



**NO.149**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT & LAND CASE NO. 538 OF 2012**

PRISCAH BOSIBORI PETER.....PLAINTIFF

**VERSUS**

CECILIA NYANGARA MOKAYA.....1<sup>ST</sup> DEFENDANT

JOSEPH MOKAYA.....2<sup>ND</sup> DEFENDANT

**RULING**

1. The Plaintiff brought this suit against the defendants seeking; a declaration that the Plaintiff is the owner of a portion measuring 1.25 acres of all that parcel of land known as **LR. No. Nyansiongo/S/S/524** (hereinafter referred to as “**the suit property**”), an order for the cancellation of the title for the suit property and the issuance to the Plaintiff of a title for the said portion measuring 1.25 acres, special damages in the sum of Ksh.37,200.00, general damages, mesne profits, and a permanent injunction to restrain the defendants from trespassing on the Plaintiff’s portion of the suit property or in any way interfering with the Plaintiff’s occupation, enjoyment and access to the said portion. In the Plaint dated 1<sup>st</sup> November, 2012, the Plaintiff claimed that, in 1994 she purchased a portion of the suit property measuring 1.25 acres (hereinafter referred to as “**the portion of the suit property**”) from one, Elijah O. Mogaka (deceased) who was the registered owner of the suit property at that time. The Plaintiff claimed that the other portion of the suit property was sold by the said Elijah Mogaka to the 2<sup>nd</sup> defendant and that the Plaintiff and the 2<sup>nd</sup> defendant were supposed to divide the suit property between them in their respective shares. The Plaintiff claimed that she took possession of the said portion of the suit property soon after purchase in 1994 and established her home thereon which she has occupied since then. Similarly, the 2<sup>nd</sup> defendant also took up possession of his portion of the suit property and both have been occupying their respective portions of the suit property peacefully until the year 2011 when the Plaintiff discovered that on 5<sup>th</sup> June, 2000, the 2<sup>nd</sup> defendant without notice to the Plaintiff caused the entire parcel of land comprised in the suit property to be registered in the name of the 1<sup>st</sup> defendant thereby depriving the Plaintiff of her portion of the suit property. The Plaintiff claimed that efforts through community elders and close family members to persuade the defendants to transfer to the Plaintiff her portion of the suit property did not bear fruit. The Plaintiff claimed that on 4<sup>th</sup> March, 2012, the defendant trespassed into the Plaintiff’s portion of the suit property and caused serious damage to the Plaintiff’s maize crops that had been planted thereon. If that was not enough, the Plaintiff claimed that the defendants have since blocked the only foot path that the Plaintiff uses to access her home on the suit property from the main public marrum road in the area. It is for the foregoing reasons that the Plaintiff moved this court to seek the reliefs that I have

set out at the beginning hereof.

2. Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 1<sup>st</sup> November, 2012 seeking a an order directing the defendants to unconditionally open the only access foot path to the Plaintiff's home on the suit property. In her affidavit sworn on 26<sup>th</sup> November, 2012 in support of the application, the Plaintiff reiterated the contents of the Plaint that I have highlighted above. The Plaintiff stated further that she had purchased the suit property together with the 2<sup>nd</sup> defendant in 1994 and that the 2<sup>nd</sup> defendant sometimes in the year 2000 caused the entire parcel to be registered in the name of the 1<sup>st</sup> defendant without her consent or knowledge. The Plaintiff stated that she did not know of this development until the year 2010/2011. The Plaintiff stated further that she has an established home on the suit property and that the defendants have since blocked the only access foot path to her home. The Plaintiff now has to use the neighbor's compound to access or exit her home which compound she is only allowed to use during the day. The Plaintiff stated that it would be in the interest of justice that the orders sought do issue pending the hearing and determination of this suit. The Plaintiff annexed to her affidavit a copy of the certificate of official search dated 10<sup>th</sup> July, 2012 which shows that the suit property was registered in the name of the 2<sup>nd</sup> defendant on 15<sup>th</sup> June, 2000. The defendants filed separate affidavits in reply to the Plaintiff's application both sworn on 14<sup>th</sup> January, 2013. The defendants contended that they acquired the suit property through a bona fide agreement for sale between the 2<sup>nd</sup> defendant and the previous owner of the said property, Elijah Ongoro Mogaka in 1993 and that the suit property was transferred and registered in the name of the 1<sup>st</sup> defendant as the absolute proprietor thereof on 15<sup>th</sup> June, 2000 without any notice of the Plaintiff's alleged interest in the same. The defendants contended that the Plaintiff's alleged interest in the suit property has not been proved and that the alleged blockage of access foot path amounts to a boundary dispute with respect to which this court has no jurisdiction. The defendants contended that the Plaintiff's alleged agreement for sale that was entered into in 1994 is void for want of consent under the Land Control Act, Cap. 302 Laws of Kenya. The defendant's contended further that the Plaintiff has failed to satisfy the conditions for granting interlocutory injunction. The defendants annexed to their affidavits aforesaid among others, a copy of the title deed for the suit property in the name of the 1<sup>st</sup> defendant, a copy of the extract of the register for the suit property and an agreement for sale between the 2<sup>nd</sup> defendant and Elijah Ongoro Mogaka dated 15<sup>th</sup> December, 1993. The Plaintiff filed a further affidavit on 11<sup>th</sup> March, 2013 in reply to the contents of the defendants' affidavits aforesaid. In her further affidavit, the Plaintiff contended that the 1<sup>st</sup> defendant was registered as the proprietor of the suit property fraudulently in that the Plaintiff's portion of the suit property was included in the land that was registered in her name and that the signature of the previous owner of the suit property on the various documents submitted by the defendants in their defence including the purported agreement for sale were forged. The Plaintiff stated that she purchased her portion of the suit property through the 2<sup>nd</sup> defendant through whom the Plaintiff's sister paid the full purchase price to the previous owner of the suit property. The Plaintiff urged the court to grant the orders sought. On 13<sup>th</sup> March, 2013, the parties agreed to canvass the application by way of written submissions. The Plaintiff filed her submissions on 2<sup>nd</sup> April, 2013 while the defendants filed their submissions in reply on 19<sup>th</sup> April, 2013.
3. I have considered the Plaintiff's application together with the affidavits filed in support thereof. I have also considered the defendants' affidavits in opposition to the application and the submissions of the advocates for both parties. The principles applicable to applications for interlocutory injunction are well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for interlocutory injunction must show that he has a prima facie case with a probability of success against the respondent and that unless the order is granted he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. If the injunction sought at the interlocutory stage is a mandatory one, the applicant must demonstrate unusually strong case to warrant the granting of such injunction. The Plaintiff has claimed that she purchased a portion of

the suit property measuring 1.25 acres from the previous owner thereof, one, Elijah Ongoro Mogaka through the 2<sup>nd</sup> defendant who purchased the other portion. The Plaintiff has claimed that after purchasing this portion of the suit property, she took possession and set up her home thereon which she has occupied from 1994 to date. The Plaintiff has claimed that the 2<sup>nd</sup> defendant fraudulently caused the entire parcel of land comprised in the suit property to be transferred to the 1<sup>st</sup> defendant including the Plaintiff's portion thereby dispossessing the Plaintiff of her share in the suit property. The Plaintiff has not exhibited the agreement for sale that she entered into with the previous owner of the suit property with respect to the said portion of the suit property. The Plaintiff however claims that she trusted the 2<sup>nd</sup> defendant who is a brother in law to her sister who paid the full purchase price on her behalf that she would get her share of the suit property. The 2<sup>nd</sup> defendant has not denied that the Plaintiff purchased a portion of the suit property from Elijah Ongoro Mogaka through him. The 2<sup>nd</sup> defendant has not denied the fact that the Plaintiff has been in occupation of a portion of the suit property since 1994 and that she has her residence thereon. What the defendants seem to be challenging is the validity of the agreement for sale that the Plaintiff is alleging to have entered into with the said Elijah Ongoro Mogaka. The defendant's other contention is that the 1<sup>st</sup> defendant being the registered proprietor of the suit property, her title cannot be defeated by the Plaintiff's alleged interest in the suit property with respect to which she had no notice. I have noted that the 1<sup>st</sup> defendant was registered as the proprietor of the suit property on 15<sup>th</sup> June, 2000. If the Plaintiff had taken possession of the portion of the suit property which she claims to be entitled to in the year 1994 and put up a house thereon which she has occupied since then, then the 1<sup>st</sup> defendant's title was acquired while she was in possession. Although the Plaintiff's interest in the suit property was not registered and as such the 1<sup>st</sup> defendant couldn't have had notice thereof as alleged, the Plaintiff's occupation and possession of a portion of the suit property created an overriding interest to which the suit property was subject to. The 1<sup>st</sup> defendant who acquired the suit property with the Plaintiff in occupation did so subject to the Plaintiff's right of occupation. In this regard, see section 30 (g) of the Registered Land Act, Cap. 300 Laws of Kenya (now repealed). Due to the foregoing, the Plaintiff has established that she has an interest in the suit property which deserves protection by the court. The Plaintiff has accused the defendants of blocking her only access to the main public road in the area.

Save for calling the Plaintiff a trespasser who does not deserve any protection from the court, the defendants have not denied the Plaintiffs claim that they have blocked the said foot path which the Plaintiff has been using to ingress and exit her home on a portion of the suit property. I am of the view that whether the Plaintiff is a trespasser on the suit property or not is for the court to decide at the trial. The same applies to the validity of the agreement for sale that the Plaintiff claims to have entered into with Elijah Mogaka, deceased, with respect to the portion of the suit property in her possession. The defendants cannot be allowed to take the law into their own hands. As I have stated above, the 1<sup>st</sup> defendant's title over the suit property that was acquired while the Plaintiff was in possession and occupation of the said property was subject to the Plaintiff right of possession and occupation of the said property which was an overriding interest over the suit property as at the time of its acquisition by the 1<sup>st</sup> defendant. The defendants forceful entry into the portion of the suit property occupied by the Plaintiff and their blockage of access foot path thereto was a violation of the Plaintiff's said right of occupation and amounted to trespass. As was held in the case of **Aikman-vs-Muchoki [1984] KLR 353**, the defendants cannot be allowed by the court to keep what they have unlawfully taken from the Plaintiff. The parties must revert to the status quo that was prevailing before the defendants' blockage of the said foot path. In the case of **Kamau Mucuha-vs- The Ripples Ltd.(Civil Application No. Nai. 186 of 1992) (unreported)**, Justice Cockar, JA stated that, “**A party, as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act....**”. In the case of **Jaj Superpower Cash and Carry Ltd. –vs- Nairobi City Council & 2 others, Court of Appeal at Nairobi, Civil Appeal No.111 of 2002(unreported)**, the Court of Appeal said this at page 10, “**this court has recognized and held in the past that it is a trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can**

**pay for it.” In the Court of Appeal Case of Ougo & Another-vs-Otieno[1987]KLR 364, it was held that, “ The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.” I have said enough to show that the status quo in relation to the disputed portion of the suit property prior to the blockage of the said foot path by the defendants must be preserved pending the hearing and determination of this suit. The defendants who have forcefully blocked the Plaintiff’s foot path for accessing her residence on the suit property must be ordered to open up the same.**

4. Due to the foregoing, I am persuaded that the Plaintiff has established a prima facie case with a probability of success against the defendants and that this is a proper case to grant a mandatory injunction. I am also satisfied that unless the order sought is granted, the Plaintiff would suffer irreparable harm. The Plaintiff’s Notice of Motion application dated 1<sup>st</sup> November, 2012 is therefore well merited. The same is allowed in terms of prayer 3 thereof. The costs of the application shall be in the cause.

**Dated, signed and delivered at Kisii this 8<sup>th</sup> day of November, 2013**

**S. OKONG’O,**

**JUDGE.**

**In the presence of:-**

No appearance for the Plaintiff

No appearance for the Defendants

Mobisa Court Clerk.

**S. OKONG’O,**

**JUDGE.**