



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 130 of 2009

ROSALIA MONGINA MWEBI PLAINTIFF/APPLICANT

VERSUS

MAUREEN KEMUNTO MIRUKA DEFENDANT/RESPONDENT

RULING

1. By the chamber summons dated 9th July 2009 and filed in court on the same day, the plaintiff/applicant prays for, *inter alia*, an order of temporary injunction restraining the defendant/applicant (sic) by herself, agents, servants and/or any other person acting under her instructions from trespassing upon, interfering with the peaceful possession and ownership of the plaintiff/applicant's parcel of land known as LR NO. KISII/WEST KITUTU/BOGEKA/3680 (the suit land) pending the hearing and determination of the suit herein. The applicant also prays that the defendant/respondent bears the costs of this application.
2. The application is premised on the sworn affidavit of Rosalia Mongina Mwebi dated 9th July 2009 and on the grounds that are set out on the face of the application. In particular, the applicant contends that she is the registered and sole proprietor of the suit land and therefore that the defendant/respondent has no colour of right to interfere with and/or trespass onto the same. She has also says that the respondent's continued interference with the suit land has obstructed the applicant's desire to develop the suit land. She prays for the orders of injunction. The applicant has annexed to her affidavit a copy of the Title Deed issued to her on the 22nd June 2009. She also annexed to the same affidavit a copy of the Certificate of Official Search dated 23rd June 2009 showing that the registered proprietor of the suit land is Rosalia Mongina Mwebi. The suit land measures 1.11 hectares being a sub division of plot No.3557.
3. The application is opposed vide the replying affidavit sworn by Maureen Kemunto Miruka on 24th April 2011. The deponent denies that she has encroached on the suit land and that she has embarked on any construction thereon. She says she owns plot No.38 "A" at Nyakoe market and that it is the plaintiff/applicant who has trespassed onto the said plot as evidenced by a letter dated 21st May 2009 addressed to the plaintiff/applicant by the Clerk to Gusii County Council after the respondent made a complaint against the applicant. The complaint by the respondent was that the applicant had erected a wall on plot No.38'A' at Nyakoe market without the owner's authority.
4. The parties agreed to prosecute this application by way of written submissions. In her submissions filed on her behalf by M/s C.M. Ayienda and Company Advocates, on 19th August 2011, the plaintiff/applicant contends that as registered proprietor of the suit land, she has satisfied the conditions for granting of injunctions as set out in the case of **Giella –vs- Cassman Brown and Company Ltd. [1973] EA 358** for the granting of injunctions. A litigant seeking orders of injunction must demonstrate to the court that:-

(a) *he has a prima facie case with a probability of success.*

(b) *unless the order sought is granted, he might otherwise suffer irreparable injury.*

(c) *when the court is in doubt, it will decide the case on the balance of convenience.*

5. In the plaint that was filed contemporaneously with the application for injunction, the plaintiff/applicant averred that at all times material to this suit, she was the registered owner of the suit land which is registered under the provisions of the now repealed **Registered Land Act, Cap 300 Laws of Kenya**. She seeks a similar order of injunction against the defendant/respondent as prayed in the chamber summons.

6. The respondent in her submissions filed on her behalf by the firm of S.O. Omwega & Co. Advocates contends that she has never encroached on the suit land as alleged or at all and that it is the plaintiff/applicant who has encroached on the respondent's plot No.38"A" at Nyakoe market. She wants the application dismissed with costs.

7. I have now carefully read the pleadings, the affidavits in support and annexures thereto. I am satisfied that based on the facts before me, the plaintiff/applicant has made out a case for the orders sought. I find that since the defendant/respondent has denied the allegation of trespass and encroachment, it will not prejudice her if the order sought is granted. From her pleadings too, the respondent has no interest in the suit land. The plaintiff/applicant is the absolute registered proprietor of the suit land and on the face of it; she has demonstrated that she has a case against the respondent with a probability of success.

8. In the premises, I allow the chamber summons dated 9th July 2009 and order that the defendant/respondent by herself, her agents, servants and/or others claiming under her instructions be and is hereby restrained from trespassing upon, interfering with the suit land until the main case is heard and determined. Costs of the application to the applicant.

9. Lastly, the delay in delivering this ruling/judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

10. It is so ordered.

Dated and delivered at Kisii this 7th day of September, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

M/s Ayienda & Co. (absent) for Plaintiff/Applicant

Mr. Tergin for Omwenga (present) for Defendant/Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.