



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

LAND CASE NO.245 OF 2013

CORNEL ODUOR AMAM.....PLAINTIFF

VERSUS

DAN ODHIAMBO OGWANY.....DEFENDANT

RULING

1. This is a ruling on a Notice of Motion dated 20/9/2013 and filed on the same date. The motion is brought under S.3A of Civil Procedure Act (Cap 21) and order 40 rules 1 & 2 of Civil Procedure Rules, 2010. It seeks to restrain the defendant – **DAN ODHIAMBO ONGANY** – His agent, servants or assignees from trespassing, developing, dealing, disposing or in any other way interfering with plaintiff's occupation, user, and/or possession of the property known as **KISUMU/KORANDO/742** pending hearing and determination of the suit. Provision for costs is also asked for. The applicant, who is the plaintiff in the suit, is **CORNEL ODUOR AMAM**.

2. The application is premised on the grounds that the plaintiff is the bonafide owner and sole proprietor of **KISUMU/KORANDO/742** (hereafter suit property). The defendant is said to have invaded the land through his agents and started cultivation.

3. The supporting affidavit tells of acquisition of the property by the plaintiff through sale. Thereafter, due process was followed and title was ultimately issued to him. He is now the title holder to the suit property but the defendant at one time demanded surrender of that title and subsequently thereafter entered the land, through agents, and started cultivating it. That gave rise to this suit.

4. The defendant filed a replying affidavit on 22/11/2013 in which he termed as fraudulent the acquisition of title to the suit land. The plaintiff is a neighbour, he deponed, and knows the land as family land. The land, defendant continued, originally belonged to defendant's mother, who died on 25/8/1992. Succession has not been done yet title has changed hands through a wily nephew, who illegally seems to have acquired title, or falsely represented himself as owner.

5. The plaintiff said he lives in far away Voi and does not farm on the land. It is other family members who till the land.

6. According to the defendant, his nephew, who is the seller to plaintiff, is executing a crafty plan purporting to sell the land to plaintiff but ultimately wanting the land to revert to himself in order to disinherit other family members.

7. I heard the application on 25/2/2014. Lore for the plaintiff asked the court to allow the application. He

argued that the plaintiff is the current legal owner yet the defendant, through agents or other people, has invaded the land. Cultivation is said to be on-going and the plaintiff will suffer irreparable loss. The pleadings are said to show a prima facie case well as the plaintiff holds the title to the suit property. The defendant is said to be illegally infringing on the plaintiff's rights of ownership.

8. The balance of convenience is also said to tilt in favour of the plaintiff since he is the proprietor. The fraud alleged by the defendant is not shown to involve the plaintiff as a party.

9. Nyanga for defendant placed reliance on defendant's replying affidavit but added that the plaintiff has never possessed the suit property. He said the defendants cultivate the land and are in occupation. The defendant, he said, lives in Voi and those who cultivate are other members of the family and are not parties to the suit. Nyanga also suggested that the seller of the land to plaintiff had fraudulently obtained title and the plaintiff, being an immediate neighbour, is said to be aware of the fraud. The plaintiff is said not to have established a prima facie case, this being a clear case of fraud. The balance of convenience is said to favour the defendant and the plaintiff, Nyanga further said, can be compensated in damages.

10. Lore's reply reiterated the need to allow the application. The plaintiff is the owner of the land, he said, and it is the defendant who has instructed those cultivating the land to do so.

11. The guiding principles in denying or granting injunctive relief are to be found in the decided case of **GIELLA VS CASSMAN BROWN LIMITED (1973) E.A 358**. First the applicant must make out a prima facie case with probability of success. Secondly, an injunction will not issue unless it is demonstrated that the applicant can not be adequately compensated in damages and thirdly, if the court is in doubt it should decide on a balance of convenience.

12. But while being guided by those principles, the court should bear in mind that injunctive relief is an equitable remedy and it is therefore necessary to look at all the circumstances of the case including the conduct of the parties (**see KENYA HOTELS LIMITED V KENYA COMMERCIAL BANK LTD AND ANOTHER (2004) 1KLR 80**).

13. In this matter, it is clear that the plaintiff is the current title holder to the suit property. He bought the property from somebody the defendant describes as a nephew. The nephew is said to have committed fraud in his acquisition of title to the suit property. But it is apparent that that fraud is not challenged anywhere. The nephew appears nowhere in this suit. He does not appear to have been sued or prosecuted or even reported anywhere. It would be a herculean task to demonstrate fraud against the plaintiff while leaving out the alleged initiator of that fraud. That is the achilles heel in the defendant's reply. As things stand, the plaintiff's case still looks good. I agree with the applicants counsel that as the title holder, the plaintiff has a prima facie case.

14. According to the defendant, the plaintiff would not suffer irreparable loss. But one has to give this consideration a wide perspective. As the title holder, the plaintiff is entitled to quiet possession. He wants that possession. What would compensate him for that? What would compensate him for delayed development on the land? What would cover for the angst and frustration that would go with successful but subsequently frustrated acquisition of property? And is the defendant in a position to compensate? When all this is considered, some of the likely loss to the plaintiff does not appear compensable.

15. And when the balance of convenience is considered, the starting point is that the plaintiff is the current legal owner. If the prayers sought are granted that preserves the suit property. At least the plaintiff will get the property intact and unwasted should he ultimately win the suit. The defendant on the other hand lives in Voi and admits that he does not use the land. If those using the land are not his agents, why does he go to great lengths trying to justify what they are doing? Is he holding their brief? When all is considered, the balance of convenience lies in plaintiff's favour. Accordingly, I allow the application herein with costs to abide the outcome of the main suit.

A.K. KANIARU – JUDGE

7/10/2014

AKK/va