REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 8 of 2008

JORAM MUNGAI KIBERENGE.....1ST PLAINTIFF

ROBERT KIMANI KIBERENGE.....2ND PLAINTIFF

ASAPH WAINAINA KIBERENGE.....3RD PLAINTIFF

DAVID KARANJA KIBERENGE.....4TH PLAINTIFF

GADSON NGUGI KIBERENGE.....5TH PLAINTIFF

ELIZABETH WAIRIMU.....6TH PLAINTIFF

VERSUS

JENNIFER NJOKI.....1ST DEFENDANT

BEATRICE WAMBUI NGIGA.....2ND DEFENDANT

RULING

By a Notice of Motion dated 20th March 2012 made under Order 40 Rule 2 Civil Procedure Rules and Section 3A, the applicant prays that this court issues a temporary injunction to restrain the Defendants, their servants or agents, from entering, remaining or in any manner interfering with the 11 acres that the plaintiffs have been using and occupying in the parcel of land LR No.533/426 pending the hearing and determination of the appeal filed.

The application is premised on grounds that:

(1) Despite the defendants being aware of the appeal and the application for stay, they have threatened, and taken steps to execute the decree in this suit.

(2) The defendants main reason for intending to execute the decree is that there are no orders of stay in place and this is why orders of injunction are sought.

In the affidavit supporting the application, it is deposed by GADSON NGUGI KIBERENGE (the 5th plaintiff/applicant) on behalf of himself and his co-applicants that they were not satisfied with the trial court's decision but delayed in filing an application for stay of execution so as to enable typing of proceedings to be done. It was the applicant's belief that the Respondents would only continue using the two acres each, as they had done before when it became apparent to them that Respondents intended to execute the decree, so an application for stay was filed and served on the Respondent's counsel. However, the Respondents went ahead and purported to use 10 acres instead of 4 acres on grounds that no orders of stay were in place.

The begun ploughing and intend to plant on the same, at the onset of the rains – the applicants meanwhile want to carry on using the 11 acres as they have always done. They fear possibilities of ugly scenes unless a temporary injunction issues against the Respondents who are termed as trespassing on the 11 acres occupied and used by the plaintiffs/applicants.

The application for stay was fixed for hearing on 30/04/2012.

The application is opposed, and in a replying affidavit sworn by JENNIFER NJOKI (1st Respondent) on her own behalf and on behalf of the 2nd Respondent, she deposes that judgment was delivered on 15th April 2011 regarding LR No.533/426 which had been jointly given to her late husband and the 2nd respondent's husband, together with the applicant's father. The applicant's father, who is deceased, fraudulently registered the land in his name – by then the Respondents were each using only 2 acres of the land. After delivery of judgment, the applicants never sought stay of execution before the High Court. Meanwhile in compliance with the court's judgment, the Respondents engaged the services of a surveyor who entered the land and divided it into three equal parts. Subsequent to that subdivision, the Respondents erected a fence surrounding the five acres on 17th February 2012 (annexed is a photograph JN1 to demonstrate the state of affairs).

After the destruction, the Respondents went ahead, ploughed and planted on their respective five (5) acres. On 28th March 2012, the applicants went to the suit land and showed some people the land where the Respondents had ploughed, saying they had rented the land to those people and advising them to plant on top of the Respondent's crop. The applicants action is bound to cause bloodshed and they ask this court to order that status quo existing on the ground should be maintained pending hearing and determination of the appeal. In any event, the applicants prayers have been overtaken by events since the application is being made one year after delivery of judgment. Further, the applicant does not stand to suffer any prejudice since their five acres remain intact. It is further averred that the applicants had not obtained any order allowing them to enter the land, so this application should be dismissed.

At the hearing of the application, Mr. Mindo appeared for the applicants while Mr. Njoroge appeared for the Respondents.

Basically, Mr. Mindo's submissions reiterated the averments contained in the applicant's affidavit and the grounds on the face of the application. His argument is that Respondents admit that they have used 2 acres each since 1973, and now they suddenly want to use the 5 acres – he wonders why they cannot await the appeal and also questions their action of planting yet they are aware of the application filed seeking stay. He argues that Respondents should not be allowed to create an unlawful situation then enjoy it, saying, there is bound to be bloodshed because Respondents have planted on the land.

In opposing the application, Mr. Njoroge submits on behalf of the Respondents that counsel has failed to disclose that judgment was delivered on 15th April 2011 and a Notice of appeal filed on 11th August 2011. From that time, no stay has been sought by counsel, so the Respondents went onto the ground, hired a surveyor, who demarcated the land. He confirms that Respondents then ploughed the land, and it is at that point that the application for injunction was filed. He poses this question.

"The land has been demarcated so why could the applicants want to interfere."

It is further submitted that subdivision was carried out in January 2012, not when the court gave its orders. Mr. Mindo counters this, saying, a surveyor cannot just go onto the land without parties being present and place beacons. He argues that steps had been taken to have the application for stay heard in January, but the court was on leave.

From what was presented to this court, applicants said they were registered owners of the land, that had been their contention during the trial.

I have perused the court's file and note that the orders of the trial court were that:

(1) Applicants were entitled to 1/3 of the property and EACH of the Respondents was entitled to 1/3 of the suit property.

(2) The Title to the suit land was ordered to be cancelled, the suit land be subdivided into three equal portions and fresh title deeds be issued; one part to the applicants as tenants in common and the other two to the Respondents.

It is then clear that Respondents acted in compliance with the orders of the court, and to give effect to these orders, they engaged a surveyor to sub-divide the land. They cannot therefore be regarded as trespassers nor can their action be termed illegal as they simply observed what the court order had stated. If anything, it is the Respondents who have continued to act as though the court orders did not exist. The applicants have thus failed to demonstrate a *prima facie* case with probability of success.

Secondly, the applicants must demonstrate to this court that unless the orders are granted, they will suffer such irreparable loss that cannot be adequately compensated by way of damages. The applicants have not made even a whimper on this aspect and the Respondents have clearly shown that their use of the respective 5 acres does not deprive the applicants of land, so as to render them destitute.

In any event, there is no evidence showing that applicants had cultivated and planted on the land. If going by what Respondents stated (which I note is not denied) the Respondents only wish to rent out the land, then in the event that their appeal succeeds, that is a loss which can be calculated in terms of mesne profits and loss of income, and a quantifiable figure would adequately compensate their loss.

Since the first two limbs in the celebrated case of **GIELLA V CASSMAN BROWN 1973 EA pg 358** are not met, then it behoves me to look at the **"doubt"** principle – which is where does the balance of convenience tilt? The Respondents are on the ground, in compliance with a lawful court order issued a year ago. No orders of stay were sought until the applicants realized that the Respondents were acting in LAWFUL execution of the court order that they stirred from their comfort, the Respondents have not only executed the order by effecting subdivision of the suit land, they have ploughed and planted ant it was illegal and improper for the applicants to even deign to bring in questions purportedly to lease the land when there were no such orders is place.

As for their threats regarding bloodshed – I think counsel had better caution his clients, against that sort of threat as it does not endeavour them to justice – instead they should pursue their application for stay of execution. In fact he would have shown due diligence by moving to court under certificate of urgency to have the application for stay heard earlier than the date given. The mere fact that applicants had filed a notice of appeal, and much later on filed an application for stay orders, placed no obligation on the Respondents to restrain themselves from executing the court order or acting benevolently towards the Applicants.

The balance of convenience heavily tilts in favour of the Respondents and the upshot is that the application has no merit and is dismissed with costs to the Respondents.

Written and dated this 25th day of May 2012 at Nakuru.

H.A. OMONDI
JUDGE

Read and delivered this 25th day of July, 2012 at Nakuru.

W. OUKO
JUDGE