



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL SUIT NO. 31 OF 2014

EMKOS COMPANY LTD PLAINTIFF

VERSUS

CHARLES ASIKOWA OKOLO DEFENDANT

R U L I N G

1. The Plaintiff/Applicant Emkos Company Limited (the company) brought a notice of motion dated 14th February, 2014 in which it seeks an injunction against the defendant/Respondent from interfering with the company's possession of L.R. No.8994/20.
2. The company contends that it is the registered owner of the suit land and that the defendant/respondent had filed a suit against the applicant herein and two others claiming the suit land as well as refund of the purchase price. The case by the respondent was heard and the same was dismissed as against the company herein which was the third defendant in that case.
3. The company contends that the respondent herein contacted the District Officer Kiminini and the Deputy Commissioner who allegedly urged him to move into the suit land. The respondent then moved to the suit land and ploughed it despite the fact that he had been paid Kshs.2.9 million being part of refund of the purchase price as per the decree in his favour.
4. The company contends that unless the respondent is restrained by way of injunction, he will go ahead to plant on the suit land to the detriment of the company.
5. The application is opposed by the respondent through a replying affidavit sworn on 11th March, 2014. The respondent contends that the application can not be granted because he is in possession of the suit property and that he has already filed an application for review of the judgement in which his claim against the company was dismissed. He contends that the application for review has high chances of success and that the counter-claim he has filed in this case for specific performance will succeed.
6. The respondent also contends that the resolution authorising the filing of the suit herein against him is a forgery as it was not signed by the Advocate who I said to have signed it. The respondent contends that the company has not come to court with clean hands and that the application should therefore be dismissed with costs.
7. I have gone through the application as well as the annexures thereto. I have also gone through the replying affidavit in opposition to the application. I must now determine whether the injunction sought should issue against the respondent. The principles for grant of a temporary injunction are now well settled. First an applicant must demonstrate that he has a prima facie case with probability of success. Secondly an injunction will not normally be issued unless the applicant shows that he will suffer damage

which will not be compensated. Thirdly if the court is in doubt it will decide the application on a balance of convenience.

8. In the present case, the company is the registered owner of the suit land. In Kitale HCCC No. 39 of 2011 the respondent had sued the company as well as two other defendants. The respondent in that case was seeking the suit land or in the alternative refund of the purchase price which he had paid to one of the defendants Benjamin Oonge. The suit against the company which was the third defendant was dismissed with costs and judgement was given in favour of the respondent as against Benjamin Oonge. Part of the decretal sum of Kshs.2.9 million has been paid by the said Benjamin Oonge to the respondent.

9. As was clearly set out in the judgement in Kitale HCCC No. 39 of 2011 Benjamin Oonge purported to sell land which did not belong to him. As it was found then as well as the present there was no evidence to show that Benjamin Oonge was a director of the company. The respondent has no business interfering with the company's land when he has already had a judgement in his favour which has been partially met.

9. The company has demonstrated that it has a prima facie case with a probability of success. The fact that the respondent has filed an application for review which has high chances of success is not a ground for the respondent to interfere with the company's land.

10. An argument was raised by Mr Ochanda that the LR No. quoted in the prayer does not refer to the suit land. This is true and indeed Mr Kiarie for the company conceded as much. He however pointed out that that was a typing error and that the correct land reference number is given in paragraph 3 of the supporting affidavit as well as the plaint. I do not think that the reference to a wrong land reference number in the prayer in the notice of motion can defeat the application particularly when it is clear that the correct land reference is mentioned in the supporting affidavit as well as the plaint. Cases have to be determined on merits and not on technicalities such as quoting of a wrong reference number in part of an application.

11. The argument by the respondent that the resolution by the company is a forgery can not be taken with any seriousness. The Advocate who is said to have signed it did not swear an affidavit denouncing the signature. I find that the company has demonstrated that it has a prima facie case with a probability of success. I do not have to consider the other two principles. I therefore grant an injunction in favour of the company restraining the respondent his agents or anybody under his instructions from staying, ploughing, planting or interfering with the company's land reference No. 8994/20 until the hearing and determination of this suit.

12. The company shall have costs of this application.

It is so ordered.

Dated, signed and delivered at Kitale on this 31st day of March, 2014.

E. OBAGA,

JUDGE

In the presence of Mr Kiarie for Plaintiff/Applicant and Mr Ingosi for Mr Ochanda for defendant/Respondent Court clerk – Lobolia.

E. OBAGA,

JUDGE

31/3/2014