



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 19 OF 2015

RAPHAEL ORWARU MAKORI.....PLAINTIFF

VERSUS

NICKSON WANDABI.....DEFENDANT

RULING

1. The applicant filed a notice of motion dated 9/2/2015 seeking orders of injunction against the respondent restraining him from cultivating or occupying LR NO. Trans-Nzoia/Gidea/87 (suit land). The applicant contends that he is the owner of the suit land having purchased the same from one Albert Ekirapa.
2. The applicant was granted a temporary injunction ex-parte on 19/2/2015. At the hearing of the application inter-partes, the applicant argued through his lawyer Mr Murgor that the applicant had bought the suit land from Albert Ekirapa in 2006. The suit land is about 50 acres. That the applicant paid the entire purchase price to Albert Ekirapa who then went ahead to obtain consent of the land control board to transfer the suit land to the applicant.
3. The applicant contends that he has sued the respondent as a trespasser on the suit land and that he should therefore be restrained from invading the suit land as threatened.
4. The respondent has opposed the applicant's application through replying affidavit sworn on 4/3/2015. The respondent contends that he has wrongly been sued as he is not the legal representative of the estate of his late father Fred Wandabi. He contends that his late father catered into an agreement with Albert Ekirapa in 2004 whereby the said Albert Ekirapa sold 10 acres out of LR NO. Trans-Nzoia/Gidea/87. His father then took possession of the 10 acres in 2005 and has been in occupation since then. When his father died, their family continued to stay on the land and they are still staying there.
5. The respondent further argued through his lawyer Mr Nyakundi that there is a time when both the applicant and the respondent's father took Albert Ekirapa before the Kwanza Land Disputes Tribunal seeking to compel Albert Ekirapa to give them their respective portions which he had sold to them. The respondent argued that it is ironical that the applicant has now turned against his co-claimant in the dispute before Kwanza Land Disputes Tribunal and is now seeking the entire land of 50 acres.
6. I have gone through the applicant's application as well as the respondent's replying affidavit and the submissions by counsel for the parties herein. There is no contention that the suit land has not been transferred to the applicant. The suit land is still registered in the name of Albert Ekirapa. The principles for grant of temporary injunction are now well settled. Firstly an applicant has to demonstrate that he has

a prima facie case with probability of success. Secondly an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss which will not be compensated in damages.

Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

7. The proceedings of the Kwanza Land Disputes Tribunal were annexed to the replying affidavit of the respondent. It is clear from the proceedings that both the applicant and the respondent's father were residing on plot No. 87 as at the time the Tribunal case against Ekirapa was filed. The respondent's father was occupying 10 acres and the applicant was occupying about 37 acres. It is also clear that the Tribunal found that Plot No. 87 was not enough for both the applicant and the respondent's father. This is why the Tribunal observed that Mr Ekirapa was to give the applicant the shortfall which will make it 50 acres which he had bought.

8. When the applicant came to court, he did not disclose that the respondent was already on the suit land by virtue of his father having bought 10 acres from Ekirapa who also sold land to the applicant. The respondent's father had entered into an agreement with Mr Ekirapa on 28/7/2004. He paid the entire purchase price. He remained in possession of the 10 acres until he died. The applicant bought 50 acres later on. There is evidence that Albert Ekirapa not only had Plot No. Trans-Nzoia/Gidea/87. He also had other parcels which bordered the suit land. It therefore means that he could accommodate both the respondent's father and the applicant. It is not clear how Mr Ekirapa came to sell the entire 50 acres comprised in the suit land when he was well aware that he had sold 10 acres to the respondent's father who was already in possession.

9. The purpose of a temporary injunction is to preserve the suit land until the dispute is heard and resolved. The facts emerging show that the respondent is on the suit land as son of the late Fred Wandabi who bought 10 acres from the suit land. The applicant has no prima facie case with probability of success. The applicant did not file any replying affidavit to counter what the respondent said in his replying affidavit. It does not help the applicant to merely argue that the applicant sorted out the issues he had with Ekirapa who gave him 50 acres. Ekirapa should not have given the applicant 50 acres to the exclusion of the respondent's father who bought 10 acres earlier than the applicant. I do not see what loss the applicant will suffer which will not be compensated in damages should it turn out that the respondent's father was not entitled to the 10 acres which he bought in 2004. I find that the application herein lacks merit. The interim injunction granted to the applicant was given without material disclosure. This application is hereby dismissed with costs to the respondent. The interim injunction granted on 19/2/2015 and subsequently extended is hereby discharged.

It is so ordered.

Dated, signed and delivered at Kitale on this 13th day of April, 2015.

E. OBAGA

JUDGE

In the presence of Mr Bungei for Plaintiff/Applicant – Present, Court Clerk – Kassachoon.

E. OBAGA

JUDGE

13/4/2015