



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

E & L CASE NO. 236 OF 2012

JUSTUS MUGAA M'IMPWI.....PLAINTIFF

VERSUS

FRANCIS KAMUTA M'THIRUAINE.....DEFENDANT

RULING

This application is dated 13th day of December, 2012. It seeks orders:

- a) **THAT** this application be certified extremely urgent and be heard on priority basis in the first instance.
- b) **THAT** an order of temporary injunction do issue restraining the defendant, his agents, servants, employees or anyone acting for him or through him from committing any further acts of trespass or in any other way interfering with the quiet possession and ownership of P/NO 3500 Athinga Adjudication Section pending inter parties hearing and determinatio of this application.
- c) **THAT** an order of interlocutory injunction do issue restraining the defendant, his agents, servants, employees or any one acting for him or through him from committing any further acts of trespass or in any other way interfering with the quiet possession and ownership of P/No.3500 Athinga Athanja Adjudication Section pending the hearing and determination of this application.
- d) That costs of this application be provided for. An Interim Injunction was granted exparte on 17.12.2012 in terms of prayer b.

The parties filed written submissions.

The plaintiff's case was that he bought the suit land from the defendant's grandfather way back in 1979 and has been in actual occupation since then. He says it was only since 2012 that the defendant unlawfully trespassed into the land. He says that the defendant approached him and he extended a hand of kindness to the defendant and gifted him 0.060 acres to be curved out of P.No. **3500 ATHINGA/ATHANJA**. He does not say when he did this. He says that due to the ungratefulness of the defendant he had revoked the gift of 0.60 he had given to the defendant. I think he means 0.060 as he has stated in another part of his submissions.

The defendant denied the plaintiff's case. He said that the suit land originally belonged to his grandfather. He approached his grandfather and was given the suit land on condition that he would put up business premises for his grandfather on behalf of the land which measured approximately 1.4 acres. He asserts that the plaintiff reneged on the agreement. After his grandfather died he says that the plaintiff put up- business premises instead of for the defendant as the plaintiff had agreed with his grandfather.

To alleviate the situation, the plaintiff reached an agreement with the defendant to transfer 0.6 acres to the plaintiff. However the plaintiff had added a zero to the point with the effect that he had curved out 0.060 of the suit land instead of 0.60, which he had intended to transfer to the defendant. As the plaintiff had intended to transfer part of the suit land to him, the defendant submitted that there was no way the defendant would deem him a trespasser. He alleged fraud on the part of the plaintiff.

The submissions of both parties contained some claims whose veracity could only be established at the hearing and determination of the main suit. Such facts cannot be established at this interlocutory stage. This position is restated in the case of Dorris Kanini Ndunda Vs Family Bank Ltd which quoted the Court of Appeal in Mbuthia Vs Jimba Credit corporation & Another [1978] KLR 1 said:

“The correct approach in dealing with an application for interlocutory injunction is not to decide the issues of fact, but rather to weight up the relevant strength of each side's propositions. The Lower Court Judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits.”

It is not in dispute that the suit land originally belonged to the defendant's grandfather. The claim that the plaintiff purchased the land cannot be conclusively established at this interlocutory stage. The competing claim made by the defendant that the plaintiff had reneged upon an agreement he had with his grandfather can also not be established at this stage. It is, however, clear that the plaintiff had agreed to transfer some land to the defendant. Whether the area was 0.060 acres or 0.60 acres can only be established after the hearing and determination of the main suit. But granting the prayers sought in this application would be declaring the defendant a trespasser on that part of the suit land measuring 0.060 acres which he had been allowed access to by the plaintiff.

Having considered the pleadings, the averments, the assertions and the submissions of the parties I am inclined to decline to grant the prayers sought in the application. Accordingly, the application is dismissed with costs to be in the cause.

Delivered in Open Court at Meru this 18th day of February, 2014 in the presence of :

Cc. Daniel

Imitator - Present for Respondent

Mithega and Kariuki – Absent for the Applicant

P. M. NJOROGE

JUDGE