

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CIVIL SUIT NO. 154 OF 2010

DAVID OCHIENG PLAINTIFF

-VERSUS-

COUNTY COUNCIL OF SIAYA
OWUOR GOMBE

..... DEFENDANTS

R U L I N G

1. The applicant/plaintiff moved the court by way of a chamber summons dated 16th November, 2010 under Order XXXIX Rules 1, 2 & 3 of the now repealed Civil Procedure Rules and under Section 3 & 3A of the Civil Procedure Act seeking for both an interim and mandatory injunction against the respondent/defendants touching on L.R. NO. SOUTH/GEM/NDORI/455 pending hearing and final determination of the suit.

2. The application was supported by the grounds on the face of the application and the annexed affidavit of David Ochieng the applicant. The grounds are that, the appellant is the registered proprietor of the suit property, the defendants have encroached into the plaintiff's said land, removed beacons, uprooted trees and other plantations and constructed a road passing through the said land and the defendants have used raw and crude force to prevent the plaintiff from accessing part of his land.

3. The 1st respondent/defendant objected to the application by filing a replying affidavit dated 7th February, 2011. In the said affidavit it was contended that the subject matter is res judicata having been subject in HCC NO. 102 OF 2005 which was dismissed for want of prosecution, therefore the current application is an abuse of court process and the applicant has come to court with unclean hands.

4. Having considered the pleadings, authorities cited and submissions by Counsel from both sides, the issues for determination are whether the matter before court is re judicata and whether the court can grant the temporary and mandatory injunctions being sought by the applicant/plaintiff.

5. Order 16 rule 5 of the old Civil Procedure Rule is silent on whether a fresh suit may be filed upon dismissal of a suit for want of prosecution. Order 16 rule 6 where the court on its own motion dismisses a suit provides that a fresh suit may be filed subject to limitation of the Law. Under the new Civil Procedure a party may move the court if no action has been taken for a period of more than 1 year, for dismissal of the suit.

6. The earlier suit was dismissed for want of prosecution. Is this suit res judicata? Section 7 of the Civil Procedure Act defines res judicata as follows:-

” No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under

whom they or any of them claim, litigation under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such a court” (Emphasize provided).

From the affidavits of the parties the earlier suit was not finally heard and decided. It was dismissed due to lack of action by the plaintiff. I am of the view that the Principle of res judicata is not applicable.

7. Having held as above, I now must consider whether the plaintiff is deserving of the injunction being sought. I will consider first the prayer for a temporary injunction. The law for issuing of a temporary injunction is now settled as enumerated in the notable case of *GIELLA vs CASSMAN BROWN & CO. LTD* (1973) E. A. at 358 where the court held in part:-

“ iv) an applicant must show a prima facie case with a probability of success;

v) an injunction will necessarily not be granted unless the applicant might otherwise suffer irreparable injury;

vi) when the court is in doubt, it will decide the application on a balance of convenience.”

The applicant has demonstrated to the court that he is the registered owner of the suit property and secondly it has been conceded that he is in possession. The respondents have not disputed encroachment and/or interference. The subject matter is land and although the plaintiff has not categorically stated that he is likely to suffer irreparable loss and damage in the application; the plaint alludes to the same; (see paragraph 7). I am of the view that the plaintiff/applicant has made a case for a temporary injunction.

8. Order XXXIX of the old Civil Procedure Rules cater for mandatory injunction and as such reliance would be on Section 3A, and in which case the proper way to have moved the court would have been by way of a Notice of Motion. More importantly as stated above mandatory injunction is granted where there are special circumstances and only where the plaintiff’s case is clear and incontrovertible. In the case of *Nderu vs Kenya National Chamber of Commerce and Industry and Another* (2003) KLR at p 160 Onyange Otieno J. (as he then was) stated in part:-

“ 1. A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thinks that the matter ought to be decided at once or where the injunction is directed at a simple and summary act which can easily be remedied.

2. A mandatory injunction at an interlocutory stage is rarely granted; only when the plaintiff’s case is clear and incontrovertible.”

The plaintiff has not demonstrated any special circumstances neither is this a matter to be decided at once so as to warrant a mandatory injunction.

10. The upshot of all the above is that the application succeeds to the extent that a temporary injunction do issue against the respondents/defendants, their servants and/or agents from interfering, trespassing, entering, encroaching or doing any act which will interfere with the applicant/plaintiff’s quiet enjoyment

of L.R. NO.SOUTH/GEM/NDORI/455 pending the hearing and further determination of the suit. Costs of the application is awarded to the applicant/plaintiff.

DATED AND DELIVERED IN KISUMU THIS 29TH MARCH, 2011.

**ALI-ARONI
JUDGE**

In the presence of:

..... present for plaintiff

.....present for defendant (s).