THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO.73 OF 2009

NTHENYA MUIA MUTIO ..... PLAINTIFF

VERSUS

NDETO KYALO .....DEFENDANT

RULING

Nthenya Muia Mutio, hereinafter "**the Applicant**" on 24th March, 2009 mounted this suit against **Ndeto Kyalo**, hereinafter "**the Respondent**" praying for an order of eviction as well as costs of the suit. The suit was informed by the fact that she was the registered proprietor of all that piece or parcel of land known as **Okia/Nzuuni/III** hereinafter "**the suit premises**", by virtue of first registration. However, in the month of November, 2007, the respondent unlawfully trespassed on the suit premises, uprooted the sweet potatoes and natural trees growing thereon. He thereafter started grazing his animals thereon. He had since occupied the suit premises and denied the applicant access to the same. As a result, the applicant was suffering immense loss as she is unable to plant crops for her daily upkeep. Hence the suit.

The respondent entered appearance and filed a defence to the applicant's claim. He denied trespassing on the suit premises. He averred that sometimes in December, 1980, he bought unregistered parcel of land from the applicant and completed payment in 1999 having paid in total, a sum of KShs.118,300/-. Following land adjudication, the parcel of land he purchased as aforesaid was registered in his name as **Okia/Nzuuni/1327**. He did not therefore trespass or occupy, the applicant's suit premises.

On 3rd June, 2009, the applicant filed an application seeking an injunctive order against the respondent. She wanted the respondent, his servants and or agents restrained from trespassing, cultivating or interfering with her possession of land parcel **No. Okia/Nzuuni/II**.

The grounds and affidavit in support of the application were along the same lines as her averments in the plaint aforesaid. Suffice to restate that the applicant was the registered proprietor of the aforesaid parcel of land and had been in occupation thereof for well over 60 years. The respondent had however, forcefully entered the same between March and May 2009 and had started using the same, thereby preventing the applicant and her family from accessing and using the land. As a consequence, the applicant had suffered irreparable harm. As proof that she was the proprietor of the suit premises, she exhibited a copy of the title deed.

As expected, the respondent opposed the application. The respondent filed a replying affidavit sworn on 23rd October, 2009 in which he basically said that he had nothing to do with **Okia/Nzuuni/II** and or the suit premises. The application was therefore frivolous and vexatious. He had bought from the applicant unsurveyed land for which he paid a total of KShs.118,300/- and upon completion of the sale in 1999, the land was transferred and registered in his name following completion of Land Adjudication Process. Henceforth, his piece of land is known as **Okia/Nzuuni/127**. He annexed to his replying affidavit copies of the sale agreements and the title deed. The upshot of all the foregoing and indeed is the respondent's contention is that he did not trespass or occupy Okia/Nzuuni/II or the suit premises and therefore the order sought is of no consequence since he is in occupation of his own parcel of land.

When the application came before **Lenaola J.** for interpartes hearing on 17th September, 2009, he directed parties to file and exchange written submissions. However, it was not until 9th and 8th November, 2011 respectively that parties complied with **Lenaola J.'s** order aforesaid. By then **Lenaola J.** had long left the station on transfer. The matter then fell on me to give directions as to the way forward. Luckily, parties agreed that I proceed to craft and deliver the ruling on the basis of the materials on board.

I have now read and considered the written submissions and authorities cited therein. The principles upon which a court grants a temporary injunction are settled. They were settled 38 or so years ago in the celebrated case of **Guella –vs- Cassman Brown & Co. Ltd (1973) E.A. 358**. It was therein opined that for an applicant to succeed on such an application, he must demonstrate that he has a prima facie case with probability of success, that unless the injunction is granted he might otherwise suffer irreparable damage that cannot be compensated by an award of damages and that in the event that the court is in doubt, it will decide the application on the balance of convenience. Above all, it must be appreciated whether or not to grant an injunction is an exercise in discretion by the judge. But as usual, such discretion must be exercised judicially.

Applying the foregoing principles to the circumstances of this case, I find that those principles do not favour the applicant. These are my reasons.

Though in the plaint, the applicant has indicated the suit premises as **Okia/Nzuuni/III** in the application, she refers to **Okia/Nzuuni/II**. These are separate parcels of land. If the court was to grant the injunction sought and which will be in respect of **Okia/Nzuuni/II**, it will have acted in vain since the said parcel of land is not the subject of this litigation. It may not even be in existence and if it is, it may be registered in the name(s) of person(s) who are not parties to this suit. The response by the applicant to this anomaly is that it was a typographical error which can be cured by an oral application. That may well be so. However, as at the time of crafting this ruling, no such oral application had been made. Accordingly, the error if at all still stands. It is not the business of the court to assist litigants who are indolent by moving *suo moto* to do on their behalf which they ought to have done by themselves.

Secondly, looking at the suit as filed, there is no prayer for an injunction. Accordingly, the instant application is made in *vacuo*. As stated by **Ringera J.** (as he then was) in the case of **Southern Credit Banking Corp Ltd. –vs- Charles Wachira Ngundo HCCC No.1780 of 2000 (UR)**, an interlocutory injunctive relief cannot be granted where there is no relief in the nature of a permanent injunction prayed for in the plaint as the same cannot be granted in *vacuo*.

An injunction is an equitable remedy. In deciding whether to grant the same, the court is entitled to take into account the conduct of the parties. In other words, he who seeks equity must come to court with clean hands. That is to say that, the remedy of injunction being equitable in origin, the court must decline to exercise its discretion in favour of the applicant whose conduct is shown not to meet the approval of a court of equity and justice. From what has been laid before me so far, I cannot say that the applicant has been candid with the court. She claims not to know how the respondent came by his land, yet documents show prima facie that she was involved in some transactions relating to the land with the respondent. A party who deliberately sets out to mislead the court as the applicant has sought to do here cannot endear herself to the court of equity. There is an allegation by the respondent that the applicant has a history of reselling land she personally sold earlier to another person. That allegation was not at all rebutted by the applicant. It must then be true.

Again, the respondent has stated that his parcel of land is Okia/Nzuuni/1327. He demonstrated such ownership by bringing forth the sale agreement and the title deed. In those circumstances, what will the injunctive order achieve if it is directed at Land Parcel Okia/Nzuuni/II or the suit premises. Such an order in the circumstances will be in vain and of no consequence. Courts of law do not act in vain.

It appears that the applicant has her land, the suit premises while the respondent too has his land. The issue as to who is encroaching on whose land cannot be determined at this stage. What prima facie case has been made out if the two have and reside on their respective parcels of land? None!

As to irreparable injury, if at the end of the day, upon taking evidence at the trial, it is found that the respondent was at fault, the damage can be computed and the respondent called upon to make good the damage. Accordingly, the damage that may be suffered by the applicant in the interim is not irreparable.

On the question of balance of convenience, I would imagine that it is better for parties to maintain the status quo currently obtaining. Each party should remain in his/her portion of land until this case is heard and determined.

The application therefore lacks merit. Accordingly, it is dismissed with costs to the respondent.

Dated and **delivered** at **Machakos**, this **16th** day of **January**, 20**12**.

ASIKE-MAKHANDIA

JUDGE