

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 516 OF 2011

DEVENSON MORANGA ONYIEGO.....PLAINTIFF

VERSUS

HAMISI BAKARI MATATA.....DEFENDANT

RULING

The plaintiff by this action seeks a permanent injunction to restrain the defendant from entering or interfering with the plaintiff's quiet possession or enjoyment of L.R. No. Kwale/Diani/150 (suit property). The plaintiff also seeks for special and general damages for trespass to land. The plaintiff alleges that the defendant entered the suit property on 12th September 2011 without his consent. What is for consideration in this ruling is a notice of motion dated 20th September, 2011. By that application the plaintiff seeks temporary injunction, pending the determination of this suit to restrain the defendant from entering on the suit property. The affidavit in support of that application sworn by the plaintiff on 20th September 2011 is very short. The plaintiff stated that the defendant entered the suit property on 12th September 2011 wrongfully and without his consent. The defendant on entering damaged the Plaintiff's plants which led the plaintiff to report the matter to the Police but he was advised to file a civil suit. The plaintiff deponed that the defendant had threatened to re-enter the suit property and hence sought restraining orders to stop the defendant.

The defendant in his replying affidavit deponed that the plaintiff was registered as the owner of the suit property unlawfully. He deponed that he has been and is in possession of the suit property. He attached documents to his replying affidavit which documents indicate that the suit property was the subject of adjudication under the Diani settlement scheme. Under that scheme, the suit property is indicated to be under the name of Bakari Salim Matata (deceased). The said deceased was the father of the defendant. The defendant annexed a letter written by the department of Land Adjudication and Settlement dated 16th February, 2009. In that letter, which was addressed to the director of Land Adjudication and Settlement in Nairobi, it was stated as follows:

“.....we request you to prepare the above documents in favour of the settler as per the details below.

Name: Bakari Salim Matata.....”

That letter made reference to the suit property. It is pertinent to note that, when the application under consideration was pending hearing, parties on 29th November, 2011 by consent entered into an order to the effect that the status quo on the suit property be maintained. That order aggrieved the plaintiff who by his application dated 7th December 2011 sought for that consent order to be vacated. It is important to state that the application dated 7th December 2011 was withdrawn on 14th February, 2012. The importance of mentioning that application is to note that the plaintiff seemed to be uncomfortable with the order of status quo to be maintained. The question is why would the plaintiff be uncomfortable with that order, unless the status quo is that the defendant is the one in occupation of the suit property. There seems to be contradictions in the plaintiff's case which I am unable to reconcile. The contradictions seem to be in relation to the plaintiff's allegation that the defendant is not in occupation of the suit property yet in the

affidavit in support of the application under consideration the impression given is that the defendant entered and was in possession of the suit property. At this moment, I am not called upon to decide who is the true owner of the suit property and despite parties attempt to get me to decide, I decline. If indeed the defendant is in possession of the suit property, then what the plaintiff seeks in this court is a mandatory injunction. It is only in a plain and strong case that the court will issue a mandatory injunction. That was so stated by Megarry J. (as he then was) in **SHEPHERD HOMES LTD VS SANDAHM [1971] 1 CH. 34** as follows:

“....., it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the defendant has rushed on with his work in order to defeat the plaintiff’s attempts to stop him, then upon the plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the plaintiff’s promptitude is a badge of the seriousness of his complaint.”
(emphasis added).

The case presented by the plaintiff on a *prima facie* basis does not merit an order which essentially would be a mandatory injunction. It is for that reason that the notice of motion dated 7th December, 2011 is dismissed with costs being awarded to the defendant.

DATED and DELIVERED at MOMBASA this 29th day of March, 2012.

Mary Kasango
JUDGE