



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

CIVIL SUIT NO. 128 OF 2012

ISAAC M. M. MAKHAMBALA.....PLAINTIFF

VERSUS

RICHARD OMBIMO DEFENDANT

RULING

1. The applicant is a step brother of the respondent. The applicant filed a notice of motion dated 16/12/2014 in which he seeks an injunction against the respondent from interfering in any way with LR NO. Kwanza/Kwanza Block 3/Luhya/328 (suit property). The suit property was part of LR NO Kwanza/Kwanza Block 3/Luhya/16 which was owned by Brown Mbito Kusienya who is the father of the applicant and respondent (now deceased).

2. The deceased's land was 23 ½ acres. The applicant contends that in 1990, the deceased had indicated on how his property was to be sub- divided. That the sub-division was done after the death of the deceased and the property jointly registered in both the names of the deceased's son and one of his wives. The applicant contends that the deceased asked each son and one of his wives to collect their individual titles. The applicant proceeded and processed his title and obtained the same. The applicant contends that he leased his portion to the respondent on 20/12/1992 for one season which was to end in December, 1993 but that the respondent has since refused to move from the suit land. It is on this basis that the applicant wants the respondent restrained from interfering with the suit land.

3. The respondent who was duly served with the notice of motion neither filed any grounds of opposition nor replying affidavit. His advocate did not appear during the hearing. The application was therefore argued ex-parte.

4. I have gone through the applicant's application as well as the supporting documents. The applicant does not state when his father died but from the defence filed by the respondent, their father died intestate on 14/9/1992. I have now to decide whether to grant the injunction sought by the applicant. The principles for grant of injunction were settled in the now famous *case of Giella -Vs- Cassman Brown Co. Ltd. 1973 EA 358*.

First an applicant has to demonstrate that he has a prima facie case with probability of success. Secondly are injunction will not normally issue unless the applicant might otherwise suffer irreparable injury. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

5. In the instant case, it is clear from the documents filed by the applicant as well as those filed by the respondent that there was a dispute regarding the division of the deceased's property. The dispute was

taken to Kwanza Land Disputes Tribunal which ruled that sub-division be carried out after the family had undertaken the process of succession. The deceased had 23 ½ acres at Kwanza and 18 acres at Kabras. The verdict of the Kwanza Land Disputes Tribunal was adopted as Judgement of the court vide Kitale Land Case No 85 of 2007. Though the applicant claims that he was not aware that there was such a dispute before the Tribunal, the fact remains that he was the defendant and the respondent was the claimant. The elders must have satisfied themselves that he was properly served before they proceeded.

6. The applicant despite being advised that the family goes through succession went a head and processed his individual title which is comprised in the suit land. It is not clear how this was possible. The deceased's property was transferred into the names of four of his family members in 2006. By this time time, the deceased had long died and it is not clear who signed for the transfer and or if the deceased had title in his name in respect of his land. The applicant obtained his title in 2014. The respondent is alleging that the applicant obtained sub-division secretly in respect of the property held by their deceased father.

7. The applicant has not demonstrated that he has a prima facie case with probability of success. There is also no loss which he will suffer which will not be compensated in damages. The respondent has been in the property since 1992 as per the applicant's own affidavit. The applicant has also quantified his loss from 1992 to- date. He will therefore not suffer loss which will not be compensated. It is the respondent who is on the suit property. The property is already in the name of the applicant. The balance of convenience is in favour of the respondent. I will for that reason decline to issue the injunction sought. The purpose of an injunction is to preserve the property from danger of being alienated or wasted. The same cannot be alienated by the respondent who has no title to the same. The upshot of this is that the applicant's application is hereby dismissed with no order as to costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 9th day of February, 2015.

E. OBAGA

JUDGE

COURT: Ruling delivered at 9.33 a.m. in the absence of parties who were aware of the today's date.
Court Clerk – Kassachoon.

E. OBAGA

JUDGE

9/2/2015