REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 83 of 2010

MOSES SAUL KHAMATI ……..……..…… PLAINTIFF/APPLICANT

VERSUS

SEBIO JUMA KWEYU…….…….1ST DEFENDANT/RESPONDENT

MUMIAS SUGAR CO. LTD. ……..…. 2ND DEFENDANT/RESPONDENT

RULING

The application by way of Notice of Motion dated 2.3.2011 seeks orders that "pending the hearing of the suit, the defendant, his agents, heirs and/or assigns be restrained by an order of temporary injunction from interfering with the plaintiff's use and/or occupation of land parcel No. **S.WANGA/BUKAYA/1221**."

The application is supported by the affidavit of the applicant, MOSES SAUL KHAMATI sworn on 28.2.2011.

The applicant's case according to the said affidavit is that he is the registered owner of land parcel No. **S.WANGA/BUKAYA/1221**. The applicant accuses the 1st defendant/respondent of ploughing the said parcel of land and planting sugarcane on the same, thereby denying the applicant access to the land. The applicant's contention is that when he became registered as the proprietor of the Suitland, no inhibition and/or any other interest was registered in favour of the 1st defendant. The applicant has also stated that the actions of the 1st defendant have also prevented him from utilizing the land to grow maize for his family and for sale.

In opposition to the application, the 1st defendant/respondent filed the grounds of opposition dated 24.10.11 which state as follows:-

"1. That the application is incompetent, fatally defective and misconceived.

2. That the application is bad in law and ***res judicata*** as the subject matter herein has been subject to litigation in this Honourable court vide application dated 21.06.2010.

3. That the application is otherwise frivolous, vexatious and an abuse of the process of this Honourable court."

I will first tackle the issue whether the application is ***res judicata***.

An earlier application which was dismissed had sought orders to restrain the defendants from entering a

cane farming contract in respect of Land Parcel No. S.WANGA/BUKAYA/1221 (hereinafter suit land). The application at hand seeks orders to restrain the 1st defendant from interfering with the plaintiff's use and/or occupation of the suit land. The subject matter is therefore different. The application is not ***res judicata***.

The applicant has exhibited a Title Deed (annexture "MSK-1") which shows that he is the registered owner of the suit land. This position is not controverted by any affidavit evidence by the respondent. Although it has been submitted that the applicant does not have a good title to the suit land and that the 1st defendant had a valid cane farming contract with the 2nd defendant by the time the applicant purchased the suit land, this is not supported by any evidence. It is also not clear in what capacity the 1st defendant is challenging the title held by the applicant.

On the application of the principle set out in the case of ***GELLA VS CASSMAN BROWN [1973] E.A 358*** I find that the applicant, as the holder of the title Deed has established a prima facie case with a probability of success. The 1st defendant has not denied interfereance with the applicant's land. Denial of access to the land and the houses that stand thereon is a loss that cannot be compensated by monetary terms. In the absence of any evidence from the 1st defendant, the court has no doubts that would make it consider where the balance of convenience falls.

I agree with the applicant's counsel's submissions that it is the trespasser who should give way pending the determination of the dispute (see ***JAJ SUPER POWER CASH & CARRY LTD. VS NAIROBI CITY COUNCIL & 2 OTHERS CA NBI 111/2002***. No submissions were made on the ground tht the application is incompetent. I have not seen any deffects in the application that would render the same to be deffective.

With the foregoing, I find the application has merits and I allow the same with costs.

Delivered, dated and signed at Kakamega this 18th day of December, 2012

B. THURANIRA JADEN
JUDGE