



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 305 of 2011

JEREMIAH MUTISYA NZOKAPLAINTIFF

VERSUS

HELLEN MBATHI.....1ST DEFENDANT

DAVID IVIVI2ND DEFENDANT

RULING

Before court is an application dated 26th October, 2011 in which the plaintiff seeks that;

- The defendants be restrained from trespassing, constructing, selling and wasting or in any way dealing with land parcel Mutonguni/Muthini/1717, hereinafter “*the suit premises*” pending the hearing and determination of the suit
- The structures erected by the 1st defendant on the suit premises be demolished with the assistance of the OCS, Ndolo Police Station.

The plaintiff’s case is that he is the registered proprietor of the suit premises and that the 2nd defendant who is his brother misrepresented himself as the owner of the suit premises and sold the same to the 1st defendant without his authority and or consent. Since then the 1st defendant had gone ahead and put up structures and which he wanted pulled down. He therefore sought both mandatory and temporary injunctions to restrain both defendants from trespassing on the suit premises and also to pull down the structures built thereon.

The case for the 1st defendant on the other hand is that this court has no jurisdiction to entertain these proceedings. She had entered into a sale agreement with the 2nd defendant whom she knew to be the son of the late **Francis Nzoka Ivivi**. The 2nd defendant persuaded her into the transaction on the basis that he was the beneficial owner of the suit premises. No family member of the deceased had objected to the said sale. She was made aware that the succession cause relating to the estate of the deceased had not been commenced nonetheless she believed that the 2nd defendant was a beneficial owner. On that basis she acquired rights of usage, possession and occupation. She subsequently put up permanent premises on the suit premises. Lastly, she alleged that the plaintiff was vexatious as he had failed to disclose that he had earlier on filed in the Principal Magistrate’s Court at Kitui, a similar suit being PMCC No. 165 of 2011.

As for the 2nd defendant, he maintained that the suit premises belonged to their late father who died in 2007. That no letters of administration to the estate had been taken out nor confirmed and therefore it was impossible to effect a transfer of the suit premises then registered in the name of his dead father to the 1st

defendant. He went on to allege that the suit premises being agricultural land, consent was required for any transfer. None had been obtained from the relevant Land Control Board and therefore any transfer was a nullity. Finally, he contended that his late father gave him the suit premises and the applicant was similarly given a different piece of land elsewhere and therefore he is entitled to the suit premises.

When the application came before me for *interpartes* hearing on 9th May, 2012, **Ms Muthutu, Mr. Kioko and Mr. Mutinda**, learned counsel for the plaintiff, 1st defendant and 2nd defendant respectively agreed to canvass the application by way of written submissions. However, it was not until 27th July, 2012 that all submissions were on board. I have carefully read and considered them alongside cited authorities.

It is common ground that the 1st defendant is in possession of the suit premises and has developed the same substantially. Indeed she runs a children home on the same. It is also common ground that the plaintiff and 2nd defendant are brothers and sons of the late **Francis Nzioka Ivivi** who was initially the registered proprietor of the suit premises. It is common ground that the plaintiff had previously filed another suit based on the same cause of action in Kitui Principal Magistrate's Court being Civil Case Number 165 of 2011 which was dismissed or struck off for want of jurisdiction. Finally, it is common ground that the applicant did not disclose this fact to court in his pleadings.

An injunction is an equitable and discretionary remedy. It behoves the person seeking it to come to court with clean hands and should disclose all material facts even if such disclosure would tend to diminish the viability of his case. Deliberate failure to make such material disclosure has consequences; the application will be denied.

In the instant case the plaintiff deliberately hid from this court the fact that he had filed the aforesaid suit in the Principal Magistrate Court at Kitui. It was based on the same cause of action. It was however struck out for want of jurisdiction. Instead of appealing, the plaintiff rushed and filed the present suit. In paragraph 10 of his plaint, he misleadingly avers that there has been no other proceedings between the parties to this suit, knowing very well that this was a lie. He then swore a verifying affidavit where again in paragraph 2 thereof, he depones that he has read the averments contained in the plaint and verify them as correct. This is a false deposition. Because of this material non-disclosure the plaintiff has approached the court with unclean hands and is undeserving of the equitable jurisdiction of this court. Further, if the suit in the subordinate court was dismissed or struck out, the issue of *res judicata* comes to the fore. On this basis, I do not think that the plaintiff has a *prima facie* case with a probability of success.

The plaintiff has sought an order of mandatory injunction as well to demolish the 1st defendant's developments on the suit premises. No such prayer is however found in the plaint. In the plaint, the plaintiff has only sought a restraining order. The prayer for mandatory injunction therefore lacks the requisite substratum to stand on. An interlocutory injunction relief cannot be granted where there is no such relief in the plaint for the same cannot be granted "*in vacue*"

The plaintiff has conceded that the 1st defendant is in possession of the suit premises and has developments thereon including a children's home. Where was the plaintiff all this time that the 1st defendant was undertaking these developments? The effect of granting such an order is to evict the 1st defendant from the suit premises with far reaching consequences and in particular the children's home. As correctly submitted by counsel for the 1st defendant, it is a flat contradiction in terms of the plaintiff to seek to injunct the defendants for acts acknowledged to have taken place over 2 years ago. It is a way of seeking determination of the suit prematurely and by way of an interlocutory application. This is not permissible. The plaintiff cannot seek to undo what has already been done under his watchful eye.

Much as the plaintiff claims to have the title deed to the suit premises, the same is contested on various grounds, such as the transfer being effected without a grant of letters of administration and even without consent to the transfer by the relevant Land Control Board. All these facts militate against the plaintiff establishing a *prima facie* case with probability of success.

Similarly, the plaintiff seeks to restrain the defendants from doing acts which have already taken place. Nor has demonstration of irreparable loss that he may suffer been availed to court. On the contrary the 1st defendant has developed the suit premises and it is her who stands to be prejudiced by the order if her activities are stopped. The plaintiff having submitted that the suit premises were occupied by the 1st defendant and had all along been used by the 1st defendant for various purposes cannot now turn around and state that the said status would result in his irreparable loss.

Lastly, with regard to balance of convenience, the same tilts in favour of the 1st defendant and against the grant of injunction. She has developed the suit premises and runs a charitable organization—a children's home. To grant an injunction in the circumstances would compromise the vested interest of the 1st defendant.

In the result, the foregoing weighed against the time honoured principles of granting interlocutory injunction as established in the case of **Giella vs Cassman Brown and Company Ltd [1973] E.A. 358** clearly show that the plaintiff has not met the threshold. The application is dismissed with costs to the defendants.

DATED at MACHAKOS this 22ND day of NOVEMBER, 2012.

**ASIKE-MAKHANDIA
JUDGE**

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of NOVEMBER, 2012.

**GEORGE DULU
JUDGE**