



REPUBLIC OF KENYA

IN THE ELC AT KISII

ELCC NO 296 OF 2013

PETER ARIKO

CONSOLATA BWARI.....(PLAINTIFFS/RESPONDENTS)

VS

JAMES OBARA OKWENA

REBECCA GESORE.....(DEFENDANTS/APPLICANTS)

RULING

1. By a notice of motion application brought under certificate of urgency dated 10th March,2017 the defendants/applicants who are represented by Kaburi and company Advocates seek against the plaintiffs/respondents who are represented by Anyona Mbunde and company Advocates the following orders:

a) Spent

b) Pending the hearing and the determination of the instant application, the Honorable Court be pleased to grant an Interim Order of Injunction restraining the Defendants/Respondents either by themselves, their agents,servants,employees and/or anyone claiming under the Defendants/Respondents from entering,re-entering,trespassing onto,cultivating,digging,cutting trees, interfering with and/or in any other manner,whatsoever,dealing with the suit land, that is,LR.NO SOUTH MUGIRANGO/BOSINANGE/3098 and/or any portion thereof.

c) The Honorable Court be pleased to grant an order of Temporary Injunction restraining the Defendants/ Respondents either by themselves, agents,servants,employees and/or anyone claiming under the Defendants/Respondents, from entering,re-entering,trespassing onto,cultivating,digging,cultivating trees, interfering with and/or in any other manner,whatsoever,dealing with the suit land, that it,LR.NO.SOUTH MUGIRANGO/BOSINANGE/3098 and/or portion thereof, pending the hearing and determination of this suit.

d) Costs of this application are borne by the Defendants/Respondents.

e) Such further and/or other orders be made as the court may deem fit and expedient.

2. The application is based on the following:

a) grounds a to oon the face of it,

- b) supporting affidavit sworn on 10th March,2017 by the 1st Defendant/Applicant
- c) title deed to LR.NO SOUTH MUGIRANGO/BOSINANGE/3098 marked “**JOO1a**”,
- d) certificate of official search dated 22nd Nov 2016 thereof marked “**JOO-1B**” ,
- e) official receipt for Ksh.520/= issued to the 1st Defendant/Applicant on 22/11/2016 marked “**JOO-1C**” and
- f) certificate of official search dated 19/7/2013 in respect of LR.NO.SOUTH MUGIRANGO/BOSINANGE/1387 marked “**JOO-2**”.

3. The Notice of Motion application is brought under the following legal provisions:

- Order 40 rules 1,2,4 and 10 CPR , 2010
- Sections 1A,B,3A,63(e) Civil Procedure Act (Cap 21 Laws of Kenya)
- Sections 27 and 28 Registered Land Act (Cap 300 Laws of Kenya)
- All enabling provisions of law.

4. The Plaintiffs/Respondents contest the application. In a replying affidavit of paragraphs 1 to 21 sworn on 28/3/17 by the 1st Respondent.He stated as summarized below;

- That the 2nd plaintiff died in 2014
- Title acquired through fraud-----CASE
- Defendants/applicants held LR 1385 in trust for the Respondents father-----Trust over agricultural land not subject to section 6 (1) (a) of the Land Control Act (Cap 302 Laws of Kenya) for which the consent of the local land control board may be required
- Cr 664/2015 Ogembo by Respdt still pending
- 2nd Def registered owner of LR 1986
- LR 3098 not subject of suit----para 17
- Annexed certificate of death of his father (PA 001),
- Notice of motion in Kisii CMC Misc. Application 32/2006 (PA 002)

5. On 29/3/2017, I heard submissions by counsel for the Defendants/Applicants and counsel for the Plaintiffs/Respondents. The submissions in brief are noted.

6. Issues –interim, injunction **threshold** Cassman Brown CASE. -Orders, rules and sections under which it is brought.

7. Three conditions and substantial injustice .

8. SS.27 and 28 RLA Cap 300 Lokrepealed by RLA 2015 (2012)—**Gatu-vs- Muriuki (1986) KLR 211** –the applicant had erroneously quoted a wrong provision of law in his application to reinstate his suit was hardly a sound basis for dismissing the motion.The court can exercise it’s discretion to allow application if it is satisfied that no harm would result to the respondent or if it did the same.

9. Plaint 28/6/2013at paragraphs 5 and 6the suit land is LR 1385 and prayers a and b refer to LR 1385 and NOT LR

10. I am not satisfied that the defendants/applicants has met the threshold in Giella and Nguruman cases (supra).

11.A fortiori, the Notice of Motion application dated 10th March, 2017 must fail. I accordingly dismiss it.

12. Costs- The proviso to Section 27 (1) CPA Cap 21 LOK and in Rai-vs-Rai (2014) eKLR the basic rule

on costs follow event is not an invariable rule and indeed, the ultimate factor on award or non-award of costs is the judicial discretion.

Delivered, signed and dated at Kisii this 25th day of May 2017

GEORGE M A ONGONDO

JUDGE

In the presence of;

Kaburi for plaintiff

Anyona Mbunde for Def

Ruth