



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 262 of 2012

SHEDRACH KIRUKI M'LAARIA APPLICANT

VERSUS

SAMUEL KIPTANUI KORIR1ST RESPONDENT

JOHN ETHURO 2ND RESPONDENT

GIDEON LOTHEMBO 3RD RESPONDENT

RULING

The Notice of Motion dated 19/7/2012 was filed by Shedrach Kiruki M'laaria, the plaintiff/applicant herein. He seeks the following orders:

1. That a permanent injunction do issue jointly and severally to stop, prevent and restrain the defendants/respondents their servants and or agents or any other person at all on their behalf or claiming through them from continuing to graze their animals, cutting down trees and all other forms of vegetation and in any manner taking or continuing to take any act that would lead to the destruction of the trees and vegetation on L.R. 9379 or to its wastage and degradation howsoever, pending the hearing and determination of the suit;
2. That a permanent injunction do issue jointly and severally to stop, prevent and restrain the defendants/respondents, their servants and or agents or any other person at all on their behalf or claiming through them from entering or remaining upon the L.R. 9379 situated in North East of Nyahururu and Adj. Of Nyahururu Municipality in the erstwhile Laikipia District, now Nyahururu District pending the hearing and determination of the suit filed;
3. That mandatory injunction do issue ordering the defendants/respondents, jointly and severally, their servants and or agents or any other person at all on their behalf or claiming through them, to vacate from LR No. 9379 situated in North East of Nyahururu and Adj. Of Nyahururu Municipality in the erstwhile Laikipia District, now Nyahururu District pending the hearing and determination of this suit; The grounds which the application is premised are found in the body of the application, supporting affidavit and supplementary affidavit sworn by the applicant on 19/7/2012 and 22/8/2012. An affidavit sworn by Charles Gachago Mukere on 22/8/2012 also supported this application. The applicant depones that he is the registered owner of LR No. 9379 situated in North East of

Nyahururu. That in 1994, he applied to the President of the Republic of Kenya through the Ministry of Agriculture and Livestock Development for a parcel of agricultural land in Laikipia District. The applicant was offered to purchase the suit land by the Ministry of Lands and Settlement subject to payment of the consideration and other charges. The applicant accepted the offer, paid the full purchase price and took possession of the suit land. He employed a caretaker, Charles Gachago Mukere, who occupied a portion on the suit land. In early, 2011, the applicant was informed by the caretaker that the respondents had entered and taken possession of the suit land. He alleges that the respondents were burning charcoal, grazing animals and cutting down indigenous trees. The applicants therefore prays that this court grants the orders sought in the notice of motion.

The 1st respondent swore a replying affidavit on 7/8/2012 and a further replying affidavit on 27/8/2012 on his behalf and on behalf of the 2nd and 3rd respondents. He strenuously opposed the application. He deponed that he has occupied the suit land peacefully and without interruption for more than 30 years. That he came to settle on the land following a consent from the Government of Kenya through the Ministry of Livestock to graze his animals on the suit land. That he has been paying the grazing fee to the Ministry of Livestock and has never been informed of change of ownership of the suit land. The deponent denies burning, destroying of indigenous trees and generally causing wastage of the suit land.

Mr. Ashitiva, learned counsel for the petitioner submitted that it was not common to issue mandatory injunction, however in the circumstances, he argued that the applicant had demonstrated by producing evidence on how the applicant acquired the suit land and occupied it. He further submitted that the respondents were trespassers and there was wastage of the suit land. The applicant had engaged the local Chief and District Officer to remove the respondents from suit land. However despite the respondents promising to vacate they have failed to do so and it is for that reason that the applicant approached this court. The respondents were charged in criminal proceedings for forcible detainer of the suit land without color of right in Criminal Case Number 1036/2012.

Ms. Ayuma, Learned Counsel of the respondents made her oral submission in opposing the application. She submitted that the respondents had been in occupation of the suit land for over 30 years and had put up structure on the suit land. She argued that the applicants do not qualify for an injunction as it had not met the standard set in *Giella v Cassman Brown*. She submitted that the respondents would not suffer irreparable damages that cannot be compensated and therefore urged the court to maintain the status quo.

In reply, Mr. Ashitiva clarified that the respondents were in occupation of a small portion of the suit land and not the whole and that if they had been in occupation of the portion of the land subject to payment of grazing fees to Ministry of Livestock then the respondents cannot claim adverse possession. Their occupation was with permission and therefore adverse rights did not arise. He further submitted that this right was also disrupted by registration of the title to suit land in his favour. Counsel argued that the applicant was been denied free use of the entire parcel in particular the portion occupied by the respondents and that damages will not be adequate as compensation.

A mandatory injunction, at the interlocutory stage, is normally granted in the clearest of cases and where there are special circumstances. See **Halsbury's Laws of England Vol. 24 (4th edition) para. 848**. This was also the holding in the case of **Locabail International Finance Ltd vs Agroexport and others (1986) All ER pg. 901** wherein the court stated;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction”.

The Courts have also held granting a mandatory order or injunction may have the effect of bringing the litigation to an end at the interlocutory stage. This was echoed by the Court of Appeal in the case of

Trinity Prime Investment Ltd vs Savings & Loan and another Civil Appeal No. 90 of 1998 that “where the Court has granted an interlocutory injunction prayed for, it should not grant a mandatory injunction whose effect shall bring the litigation to an end.”

The application herein is not a clear case to warrant the Court to grant an interlocutory mandatory injunction. Despite the applicant having title to the suit land, there are allegations by the respondents that they have lived on the suit land for over 30 years and leading to a claim of adverse possession of the suit land. Therefore, a mandatory injunction against the respondents directing to vacate the suit land would amount to extinguishing their claim for adverse possession at an interlocutory stage. As to whether the respondent's claim for adverse possession was extinguished when the title was registered in favour of the applicant is an issue to be canvassed during the main hearing.

It is apparent that the respondents are in occupation of a portion of the suit land, a permanent injunction therefore restraining the respondents from entering the suit land would amount to an eviction order and consequently ending the suit at an interlocutory stage. The issue before this court is not direct and simple and there are no special circumstances adduced by the applicant to warrant a mandatory injunction. The respondents occupy only a portion of the land and the applicant the remaining portion. It is therefore in the interest of justice that the status quo be maintained pending the hearing and determination of the suit.

To this end, the applicant has failed to meet the threshold for grant of interlocutory relief, in the result I decline to grant the orders sought in the Notice of Motion dated 19/7/2012.

DATED and DELIVERED this 19th of April 2013.

L N WAITHAKA

JUDGE

PRESENT:

Mrs Wanderi holding brief for Shitiva for the Applicant

Ayuma holding brief for Konogi for the Respondents

Stephen Mwangi – Court Clerk