



REPUBLIC OF KENYA

High Court at Meru

Civil Case 71 of 2010

JOSES MATI M'MAUTA.....PLAINTIFF

VERSUS

HON. MITHIKA LINTURI

CHIEF MICHAEL MURUNGI & OTHERS.....DEFENDANTS

R U L I N G

The plaintiff/applicant filed this suit on 25th May, 2010 seeking inter alia a permanent injunction restraining the defendants, their agents or servants from being on plaintiff's plot No.5124 and from in future from entering the said plot number 5124 situated at Kiraone, upper Athiru Gaiti Adjudication Section. The applicant also sought special and general damages with cost of the suit contemporaneously with filing of the suit the plaintiff/applicant filed Chamber Summons seeking an order to restrain the defendants either by themselves, and their servants from being on the plaintiff/applicant's plot No.5124 and thereafter from entering the said plot situated in Kiraone, upper Athiru Gaiti Adjudication Section pending hearing and determination of this suit.

The grounds in support of the application are stated on the face of the application. The application is supported by annexed supporting affidavit of the applicant and annexed annexures thereto. The application is opposed. The respondents swore replying affidavits in opposition to the application.

The brief facts of this suit are that when the matter came up for hearing before Hon. Lady Justice Lesiit the Counsel for the 2nd to 14th defendants/respondents raised a preliminary objection on the ground that the area where the land the subject matter of this suit is situated is still under adjudication and that the plaintiff/applicant had not obtained consent from the Land Adjudication Officer as required by Section 30(1) of the Land Adjudication Act(Cap.284) to file this suit and as such court lacked jurisdiction to hear and determine the plaintiff's suit and the application.

That on 10th November, 2011 court delivered its ruling upholding the preliminary objection. The court further ordered the proceedings to be stayed until further orders of the honourable court. On 11th December, 2011, the plaintiff/applicant filed notice of motion seeking inter alia that the suit be deemed to have been duly instituted with consent of the Land Adjudication Officer in accordance with Section 30(1) of the Land Adjudication Act having now acquired the said consent. The court allowed prayer 3 of the said application and further directed that the application dated 24th May, 2010, be set down for hearing on merits and the same application is now before this court for determination.

The issue for determination is whether the applicant has laid sufficient basis for this court to grant injunction orders pending hearing and determination of this suit.

This court has carefully considered submissions by Counsel for the applicant and Counsel for the respondents. It has also read the pleadings filed by the parties herein in support of their respective opposing positions.

In applications for injunction courts are required to take into consideration the principles set down for granting an injunction as set out in the case of GIELLA – VS – CASSMAN BROWN AND CO.(1973) E.A. 358 which are as follows:-

1. ***An applicant must show a prima facie case with a probability of success;***
2. ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;***
3. ***When the court is in doubt, it will decide the application on the balance of convenience.***

In the instant case, the 2nd to 14th defendants have not filed their defences but only replying affidavits. The applicant's contention is that on all material times relating to this suit, he was and still is the lawful owner of plot No.5124 having been given the said plot as a gift by Athimba clan in 1975 before land adjudication was established in the area where the said plot is situated. The applicant further avers that the defendants/respondents have on diverse dates trespassed on the suit property and inter alia destroyed his stock in trade. The 5th, 6th, 10th, 12th, 9th, 13th, 11th, and 7th defendants/respondents in their replying affidavits they denied that they ever trespassed on the suit property or destroyed the plaintiff/applicant's stock in trade. They do not contest ownership of the land. The 2nd, 3rd, and 8th defendants filed replying affidavits claiming inter alia that the clan has denied giving the suit property to the plaintiff/applicant and have annexed a letter from the clan to that effect. They further averred that the local community was claiming that the suit property was grabbed and curved from the plot owned by the community where Kiraone dispensary is situated and further Kiraone was sacred grounds since immemorial where clan members met from time to time. The defendants other than their averments in their affidavits have not produced any document from the Land Adjudication Officer to show their interest. The plaintiff/applicant has produced a letter from the District Land Adjudication and Settlement Officer confirming the suit property is demarcated and surveyed in plaintiff/applicant's name and the same is still under demarcation. The plaintiff/applicant has submitted that at the time of defendant's taking over, he had immediate possession of the suit property whereas the defendants were not. The defendants, the plaintiff avers have not claimed ownership of the suit property nor have they filed case in court for determination of such rights either individually or in a representative manner and urges that the balance of convenience tilts in the plaintiff's favour. The defendants on the other hand have submitted the suit property is under adjudication and that the plaintiff's rights have not crystalized to confer the title to the suit property which can enable a party to claim ownership and sustain a claim for an injunction like the one sought herein.

Annexure JMM2 which is a letter from the District Land Adjudication Officer, clearly states that the suit property is demarcated and surveyed in the name of the plaintiff. It still confirms the area within which the suit property is situated is under demarcation stage within the meaning of the Land Adjudication Act(Cap.284). A preamble of the said Act reads as follows:-

“an Act of Parliament to provide for the ascertainment and recording of rights and interest in trust land and for the purposes connected thereto and purposes incidental thereto”

In light of the above proviso, it is my humble opinion that the defendants assertion to the effect that since the suit property is still under adjudication the parties(including the plaintiff's) rights have not crystalized to confer title to the suit property which can enable a party to claim ownership and thus found and sustain a claim for an injunction like the one sought herein cannot and should not stand, to be without any basis.

The defendants have not denied that the plaintiff had immediate possession of the suit property neither have they claimed ownership of the suit property. The plaintiff/applicant averred that he had developed the suit property and that it was his only source of livelihood and that of his family and that if title deeds

were to be issued today, he would be issued with a title as the registered proprietor of the suit property. The defendants have not claimed the suit property as individual nor have they filed defence to the plaint but they claimed that the suit property belong to the “community”.

The plaintiff have made up a prima facie case with probability of success. I further find that the applicant has established that if an injunction is not granted he could suffer irreparable injury which cannot be compensated by damages. The suit property is his developed by the plaintiff/applicant and it is only source of his livelihood and that of his family. That the refusal to grant injunction would lead to the applicant suffering irreparably and reduce him to a pauper. I have further found that balance of convenience tilts in favour of the plaintiff/applicant.

In addition to the principles set out in the case of **GIELLA – VS – CASSMAN BROWN & CO.**(supra) this court is obliged to apply oxygen principles which are aimed at enabling litigants to obtain justice affordably, expeditiously and proportionately. The oxygen principles as set out under Section 1A and 1B of Civil procedure Act obliges the courts to do substantive justice and ensure no injustice is meted on a party on a technicality.

It is my humble opinion in applications for injunction oxygen principles should be given priority so that courts, can do substantive justice. once applicants in an application for injunction satisfies court that he has proprietary interests or rights over a suit property which are likely to be violated or are threatened to be infringed by the respondent the court is obliged to do substantive justice by granting the injunction as refusing to do so would amount to doing injustice to the party whose proprietary rights or interest are at the risk of being violated and the infringed.

Further Article 159(1) 2(a) and (d) of the Constitution of Kenya, 2010 stipulates that justice be done to all and that justice be administered without undue regard to procedural technicalities.

In the interest of doing substantive justice, I find that in the interest of justice and bearing in mind the facts of this case injunction ought to be issued. I therefore grant the application and proceed to make the following orders:-

a) That the defendants be and are hereby restrained either by themselves and their servants from being on the plot No.5124 and thereafter from entering the said plot situated in Kiraone, upper Athiru Gaiti Adjudication Section pending hearing and determination of this suit.

b) That costs of the application to the applicant/plaintiff.

DATED, SIGNED AND DELIVERED AT MERU THIS 30th DAY OF OCTOBER, 2012.

**J. A. MAKAU
JUDGE**

Delivered in open Court in presence of:-

1.Mr. Mwirigi h/b for Miss Wamucii for the applicant

2. Mr. C. Kariuki for 1,3-14th defendants(absent)

2. Mr. Menge for 2nd defendant/respondent

**J. A. MAKAU
JUDGE**