



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Suit 93 of 2011

IMMACULATE AWINO..... PLAINTIFF

~VRS~

WENSLEY BARASA.....DEFENDANT

RULING

When the Plaintiff filed this suit on 13/10/2011 she stated that she was since 30/12/2010 the registered proprietor of land parcel no.E.Bukusu/S.Kanduyi/5778 which she had bought on 29/12/2010. She further stated that on visiting the land she had found that the Defendant had since May 1993 been on the land on which he had put up a semi-permanent house and a toilet. Her case was that she had requested the Defendant to vacate without success. The suit sought eviction.

Filed with the suit was an application for a temporary injunction to restrain the Defendant, and all those acting under him, from interfering with or in any manner baking bricks, ploughing or selling it or leasing it or interfering with the Plaintiff's proprietary rights till the hearing of the application interpartes. The Plaintiff was asked to serve the application and when it was not responded to it was granted with costs.

The Defendant seeks the discharge of the orders on the basis that the Plaintiff used the order to demolish part of his houses and has annexed photographs as evidence of the destruction. The Defendant's case is that he bought the land in 1987 and has occupied it ever since. He stated that he bought the parcel from one Evans and went into occupation but did not get title. He was surprised that the Plaintiff has bought the same parcels and has title and has begun fencing it. The application sought, among other things, an order that the Plaintiff removes the fence and stops any construction or further demolition.

The response by the Plaintiff to the application was that she was the registered proprietor. She annexed title deed. She denied that she effected any demolition and stated that she was only removing the "palls" left on the side by the Defendant when he was stopped from making bricks here. She denied that the Defendant had any house on the land or that he was residing here.

The injunction order that the Plaintiffs sought and obtained was a restraining one. It was a prohibitory order. The Plaintiff's own pleadings stated that the Defendant was in possession since 1993. The injunction sought was not a mandatory one. It was an order to restrain the Defendant from doing an act (baking bricks, ploughing, selling or leasing the land) but not to do a particular act (for instance, pull down a house, remove the bricks or the implements for making bricks or evict) (**Yego v. Tuiya & Another [1986] KLR 726**). The acts of demolishing the houses or removing "palls" left by the making of bricks were positive orders that required a mandatory injunction. In **East African fine Spinners Ltd and Others v. Bedi Investment Ltd, Civil Application no. Nai 72 of 1994** the Court of Appeal explained the difference between mandatory and prohibitory injunctions. It explained that prohibitory injunctions are meant to prevent for the future continuance or the repetition of the conduct of which the plaintiff complains, and it does not attempt to deal with what has happened in the past; that is left for the trial, to be dealt with by damages or otherwise. A mandatory injunction, on the other hand, is often a means of undoing what has already been done so far as that is possible. Prohibitory injunction

merely requires abstention from acting, while mandatory injunction requires the taking of positive steps and requires the dismantling or destruction of something already erected or constructed and therefore the case has to be unusually strong before the injunction can be granted.

An injunction is an equitable remedy and once misused it has to be discharged and/or vacated. It is no longer deserved.

These are the reasons why the interlocutory injunction that was issued herein is discharged and/or vacated. The parties shall revert to the position before the suit was filed. The Defendant shall be paid costs of the application.

Dated, signed and delivered at Bungoma this 26<sup>th</sup> day of July 2012.

**A. O. MUCHELULE**  
**JUDGE**