of registers for Plot No. 5222 and 5223 which shows that the two (2) parcels of land are registered in the names of the 1st defendant and 2nd defendant respectively. Lastly, the 1st defendant annexed a copy of a survey map for the area which shows how the various parcels of land the subject of this suit appeared on the RIM before the creation of Plot No. 5222 and 5223 and thereafter.
 13. In her affidavit in reply, the 2nd defendant deposed that she is the registered proprietor of Plot No. 5223 which measures 0.27 hectares and which parcel of land she purchased from the 1st defendant in May 2013 at a consideration of Kshs. 2.4 million. The 2nd defendant deposed further that whereas the plaintiff and his brother are in occupation of the suit property which is registered in the name of their deceased father, Plot No. 4967 was at all material times registered in the name of the 1st defendant. The 2nd defendant deposed that she purchased a portion of Plot No. 4967 after making the necessary inquiries and obtaining confirmation that Plot No. 4967 which lay on the lower side and was adjoining the upper part of the suit property was indeed owned by the 1st defendant. The 2nd defendant accused the plaintiff of trying to acquire undue interest in Plot No. 5223. The 2nd defendant deposed that she stands to suffer injustice and prejudice if the plaintiff's application is allowed. On 7th November 2013, I directed that the plaintiff's application be argued by way of written submissions. The plaintiff filed his submissions on 27th November 2013 while the 1st and 2nd defendants filed their submissions on 17th January 2014. I have considered the plaintiff's application together with the affidavit filed in support thereof.
 14. I have also considered the 1st and 2nd defendants affidavits filed in opposition to the application. Finally, I have considered the written submissions filed by the respective advocates for the parties and the cases cited therein. The law on interlocutory injunctions is now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 538**, an applicant for interlocutory injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that unless the injunction sought is granted he will suffer injury which cannot be compensated for in damages. If the court is in doubt on the above, the court will determine the application on a balance of convenience. The onus was upon the plaintiff to meet the said conditions for granting interlocutory injunction. I must confess that I have found it very

- difficult to understand the plaintiff's case as framed. The plaintiff's complaint is over the RIM for Kisii/Wanjare/ Bogiakumu Registration Section. It is the plaintiff's case that the way in which the various parcels of land appear on the RIM is not how they are on the ground. The plaintiff has contended that on the RIM the suit property appears where Plot No. 1552 is situated on the ground, while Plot No. 4967 which was previously registered in the name of the 1st defendant before it was subdivided to give rise to Plot No. 5222 and 5223, appeared on the RIM where Plot No. 1554 (the suit property) owned by the plaintiff's father is situated on the ground.
15. The plaintiff's case is that the 1st defendant has caused Plot No. 4967 to be subdivided on the basis of the said RIM to give rise to Plot No. 5222 and 5223 which parcels of land do not exist on the ground as the ground where they are supposed to be is occupied by the plaintiff and his brothers being Plot No. 1554 (the suit property). The plaintiff's case is that having caused the subdivision of Plot No. 4967 merely on paper and come up with Plot No. 5222 and Plot No. 5223 which also appear only on paper, the 1st and 2nd defendants have now moved to the ground which is occupied by the plaintiff and his brothers as aforesaid and laid a claim to the same purporting the same to be Plot No. 5222 and 5223. The plaintiff has claimed that the 1st and 2nd defendants are now seeking to evict the plaintiff and his brothers from Plot No. 1554 (the suit property) claiming that the plaintiff and his said brothers are in occupation of Plot No. 5222 and 5223.
16. I have found the issues raised by the plaintiff difficult to determine at this stage on affidavit evidence. It will require a hearing to determine whether the boundaries and locations of the various parcels mentioned in this suit as they appear in the RIM for Kisii/ Wanjare/ Bogiakumu Registration Section are consistent with the location and the boundaries of the said parcels of land on the ground. Apart from the sketch maps or sketch drawings which were irregularly attached by the plaintiff to his submissions, I have nothing before me to show or demonstrate the plaintiff's allegations about the errors in the RIM for the said area question. The plaintiff has not even attached the said RIM to demonstrate how the same defers with the position on the ground. Due to the foregoing, I am doubtful whether the plaintiff has established a prima facie case against the defendants herein. Having expressed my doubts as to the merit of the plaintiff's claim against the defendants, I am equally doubtful whether the plaintiff stands to suffer irreparable harm unless the orders sought are granted.
17. In view of the conclusion that I have arrived at hereinabove, the plaintiff's application falls for consideration on a balance of convenience. The plaintiff's contention before me is that the plaintiff and his brothers are threatened with eviction from the suit property which they have occupied for over thirty (30) years. I have noted from the statement of the 1st defendant dated 21st August 2013 and filed in court on 27th August 2013 that the 1st defendant has stated that: **“George Bosire Ocheng (the plaintiff) should be evicted from Rael's (sic) land to their land where his parents were buried”**. There is no doubt therefore that the plaintiff's claim that he is threatened with eviction is not farfetched. If the plaintiff is evicted from the parcel of land in his occupation be it the suit property, Plot No. 5223 or Plot No. 5222, the plaintiff will no doubt suffer great prejudice, inconvenience and loss.
18. Due to the foregoing, I am of the opinion that in the circumstances of this case, the balance of convenience tilts in favour of the plaintiff. I am of the view that it would only be fair to all the parties herein that the prevailing status quo be maintained pending the hearing and determination of this suit. In the **Court of Appeal Case of Ougo & Another vs- Otieno (1987) KLR 364**, it was held that,

“The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided in a trial.”

19. I therefore order that pending the hearing and determination of this suit, the defendants by themselves or through their agents, employees or servants are hereby restrained from evicting the plaintiff from all that parcel of land known as LR No. Kisii/Wanjare/Bogiakumu/1554 or any part thereof. For the avoidance of doubt, the plaintiff shall not be evicted from the parcel of land in dispute until the hearing and determination of this suit. The cost of this application shall be in the cause.

Delivered, signed and dated at KISII this 11th day of July, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Okenye for the plaintiff

Mr. Nyatundo for the 1stdefendant

Mr. Nyatundo for the 2nddefendant

N/A for the 3rddefendant

Mr. Ombasa Court Clerk.

S. OKONG'O

JUDGE