



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 386 OF 2015**

**WILFRED OGERO MOSIGISI.....PLAINTIFF**

**VERSUS**

**JULIUS OGERO MOSIGISI.....1<sup>ST</sup> DEFENDANT**

**DOUGLAS MAYORE MOSIGISI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff by a plaint dated 21<sup>st</sup> August 2015 avers he is together with others the registered owner of land parcels **Nyaribari Masaba/ Bonyamasicho/1008** and **Nyaribari Chache/B/B/Boburia/4068** (hereinafter referred to as “the suit properties”). The plaintiff alleges that the defendant on diverse dates in August, 2015 without any permission entered into, trespassed onto and encroached into and threatened the plaintiff’s tenants residing in the suit premises without any justification whatsoever and contends that unless the defendants are restrained by injunction the plaintiff’s property risks being wasted and the plaintiff in the event stands to suffer loss and damage. The plaintiff thus prays for judgment against the defendants for a permanent injunction, general damages on account of trespass and costs of the suit.

2. Simultaneously with the plaint the plaintiff filed a notice of motion application dated 21<sup>st</sup> August, 2015 the subject of this ruling expressed to be brought under Article 40 of the Constitution Order 40 Rules 1 (a), 2, 3 and 10 of Civil Procedure Rules and sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act. The application interalia seeks the following:-

**1. That a temporary injunction do issue restraining the defendant by themselves, their agents, servants and/or any other person whomsoever from encroaching upon trespassing onto, remaining thereon and/or in any way whatsoever interfering with, erecting electric poles onto all that parcel of land known as Nyaribari Masaba/Bonyamasicho/1008 and Nyaribari Chache/B/B/Boburia/4068 situated in Kisii County pending hearing and determination of this suit.**

**2. That the defendants, their servants, agents and/or employees be restrained from interfering whatsoever with the plaintiff/applicant’s quiet enjoyment, use, possession and occupation of the suit property pending the hearing and determination of this suit.**

**3. That the OCS Kisii Police Station and Ramasha Police Station be directed to assist to ensure compliance by the defendants/respondents.**

**4. That the costs of the application be provided for.**

3. The application is premised on the grounds set out on the face of the application and on the affidavit sworn in support by Wilfred Ogero Mosigisi the plaintiff herein on 21<sup>st</sup> August 2015 and the further supporting affidavit sworn by the plaintiff on 14<sup>th</sup> April 2016. The defendant filed grounds of opposition dated 6<sup>th</sup> November 2015 and replying affidavit sworn on 2<sup>nd</sup> December 2015 in opposition to the plaintiff's application. The plaintiff's application was argued by way of written submissions.

4. The plaintiff in support of the application states that he is the registered bonafide owner of the suit properties together with other proprietors who have given him authority to institute the instant suit. The plaintiff states the defendants on diverse dates in the month of August 2015 trespassed onto the suit properties and have persisted in such, trespass thereby interfering with the plaintiff's proprietary rights over the said properties. The plaintiff avers that the defendants have infringed on the plaintiff's absolute ownership rights and right to quiet enjoyment and exclusive user of the properties. In particular the plaintiff claims that the defendants are interfering with and threatening the tenants who are occupying the rental houses and/or inciting them not to pay rent to the plaintiffs. The plaintiff contends the defendants acts are unlawful, wrongful and without a justification and thus they should be restrained by an order of injunction.

5. The defendants by the grounds of opposition contended the plaintiff's application was misconceived and an abuse of the court process and that the same was bad in law. The defendants further averred the plaintiff's application cannot meet the threshold for grant of a temporary injunction as established in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**.

6. The defendants by the replying affidavit averred that the plaintiff's and the defendant's father the late Johnson Mosigisi Machuki who died on 23<sup>rd</sup> July 2015 was the registered owner of several properties including the suit properties herein. The defendants state their late father had two (2) wives namely Yunuke Moraa (deceased) who was the defendants' mother and Janipher Mokeira Mosigisi, the plaintiff's mother. The defendants aver that their late father had subdivided land parcel **Nyaribari Masaba/Bonyamasicho/1008** between his 2 wives and that each had use of a designated portion of the same on the ground.

7. The defendants further aver their late father was on 18<sup>th</sup> April 2015 involved in a road traffic accident which completely left him immobilized and was admitted Nairobi West Hospital before being transferred to Kisii Teaching and Referral Hospital. The defendants state their father was during the time of his admission in hospital until he died in a coma and could not therefore transact. Annexure "**JOM2**" Ram Hospital Discharge Summary made on 24<sup>th</sup> July 2015 indicates the late Johnson Mosigisi was admitted in the hospital on 19<sup>th</sup> May 2015 while in coma and that he died on 24<sup>th</sup> July 2015 having not come out of coma. The defendants aver that the purported transfer of the suit properties to the plaintiffs was fraudulent and that their deceased father could not have executed the application for consent of the land control board and the transfer forms. The defendants claim that the plaintiffs used a fake court order to have the caution registered against land parcel number **Nyaribari Chache/B/B/Boburia/4068** removed.

8. The court order allegedly issued on 3<sup>rd</sup> July 2015 in Kisii Chief Magistrate's court Misc. Application No. 143 of 2015 before SRM Ng'ang'a has been disowned by the court as per the letters dated 21<sup>st</sup> August 2015 and 14<sup>th</sup> October 2015 written by the Executive Officer to the DCIO, Kisii Central and Nyamurongi & Co. Advocates annexed and marked "**JOM 5 (b) and (a)**" respectively. The executive officer states the matter was not lodged with the court and neither does the order originate from the court. The deputy commissioner also vide a letter dated 29<sup>th</sup> September 2015 to the DCIO, Kisii Central has disowned the land board consent said to have been issued by his office and signed by him stating there had been no land control board meeting on the dates the consent was allegedly given and sated the documents were forgeries. It is the defendants position therefore that the plaintiff took advantage of the incapacity of the parties deceased father when he was hospitalized in a coma to fraudulently transfer the suit properties to their names with the objective of disinheriting the defendants and that the fraud and forgery perpetrated by the plaintiff is presently the subject of criminal proceedings at the Keroka Law Courts. The defendants in the premises assert that the plaintiff cannot be entitled to any orders of

injunction as sought in their application.

9. The plaintiff by the further supporting affidavit filed in response to the defendants replying affidavit refute that their late father died intestate and state that he left a valid will which is the subject of Kisii Succession Cause No. 471A of 2015. The plaintiff further states the defendants replying affidavit chronicles alleged family dispute as to who is entitled to what asset from their late father's estate in regard to which the plaintiff avers a valid will was left by his late father which can only be challenged before a succession court. The plaintiff states the allegations of fraud leveled against him and his brothers by the defendants are malicious and have not been provide and or established against the plaintiff.

10. The submissions filed by the parties reiterate the contents of the affidavits filed by the respective parties and the issue for determination by the court having reviewed the application and the affidavits in support and in opposition thereof and having considered the submissions is whether the plaintiff has on the basis of the material and evidence placed before the court satisfied the conditions for grant of an interlocutory injunction on the terms sought.

11. The plaintiff together with others were registered as the owners of land parcels **Nyaribari Chache/B/B/Boburia/4068** and **Nyaribari Masaba/ Bonyamasicho/1008** on 2<sup>nd</sup> July 2015 as per the copies of title deeds annexed and marked "**WOM 2(a) and (b)**". Before the transfer of the said parcels of land to the plaintiff the same were registered in the name of the plaintiff's and defendants deceased father, Mosigisi Machuki. Although the plaintiff states their late father had left a valid Will at the time he died it is evident that the suit properties could not have been transferred upon proof of the Will in a probate cause but rather that the properties were transferred during the lifetime of the deceased. It is this transfer that the defendants have challenged as being fraudulent and thus a nullity. The defendants have made reference to various matters to support the allegations of fraud as follows:-

- (i) The land control board's consent used to process the transfers to the plaintiff and his siblings have been disowned by the issuing authorities as being forgeries.
- (ii) The court order allegedly issued in CMCC Misc. App. No. 143 of 2015 to remove the caution placed by the defendants has been disowned by the court as being fake.
- (iii) That at the time the transfers to the plaintiff were effected the owner was lying in hospital in a coma following a road traffic accident from which he died on 24<sup>th</sup> July 2015.

12. Although the plaintiff has denied the alleged fraud the court is of the view that the defendants have placed before the court material evidence that if proved would establish fraudulent dealings on the part of the plaintiff in regard to the suit property. The plaintiff has argued that since they are the registered owners of the suit property they are entitled to absolute rights of ownership and use of the suit property in terms of sections 24, 25 and 26 of the **Land Registration Act, 2012**. However, the defendants have challenged the plaintiff's ownership of the suit property and have alleged fraud on the part of the plaintiff in acquiring ownership of the suit properties. Section 25 of the **Land Registration Act, 2012** provides that the rights of a registered proprietor whether acquired on first registration, or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in the Act. Section 26 of the Act provides the instances under which the title of a proprietor may be challenged.

13. Section 26 (1) provides as follows:

**(1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –**

**(a) On the ground of fraud or misrepresentation to which the person is proved to be a party;**

or

**(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

14. It is not in dispute that the suit properties herein were owned by the deceased father of the plaintiff and the defendants. The defendants challenge the transfer to the plaintiff as having been procured fraudulently. Should the defendants succeed in the challenge at the trial, the transfer in favour of the plaintiff would be liable to be annulled and in that event the properties would revert to the estate of their deceased father and therefore liable to administration through succession. The defendants in my view have demonstrated they have an arguable case. I am not on the facts of this case able to hold that the plaintiff has demonstrated a prima facie case with a probability of success. The facts and issues between the plaintiff and the defendants are highly contested and there can be no resolution of the facts and the issues without a full hearing where the parties give evidence and they are cross-examined.

15. In a matter such as the present one where the facts and the issues are in contest the court has a duty to preserve the subject matter of the suit until the suit is heard and determined. In the course of giving directions in this matter earlier on it was brought to my attention that there was rental income from one of the properties and I on 18<sup>th</sup> April 2016 directed that the income from the property be paid into a joint interest earning account in the joint names of the parties advocates. In making the order/direction I had formed the view that the income could indeed relate to the estate of a deceased person and thus the same needed to be preserved until matters/issues relating to the administration of the estate are resolved. After my review and consideration of the plaintiff’s application dated 21<sup>st</sup> August 2015 my position has not changed and I would therefore extend that order until this suit is heard and determined and/or until further orders of the court.

16. In the result, I decline to grant the prayers sought by the plaintiff in the notice of motion dated 21<sup>st</sup> August 2015 and in place thereof I make an order directing the parties to maintain and observe the obtaining status quo and specifically direct and order that there be no dealings with the suit property relating to sale, transfer and/or charge of the same to any third party pending the hearing and final determination of the suit.

17. Having regard to the fact that this is essentially a family dispute amongst the siblings I make no order for costs and it is my direction that each party bears their own costs of the application.

18. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 15<sup>th</sup> day of July, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

.....	for the plaintiff
.....	for the defendants
.....	for the Court Assistant

**J. M. MUTUNGI**

**JUDGE**