



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE NO. 209 OF 2010**

**LUKAS KIBEGWA OKARA ..... PLAINTIFF/APPLICANT**

**VERSUS**

**NYAKEYO AYEGA ..... DEFENDANT**

**RULING**

1. The application before court is the plaintiff's chamber summons dated 14<sup>th</sup> January, 2011. The application, which was filed under certificate of urgency, is brought under **Order 40 Rule 2** of the **Civil Procedure Rules** and **Sections 3, 3A and 63 (c)** of the **Civil Procedure Act, Cap 21 Laws of Kenya**. The applicant seeks an order in terms of prayer III of the application for an injunction restraining the Defendant/Respondent, his agents and/or servants from in any way interfering with **Land Parcel No. WANJARE/BOKEIRE/1682** (the suit land) until the final determination of this suit. The applicant also prays that the costs of the application be provided for.
2. The application is premised on 5 grounds set out on the face thereof. The main one being that the applicant is the registered proprietor of the suit land. The applicant also avers that the Defendant/Respondent has, without the consent and/or authority of the applicant constructed structures on the suit land and intends to use the said structures to start a private commercial school.
3. The application is also supported by the sworn affidavit of LUKAS KIBEGWA OKARA dated 14<sup>th</sup> January 2011. The deponent reiterates that he is the registered proprietor of the suit land as per annexure marked "**LKO 1**" which is a copy of a search certificate dated 7<sup>th</sup> July, 2010 and "**LKO II**" being a copy of the Land Certificate issued to the applicant on 22<sup>nd</sup> October 1982. The applicant also says that he has brought this suit which was filed on 14<sup>th</sup> January 2011 seeking orders of eviction against the Defendant/Respondent. The applicant prays that the application be allowed.
4. The application is opposed vide the Replying Affidavit sworn by Nyakeyo Ayega, the Defendant/Respondent. The Respondent avers that he purchased the suit land from the applicant way back in 1999 for Kshs.270,000/= and that the transfer has been pending completion. He however says that the school referred to by the applicant stands on **L.R. WANJARE/BOKEIRE/1801** and not the suit land though he says that the suit land was purchased for purposes of expanding the school. The Respondent also avers that contrary to the allegations by the applicant that the Respondent intends to start a school the school in question has been in existence since the year 1996. The Respondent prays that the applicant's application be dismissed with costs.
5. Briefly, the applicant commenced this suit by way of a plaint dated 26<sup>th</sup> July, 2010 and filed in court

on the same day. The applicant alleges that the Respondent has illegally and unlawfully trespassed onto the suit land and for that reason, the applicant prays for judgment against the Respondent for:

**(a) An order of eviction against the Defendant, his agents and/or servants from the plaintiff's land parcel NO. WANJARE/BOKEIRE/1628 and an injunction permanently restraining them from ever re-entering the same.**

**(b) Damages for the trees wantonly felled and the ground destroyed by construction.**

**(c) Costs of the suit.**

**(d) Interest on (b) and (c) above.**

**(e) Any other or further relief as the court may deem fit [to] grant.**

6. The application was canvassed before me on 1<sup>st</sup> March, 2011. Mr. G.M. Masese, counsel appearing for the applicant, submitted that the Respondent's admission that the suit land is registered in the applicant's name is sufficient evidence to support the prayer sought in this application. Counsel also submitted that the Respondent has not furnished any documentary proof to show that he purchased the suit land from the applicant as alleged or at all.

7. In reply, Mr. Nyakeyo, counsel appearing for the Respondent reiterated the averments of the Replying Affidavit and further highlighted the fact that the school started way back in 1996 as per exhibits "NAI – NA5". Mr. Nyakeyo urged the court to dismiss the applicant's application.

8. I have now weighed the contending views in this matter. The question that arises for determination is whether the applicant has satisfied the conditions for the granting of an injunction. In the case of Giella – vs- Cassman Brown & Co. Ltd. [1973] EA 358, the Court of Appeal for East Africa set out those conditions to be the following:-

**(a) An applicant must show a *prima facie* case with a probability of success.**

**(b) An injunction will not normally be granted unless the applicant must otherwise suffer irreparable injury.**

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

9. In the instant case, the applicant says the Respondent has trespassed on the suit land when it is abundantly clear that the applicant is the registered proprietor of the same as per the documentary evidence placed before the court. While the Respondent avers that he bought the suit land from the applicant way back in 1999, the respondent has not placed any documentary evidence before the court to prove that averment. **Section 107 of the Evidence Act, Cap 80 Laws of Kenya** places the burden of proof of any fact on he who alleges that that fact exists. The Respondent has failed to discharge that burden. This being the case, I am persuaded that the applicant has established a *prima facie* case with a probability of success.

10. Secondly, the applicant has stated that the Respondent has trespassed onto the suit land and put up structures thereon. This fact is not denied by the respondent. It is therefore imperative that unless the order sought is granted, the respondent will continue to deprive the applicant of the use of the suit land. Such deprivation, in my humble view, will result in irreparable injury to the applicant.

11. In the premises and for the reasons above given, I am persuaded that the applicant's application dated 14<sup>th</sup> January 2011 has merit. The same is hereby allowed in terms of prayer III thereof. The Respondent shall bear the costs of this application.

12. It is so ordered.

**Dated and delivered at Kisii this 4<sup>th</sup> day of March, 2011.**

**RUTH NEKOYE SITATI  
JUDGE.**

In the presence of:

Mr. Otieno for G.M. Masese for Plaintiff/Applicant

N/A for Defendant/Respondent

Mr. Bibu - Court Clerk