

REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 37 OF 2014.

JARED OJIAMBO OGUTU :::::::::::::::::::::::::::::::::::::::::::::::::::::::PLAINTIFF

=VERSUS=

WASHINGTON WANYAMA :::::::::::::::::::::::::::::::::::::::::::::::::::::::DEFENDANT.

R U L I N G.

JARED OJIAMBO OGUTU, hereinafter referred to as the Applicant, filed the notice of motion under certificate of urgency dated 27th February, 2014 for orders of temporary injunction restraining Washington Wanyama, hereinafter referred to as the Respondent, and those claiming under him for “disposing, utilizing and or alienating” Land parcel Samia/Wakhungu Odiado/99 and costs. The application is based on the three grounds on the face of the application and the supporting and supplementary affidavits of Jared Ojiambo Ogutu sworn on 27th February, 2014 and 13th March, 2014 respectively.

The application is opposed by the Respondent through replying affidavit sworn by Washington Wanyama on 3rd March, 2014.

During the hearing, the Applicant made his submissions stating that he relied on the grounds and the supporting affidavit. He said he resides on the suit land while Respondent resides on Samia/Wakhungu Odiado/121. The Respondent’s counsel, Mr. Onsongo, submitted that the application is not based on the main suit which is for cancellation of the title on the basis that Respondent got registered with the land through fraud. Counsel submitted that the Respondent got registered with the suit land on first registration and his title is indefeasible in law even on the basis of fraud. He therefore submitted that the Applicant has not established that he has a case with high chance of succeeding and therefore the orders should not issue. The counsel submitted that the Applicant has already lodged a caution over the suit land with the Land Registrar and that even though no interim orders were issued by the court, the Respondent has not taken any steps to sell the suit land as alleged. The counsel further submitted that by the time this suit and the application were filed, the Applicant had no legal capacity to file these proceedings as the limited grant annexed to the supplementary affidavit was obtained on 11th March, 2014.

Having heard the Applicant and Mr. Onsongo advocate for the Respondent, and having considered the supporting, replying and supplementary affidavits filed herein, the court finds as follows:

1. That land parcel Samia/Wakhungu Odiado/99 was registered in the names of Washington Wanyama on 11th November, 1972. That the said registration was a first registration.
2. That Simon Ogutu Keke , who is said to be the father to the parties, died on 30th May, 1995 and there is nothing to show he had taken any steps to challenge the registration of Washington Wanyama as the proprietor of Samia/Wakhungu Odiado/99.
3. That the provision of section 26(1) of the Land Registration Act requires that the one registered with the title of the suit land, be taken as the absolute and indefeasible owner of the same unless and until the contrary is shown. At this juncture, the Applicant has not availed any evidence to the contrary to restrict the Respondent’s rights conferred by registration.
4. That the Applicant obtained the limited grant attached to the supplementary affidavit on 11th

March, 2014 while the application dated 27th February, 2013 was filed on 27th February, 2014. The Applicant did not have the legal capacity to file and prosecute any proceedings for the benefit of his father's estate by the time these proceedings and application was filed. There is however nothing to confirm that these proceedings are for the benefits of the Applicant's father's estate.

5. That for reasons set out above, the Applicant has failed to satisfy the grounds set out in ***Giela – vs- Cassman Brown*** that are precedent to the issuance of the orders sought.

The Applicant's application is without merit and is dismissed with costs.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 15th DAY OF OCTOBER, 2014.

IN THE PRESENCE OF; Both parties and Mr. Onsongo for Defendant/Respondent.

JUDGE.