



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 189 of 2011

SAMUEL OUMA OMORO PLAINTIFF

VERSUS

MICHAEL OKINYI OTIENO 1ST DEFENDANT

ELISAPHAN OBURA OTIENO 2ND DEFENDANT

OYUGI MUNDU 3RD DEFENDANT

DANISH OBUGO OTIENO 4TH DEFENDANT

RULING

1. The Notice of Motion dated 19th September 2011 seeks orders of mandatory and temporary injunctions against the Defendants herein concerning and touching on LR NO. LAMBWE WEST 'A'/95 (the suit land) and/or any portion thereof pending the hearing and determination of this suit. The temporary injunction is sought to restrain the defendants either by themselves, agents, servants and/or employees from entering, re-entering, trespassing onto, cultivating, digging, building structures, interfering with or in any other manner whatsoever dealing with the suit land. The mandatory order of injunction is sought to evict the defendants/respondents either by themselves, agents, servants and/or employees from the suit land and to grant vacant possession to the plaintiff/applicant. The applicant also prays that the costs of this application be borne by the defendants and for the grant of such further and/or other orders as the court deems fit and just to grant.

2. The application is supported by grounds appearing on the face thereof and by the affidavit sworn by the plaintiff/applicant on 19th September 2011 and the annexures thereto.

3. Contemporaneously with the application, the plaintiff/applicant filed a plaint by which he prays for judgment against the defendants in the following terms:-

(i) Declaration that the plaintiff is the registered and/or lawful owner of LR NO. LAMBWE WEST 'A'/95.

(ii) An Order of Eviction directed against the defendants, their agents and/or servants, from LR NO. LAMBWE WEST 'A'/95.

(iii) Permanent injunction restraining the Defendants either by themselves, agents, servants and/or anyone claiming under the Defendants from entering upon, re-entering, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with the suit land, that is, LR NO. LAMBWE WEST 'A'/95 and/or any portion thereof.

(iv) *General damages for Trespass.*

(v) *Interest on (iv) hereof at Court rates.*

(vi) *Costs of this suit be borne by the Defendant.*

(vii) *Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.*

4. The plaintiff avers in the plaint that at all times material to this suit, he has been and still is the Registered Proprietor of the suit land measuring 5.6 hectares which parcel was registered in the plaintiff's name on or about 31st May 2011. He further avers that as registered proprietor, he is entitled to exclusive and/or absolute rights over the suit land to the exclusion of all others including the defendants herein who have jointly and severally trespassed onto the suit land and commenced construction of temporary structures thereon and also commenced cultivation of a substantial portion of the suit land to the detriment of the plaintiff. He wants the defendants enjoined from further dealings with the suit land and also evicted therefrom.

5. The plaintiff's Notice of Motion is opposed vide the Replying Affidavit sworn by Michael Okinyi Otieno on his own behalf and on the behalf of the 2nd, 3rd and 4th defendants respectively. He contends therein that the suit land belongs to the defendants' family and that they have been living thereon since the days of their forefathers and they have been surprised by the plaintiff's claims that he owns the suit land. The deponent avers that if any right has accrued to the applicant, then such right has been acquired fraudulently by the applicant and person or persons who are not entitled to pass over any right and title whatsoever to the plaintiff/applicant. The defendants pray that the application be dismissed.

6. The defendants also filed defence to the plaintiff's claim and denied each and every allegation made therein. The plaintiff also filed a Further Supporting Affidavit dated 14th November 2011 in which he depones to the following facts:-

- *The suit land was created pursuant to the Adjudication and Demarcation Process at Lambwe West 'A' Adjudication Section, whereupon the same was duly registered in the name of one Samwel Maranda, now deceased in Land Appeal Case No.167 of 1986.*
- *Upon completion of the Adjudication Process, the suit land was lawfully registered in the name of the said Samwel Maranda who was the father of Duncan Wycliffe Omondi Maranda (the vendor).*
- *Upon the death of Samwel Maranda, the suit land vested and/or inherited to the vendor.*
- *A physical search at the suit land revealed the same was unoccupied save for the defendants' encroachment onto a portion thereof.*
- *If the defendants have indeed lived on and occupied the suit land as alleged, they should have sued the estate of the previous owner to give them their portion.*
- *Since the plaintiff's registration is a first registration, allegations of fraudulent acquisition of title thereto do not lie.*
- *The defendants have no claim whatsoever over the suit land since admittedly they are trespassers.*

7. By consent of the parties, this application proceeded by way of written submissions. Both parties duly filed their submissions together with relevant authorities (Defendants did not avail any authorities). I have carefully read the submissions and the authorities provided by the plaintiff/applicant. I have also carefully read the pleadings. From a reading of all the above, the one issue that arises for determination is whether the plaintiff has brought himself within the ambit of the principles for the granting of injunctions as set out in the well known case of **Giella –vs- Cassman Bwon and Company Ltd. [1973] EA 358.**

8. While the plaintiff contends that he is well within those principles, the Defendants contend that the plaintiff has not established a *prima facie* case with a probability of success. The defendants allege that they have ordinarily resided in the suit land and have erected their respective homes thereon and have no other known place of abode. They allege that whatever interest was or may have been sold to the plaintiff was acquired fraudulently, citing the removal of a caution placed on the suit land by one Folentinus Otieno Mundu on 5th November 1994 as a case in point. They also allege that the Adjudication records were tampered with to give Samwel Maranda ownership of the suit land.

9. The defendants therefore urge this court to consider such factors as the original land use and occupation, traditional settlement patterns as well as historical land use in deciding this matter.

10. I have looked at the documents produced by the plaintiff/

applicant in support of his case by which he intends to demonstrate to this court that:-

- *he has a prima facie case with a probability of success.*
- *if the orders sought are not granted, he will suffer irreparable loss and damage such as would not be compensated by an award of damages.*
- *if this court is in doubt, it should decide this application on a balance of convenience.*

11. Among the documents annexed to the plaintiff's supporting affidavit are the following:-

- *Land sale agreement dated 10th February 2010 made between the plaintiff/applicant and one Maranda Omondi to Duncan as buyer and seller respectively.*
- *Letter of consent dated 24th March 2011.*
- *Transfer of Land – Form R.LI dated 30th May 2011*
- *Title Deed – issued to the plaintiff/applicant on 31st May 2011.*
- *Certificate of Official Search – Form RL27 – dated 7th September 2011.*

12. On the other hand, the defendants exhibited no single document to show their claims to the suit land.

13. Considering the above facts and applying the law to the same, I am persuaded that the plaintiff in this case has shown that he has a *prima facie* case with a probability of success. I am particularly alive to the provisions of **sections 27, 28 and 143** of the **Registered Land Act** (the RLA) by which the plaintiff's title is absolute and not subject to impeachment.

14. I am also of the view that being armed with these documents of title as he is, a denial of an injunction against intruders would cause the plaintiff/applicant such loss as may not be adequately compensated by an award of damages. In case I am wrong in applying the first two principles of the **Giella Case**, I am persuaded that on a balance of convenience, this case tilts in favour of the plaintiff/applicant.

15. In the premises, I make the following orders:-

1) *Prayer 4 of the Notice of Motion dated 19th September 2011 is allowed to the extent that the defendants either by themselves, agents, servants, employees and/or anyone else claiming under them are restrained from entering, re-entering, trespassing onto, cultivating, digging, building structures, interfering with and/or in any manner whatsoever dealing with the suit land except the small portion which the plaintiff admits the defendants currently occupy.*

2) *Prayer 3 of the application is declined pending consideration of evidence to be given on the same at the hearing hereof.*

3) *The defendants shall pay the costs of this application.*

16. 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.

17. It is so ordered.

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

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Nyamurongi for Oguttu-Mboya for the Plaintiff/Applicant

Mr. Nyauke (absent) for the Defendant/Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.