



Case Number:	Civil Suit 86 of 2004
Date Delivered:	26 Nov 2004
Case Class:	Civil
Court:	High Court at Kisii
Case Action:	-
Judge:	Kaburu Bauni
Citation:	Ongani v Nyamora [2004] eKLR
Advocates:	Mr. Ombachi for the Applicant;
Case Summary:	(Ruling) - civil procedure - application for summary judgment - whether defence raised triable issues
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO.86 OF 2004

ISAAC AYAKO ONGANI PLAINTIFF

VERSUS

THOMAS GUTO NYAMORADEFENDANT

RULING:

Applicant/plaintiff prays for orders of temporary injunction against the respondent/defendant restraining him, his servants or agents from constructing or erecting any building or structures on plot No.18A Keumbu market until the suit is heard and determined. He also prays for costs.

Applicant deponed that the plot in dispute is registered in his name. It initially belonged to his late father. In 1989 the respondent unlawfully entered into the said plot and erected some structures there. He said that in April this year he has taken building materials to the plot intending to build more structures.

Application was opposed. Mr. Nyariki submitted that applicant was not truthful. He said the Respondent bought half portion of the plot in question. He has built a shop there and has been in occupation for the last 19 years. There have been other suits.

I have considered the application. It is clear there is a long-standing dispute between the parties. It is clear that the Respondent is occupying half portion of the plot since 1980's. The applicant has all along been aware of the Respondent's occupation. He may now be the registered owner of the plot but that is an issue to be canvassed during the hearing.

This is the 3rd time the applicant is in court over the same plot. In 1989 he filed Kisii HCCC No.156 of 1989 where he and others were the plaintiffs. They sued the respondent and 3 others over the same plot. In that case they wanted a purported sale of a portion of the plot to the respondent declared null and void.

Instead of prosecuting that suit to its final conclusion the applicant and others withdrew the suit on 18th May 2004. They filed this suit six days later. From the pleadings in that case it is clear the issue of sale of the plot to the respondent was a live as early as late 1980's. By 1989 the respondent was already in occupation of part of the said plot.

In 1995 the applicant again filed Kisii CMCCC No.429 of 1995 against the respondent. In par.2 of the plaint he stated as follows:

"Sometimes in 1985 the plaintiff had an intention to sell his plot No.18A at Keumbu market to the defendant."

This again shows that the issue of the plot between the parties is an old one. The plaintiff withdrew

that suit on 26th May 1997. I feel the controversy between the two parties over the plot can only be sorted out after a full hearing. Applicant withdrew the first two suits on his own. There are pertinent issues especially that of sale of ½ portion of the plot to the respondent which need to be addressed. It would be unjust to have the respondent kicked out of the plot at this hour. The averment that he has been operating business on the plot was never controvert

I therefore find application has no merit and dismiss it. I however order the parties to maintain status quo and no new structures should be put up in the disputed portion until the suit is heard and finalized. Costs in the cause.

KABURU BAUNI

JUDGE

16/6/04

Delivered on 16th June 2004.

Mr. Mainye for Mr. Nyariki.

Mr. Maisiba for Mr. Ombachi for applicant.

KABURU BAUNI

JUDGE



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