



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**  
**Civil Case 67 of 2010**

**SAMUEL ONGORI ONGORI.....PLAINTIFF**

**VERSUS**

- 1. YUNIVALIS NYANKEBOKA ONGORI)**
- 2. JUSTIN ISENA ONGORI )**
- 3. DENNIS OURU ONGORI ).....DEFENDANTS**
- 4. CHRISTOPHER MOGAKA ONGORI )**
- 5. FREDRICK MACHOKA ONGORI )**

**RULING**

On 11<sup>th</sup> March, 2010 Samwel Ongori Ongori, *“the applicant”* through Messrs Oguttu-Mboya & Co. Advocates, filed this suit against his sons, Yunivalis Nyankeboko ongori, Justin Isena Ongori, Dennis Ouru Ongori, Christopher Mogaka Ongori and Fredrick Machoka Ongori, *“the respondents”* seeking a declaration that he is the registered proprietor, absolute and or lawful owner of **LR. Nos. West Kitutu/Bogeka/3566** and **West Kitutu/Bomatara/1427**, an order of eviction, permanent injunction, Mesne profit and costs. Contemprenously with the filing of the suit, the applicant took out a chamber summons application under certificate of urgency seeking the following orders that:-

***“1. The application herein be certified urgent and the same be heard***

***Ex-parte in the first instance.***

- 2. Pending the hearing and determination of the instant Application, the Honourable court be pleased to grant an Interim Order of injunction restraining the Defendants/Respondent by themselves, agents,***

*servants and/or anyone claiming under the said Defendants/Respondents, from entering, trespassing onto, collecting rents, operating the posho mill, interfering with and/or in any other manner dealing with the suit premises, that is, LR.No.West Kitutu/Bogeka/3566and LR.No.West Kitutu/Bomatara/1427.*

3. *The Honourable court be pleased to grant an order of temporary injunction restraining the Defendants/Respondents by themselves, agents, servants and/or anyone claiming under the said Defendants/Respondents, from entering, trespassing onto, collecting rents, operating the Posho Mill, interfering with and/or in any other manner dealing with the suit premises, that is, LR.NO. West Kitutu/Bogeka/3566 and LR.No. West Kitutu/Bomatara/1427, pending the hearing and determination of this suit.*
4. *The honourable court to be pleased to grant an order of mandatory injunction directed unto the Defendants/Respondents by themselves, agents, servants and/or anyone claiming under the said Defendants/Respondents, to yield up, vacate and/or grant vacant possession of the suit premises, that is, LR.NO. West Kitutu/Bogeka.3566and LR.NO.West Kitutu/Bomatara/1427 to the Plaintiff/Applicant, pending the hearing and determination of this suit.*
5. *Costs of this application be borne by the Defendants/Respondents.*
6. *Such further and/or other orders be made as the court may deem fit and expedient”.*

On the same day the application was placed before me whereupon I certified it urgent and directed the registry to set it down for interpartes hearing on priority basis. In other words I only granted prayer 1 of the application at that ex-parte stage. I declined to grant prayer 2. Accordingly the said prayer has since been rendered otiose. At this stage therefore we are only concerned with prayers 3, 4 and 5 of the application, the subject of this ruling.

The application was hoisted on the grounds that the applicant was the lawful and registered proprietor of all those parcels of land known as **West Kitutu/Bogeka/3566** and **West Kitutu/Bomatara/1427**, “*the suit premises*” and therefore entitled to exclusive possession and occupation thereof by virtue of sections 27 and 28 of the Registered land Act. However the respondents had since trespassed, alienated and taken possession of the suit premises in violation of the applicants indefeasible rights over the same. The actions of the respondents aforesaid had rendered the applicant homeless and destitute as he had been deprived of his only source of livelihood. As the Registered proprietor of the suit premises, the applicant’s rights are sanctioned in law. On the overall therefore the applicant had established as against the respondents a prima facie case as they had no valid claim over the suit premises whatsoever. The acts of the respondents aforesaid unless restrained would occasion the applicant irreparable loss. Accordingly this was a fit and

proper case to warrant the grant of the orders of mandatory as well as temporary injunction.

The application was further supported by the affidavit of the applicant which in the main sought to elaborate and expound on the grounds aforesaid. Suffice to add that the suit premises were purchased by the applicant out of his own personal resources. He had constructed thereon Posho Mill, shops and his own residential premises. He had rented out to some tenants the shops at a monthly rent. However on his other parcels of land namely **West Kitutu/Bogeka/3029**, **West Kitutu/Bomatara/608** and **1333** he had constructed thereon homesteads for his three wives, the mothers of the respondents. On 2<sup>nd</sup> March, 2010, the respondents, without lawful cause, basis and or colour of right whatsoever, trespassed upon the suit premises and took possession of the same without his consent and or permission and in the process evicted him therefrom. As a result of the respondents' actions, aforesaid the applicant had been forced to stay with friends and relatives as they had refused to allow him to set foot on the suit premises and had taken upon themselves to collect and appropriate the rental income therefrom, thereby denying the applicant his only source of income. In the process he had been rendered destitute. Since the suit premises lawfully belonged to him, the actions of the respondents aforesaid constitute wanton trespass to private property and the respondents are bound to continue with the trespass unabated, unless they are restrained by an order of his court. By virtue of being the registered proprietor of the suit premises, the applicant had the absolute and exclusive rights to possess and occupy the same. On the face of it therefore, the applicant had established a prima facie case with overwhelming chances of success against the respondents. The applicant was bound to suffer irreparable loss, mental anguish and starvation unless the orders sought are granted. Besides, as the registered proprietor, the balance of convenience tilted in his favour. Conversely, the respondents will not suffer any loss whatsoever, in so far as he has handed over and allowed them to occupy and use his other parcels of land with tea thereon. It was in view of the foregoing that the applicant felt that this was a proper and fit case for the grant of both temporary and mandatory injunction.

The summons to enter appearance as well as the application were duly served on the Respondents. They reacted by filing memorandum of appearance, defence as well as a replying affidavit through **Messrs Nyamori Nyasimi & Company Advocates**. In the replying affidavit where pertinent, the respondents through the 1<sup>st</sup> respondent deponed that they were not trespassers on the suit premises and though the applicant was the registered proprietor of the suit premises he held the same as a trustee on behalf of his wives and children the respondents included. That the suit premises and the developments thereon were acquired through joint or combined efforts and contributions by members of the applicant's family including his three wives and their children. Of late however, the applicant had attempted to dispose off the suit premises to third parties without the consent of his wives and family. The dispute was reported to the District Commissioner, Kisii Central for possible settlement but the applicant declined to attend the talks. They denied that they had deprived the applicant income from and access to the suit premises and or evicted him therefrom. All along the

operations of the Posh Mill and management of rental premises had always been done jointly by the applicant and his wives and income generated therefrom shared between them . As the children of the applicant, they respected him and could not commit acts complained of by the applicant. They only went to the suit premises as and when desirable and or when required to do so by the family to assist in the running of the posho mill and any related duties as family members and not as trespassers. That as a family, they depend on and derive their livelihoods from the suit premises. The applicant had not shown that there is any immediate danger posed to the suit premises either by sale or other disposition, wasting or alienation by the respondent that could justify a grant of the orders sought. Thus the applicant will not suffer any loss, damage, irreparable or otherwise, inconvenience if the orders sought in the application are not granted. On the other hand the respondents will suffer, be inconvenienced and deprived of their means of livelihood and will be rendered destitute if the application is granted. Therefore the balance of convenience tilted in their favour.

The applicant's three wives, **Agnes Nyamutai Ongori, Julian Nyaboke Atika Ongori** and **Sofia Magoma Ongori** also swore affidavits in support of the contentions by their sons, the respondents. They confirmed that the applicant did not stay on the suit premises, that though their husband, the applicant was the registered proprietor of the suit premises, he was not the sole owner of the same but held it as a trustee on his behalf and on behalf of his entire family, that they had contributed towards the purchase of the suit premises and the developments thereon for the benefit of their family, that the posho mill, shops and rental premises on the suit premise had been managed jointly by the applicant and themselves and income generated therefrom shared in equal portions amongst them, that the respondents as members of the family were entitled to enter the suit premises and they had not at all interfered with the applicant's interest of the same. Of late however, the applicant had made attempts to dispose of the suit premises without their consent which attempts were opposed by them. Infact they reported the dispute to the Local District Commissioner. Apparently the applicant did not take kindly that resistance and hence he filed this suit so as to intimidate them and get a free hand to dispose of the suit premises against the family interest and wishes.

When the application came before me for interpartes hearing on 24<sup>th</sup> March, 2010, **Mr. Oguttu** and **Mr. Nyasimi**, learned counsel for the applicant and respondents respectively agreed to canvass the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

As I understand it, the case for the applicant is that he is the registered proprietor of the suit premises which he solely purchased through his own sweat in or about 9<sup>th</sup> April, 1996 and 3<sup>rd</sup> October, 2008 respectively. He has title to the same and pursuant to the provisions of section 27 and 28 of the Registered Land Act he is entitled to exclusive possession and or occupation thereof. His title to the same cannot be defeated by the actions of the respondents even if they are his sons. By entering on the suit premises in the manner they did and remaining thereon having evicted him

therefrom, the respondents were committing an act for which they should be enjoined temporarily as well as mandatorily as they had no colour of right to the suit premises.

On the other hand it is the respondent's case that much as the suit premises are registered in the name of the applicant it is so registered in trust for himself and the family, the respondents included. That being the case the registration thereof does not perse confer exclusive and absolute ownership of the suit premises on the applicant. They are entitled to enter into the suit premises if necessary as beneficiaries of the trust. It was in this spirit that they committed the acts complained of by the applicant. For that reason the orders sought by the complainant should not issue.

The orders sought in the application are interim in nature pending the hearing and final determination of the main suit. Accordingly care must be taken so that there is no definite findings on the issues in dispute at this stage. Whether the suit premises are registered in the name of the applicant in trust for himself and his family is a matter which will have to be determined at full hearing. However what is not in dispute is that the applicant is the registered proprietor of the suit premises. By virtue of such registration he is entitled to exclusive and absolute possession of the suit premises. Those rights are not liable to be defeated-See Sections 27 and 28 of the Registered land Act. Ofcourse those rights can be defeated if it can be demonstrated that the applicant holds such registration as a trustee for the respondents. For now however the allegation that the applicant holds the suit premises in trust for the respondents remains that, a mere allegation that will have to be proved at the substantive hearing of the suit. Between a mere allegation by the respondents and documentary proof marshelled by the applicant by way of title deeds, I choose to accept and go by depositions of the applicant on the ownership of the suit premises. It is also instructive that though the respondent claim that the applicant holds the suit premises in trust for them in their defence, they have however not filed a counterclaim seeking such declaration.

The principles governing the grant of interlocutory injunction are well settled. See **Giella V Cassman Brown & Co. Ltd(1973) E.A. 358, Carl Ronming V. Societe Navale Chargeurs Delmas Veljeux(1984) KLR1 and Mrao Ltd V First American Bank of Kenya Ltd & 2 others(2003) KLR 123.** Essentially those principles are that the power of the court in an application for interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case, judicial discretion has to be exercised on the basis of law and evidence but not capriciously nor gratuitously. Two, the applicant must show a prima facie case with probability of success, three, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages and finally, if the court is in doubt, it will decide the application on the balance of convenience. In the case of **Mrao Ltd(supra)** the Court of Appeal observed “.....**A prima facie case in a civil application includes but it's not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal**

*properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”* It must also be appreciated that the conditions aforesaid are not conjunctive but disjunctive.

Applying the said principles to the circumstances of this case, I must say that nothing has been brought to my attention as would tilt my hand against allowing the application in the exercise of my unfettered discretion. There is no allegation that the applicant has not been above board and or has been uneconomic with the truth. He has not been accused of material non-disclosure nor has he hidden some material particulars of the suit to warrant the denial of the exercise of my discretion in his favour. Secondly, and for now the applicant is the sole registered proprietor of the suit premises. Prima facie and by virtue of section 27 and 28 of the Registered Land Act, he is entitled to enjoy exclusive possession thereof. The issue of trust can only be ventilated at the trial. The respondents have admitted that the suit premises are registered in the name of the applicant. Their point of departure however is that such registration was on trust. As I have already stated that is a mere allegation for now. The essence of a temporary injunction is to maintain the status quo prevailing. It is apparent from the record that the applicant had been in exclusive possession of the suit premises before the respondents entered the same without his permission and evicted him therefrom. Although the respondents deny having entered the premises as trespassers and evicted him, for now I am persuaded that that was indeed the case. The applicant as a father of the respondents would not have taken such drastic step to sue his own sons if the contrary was the truth. For all the foregoing reasons I am satisfied that the applicant has established a prima facie case with probability of success. On this ground alone, interlocutory injunction should issue. This finding is sufficient to dispose of this matter on the issue of Temporary injunction. However, I am minded to consider the other remaining conditions.

The applicant being the registered proprietor of the suit premises is entitled to exclusive possession, occupation and use of the same. He has been thrown out by the respondents though they deny it. Due to the aforesaid actions by the respondents, the applicant has been forced to stay with relatives and friends. He has also been denied means of livelihood. Apparently, the applicant has no other source of income. The respondents have claimed that the applicant has other sources of income and therefore cannot claim to be destitute. To my mind, this statement is a clear admission that the respondents have interfered with the applicant's quiet possession and enjoyment of the suit premises. Much as they claim that the applicant has other sources of income, they did not in their affidavit mention the said other sources of income. The respondents also claim to have contributed towards the purchase of the suit premises and the developments thereon. However, I see no evidence of such contribution in their replying affidavits as well as affidavits sworn by their mothers. Perhaps that will have to await the formal hearing of the suit. They have also asserted that the applicant is bent on selling and transferring the suit premises to third parties against their will and consent. That this suit has been filed by

the applicant for ulterior motives; to threaten them in a bid to get a free hand to dispose of the suit premises. In support of the allegation they refer to a meeting with the District Commissioner. However the details of the meeting are not shown. All that is shown is a letter from the District Commissioner to the Applicant dated 3<sup>rd</sup> March, 2010. That letter does not advance the respondents' case any further. It is headed "**Domestic Dispute**". The letter requested the applicant to see the District Commissioner over the aforesaid dispute lodged by his wives and sons. This letter does not state what the domestic dispute was all about. We cannot assume that it was with regard to the suit premises. And even if it was, I cannot see what role the District Commissioner would have assumed considering that the suit premises were registered in the name of the applicant under the Registered Land Act. It is not in dispute that the applicant is an old man. He relies on the suit premises for his upkeep. Consequently, the denial and or deprivation of the same, at the instance of the respondents, would inflict serious, irreparable and prejudicial loss to the applicant incapable of being compensated for by an award of damages.

On the question of balance of convenience, the same tilts in favour of the applicant. It is on record that the applicant resides on the suit premises. It is also on record that the applicant has other parcels of land on which he has settled the three wives and their children. The respondents who are all children begotten by the three wives stay with their mothers in those parcels of land. The respondents have not denied the fact that the applicant has settled them and their mothers on those parcels of land which according to the applicant have tea that is utilized by the respondents and their mothers. That being the case, they have no reason in the interim to interfere with his occupation of the suit premises. In any event and for now the respondents cannot control or fetter the applicant's occupation and use of the suit premises. The balance of convenience therefore tilts in favour of status quo ante or prior to the invasion of the suit premises by the respondents being maintained.

Finally, I have no doubt in my mind that on the material placed before me, prima facie there exists a right which has been infringed by the respondents as to call for explanation or rebuttal from the respondents.

How about mandatory injunction? A mandatory injunction can be granted under the inherent jurisdiction of this court and not under order XXXIX. Mandatory injunction is often a means of undoing what has already been done so far as possible and requires taking of positive steps to undo what has been done and therefore the case has to be unusually strong before the court can grant the same. Its purpose is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act(s) of the respondent. It can only be issued in special circumstances and in clear and obvious cases. See Generally, *Belle Maison Ltd V Yaya towers Ltd. NBI. HCCC.NO. 2225 OF 1992(UR), East African Spinners Ltd & Others V. Bedi Investments Ltd, C.A. No.NAI. 72 OF 1994(UR), Agnes Adhiambo Ojwang V Wycliff Odhiambo Ojijo, KSM. HCCC.NO. 205 OF 2000(UR), Royal media services Ltd V Telkom Kenya Ltd & Others (2001)IEA 210, Allsman V. Muchoki(1984) KLR 533, Shepherd Homes .V. Sandham(1970) ALL ER.*

In this case the respondents have moved into the suit premises and forcefully taken possession of the same to the chagrin of the applicant, the registered proprietor. They may have genuine grievances against the applicant. However those grievances cannot be addressed by the respondents taking the law in to their hands and depriving the applicant of his legal rights over the suit premises. As observed in the case of Alkaman(Supra) ***“...The respondents having unlawfully seized possession of the estates were infringing on the rights of the appellants and ought to have been restrained by an injunction as equity does not assist law breakers.....” To allow and protect the respondent’s unlawful acts would render totally valueless the concept of sanctity of contract, security of mortgages, debts, charges and debentures by sweeping the lost(sic) under the carpet, and then leaving the field free for insurgents to play havoc by perpetuating illegal infringements. That is not the kind of legacy to leave for posterity...”***

The same situation obtains here and although the Court of Appeal was referring to mortgages, debts, charges and debentures, I will substitute that with sanctity of title.

The respondents argue that to grant a mandatory injunction at this stage would in essence amount to the applicant obtaining judgment against the respondents at an interlocutory stage. That argument cannot possibly be correct in the light of the authorities cited above .The mandatory injunction is to return the suit premises to the status quo then prevailing before the respondents’ acts complained of by the applicant. The respondents too have contended that the suit is improperly before this court and hence incompetent. That the entire claim is based on alleged trespass and involves father and sons. This is an appropriate dispute that should be dealt with by the area Land disputes Tribunal. The plaint as filed has several prayers though; a declaration, Eviction, Mesne profits, and injunction. These prayers are not in the realm of the Land disputes Tribunals established under the Land Disputes Tribunals . I need not say more on the issue.

The applicant has correctly invoked the inherent jurisdiction of this court in seeking mandatory injunction; the respondents having blatantly and in breach of law invaded his suit premises. Much as they are his sons, they have no right to forcefully dispossess the applicant of the suit premises in the knowledge that the applicant has given them through their mothers land elsewhere. The applicant therefore need to be put back into possession of the suit premises pending the hearing and final determination of this suit. The situation which obtained prior to the activities complained of by the applicant need to be reinstated and maintained in the interim. This is therefore a clear and obvious case that calls for a mandatory injunction.

For all the foregoing reasons I would grant prayers 2,3 and 4 in the application to last until the hearing and final determination of this suit. The parties involved herein are father and sons. That being the case I will make no order as to



costs so as not to exacerbate the already volatile relationship.

**Ruling Dated, Signed and Delivered At Kisii** this 14<sup>th</sup> MAY, 2010.

**ASIKE-MAKHANDIA**

**JUDGE.**