REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT EMBU

HCC NO 34 OF 2004

LAWRENCE KARENGE.....PLAINTIFF

VERSUS

NAHASON KARENGE .....1ST DEFENDANT

JUSTUS THIRU ZAKAYO.....2ND DEFENDANT

RULING

The Plaintiff and 1st Defendant are son and father respectively. The Plaintiff lives on his father's land and they do not get along famously. The Plaintiff thus sued his father demanding to be registered as the owner of some of his father's land. The matter went to full hearing and this court rendered it's judgment on 10th June 2010. The Judgment does not seem to have settled well with the defendants and they filed an Appeal before the Court of Appeal.

Meanwhile before the parties could have the Appeal processed, they came back to court under certificate of urgency in an application dated 23/7/2010 seeking a stay of execution of the said Judgment pending the determination of the Appeal. Their contention was that the Plaintiff had misinterpreted the court's Judgment and that he had evicted his old father from his parcels of land. On perusal of the application ex-parte, I observed that the Judgment had not given the Plaintiff any rights over the land that did not exist prior to the said Judgment. In the interests of justice therefore and inorder to bring some calm and normalcy on the suit land between the father and son, I gave the stay orders pending the hearing of the intended Appeal. I need to reiterate here that though the orders of stay were given Ex-parte, these were not injunctive orders and do not therefore have the 14 days Cap. Counsel for the Plaintiff appears to misapprehend the law in that respect. The case of Chuchu Wataku –v- Adan Adow Ibrahim (HCCC NO.444/2003) has no bearing in this case at all.

Following the said orders of stay, the Plaintiff came back to this court again under certificate of urgency under Section 3A of the Civil Procedure Act primarily seeking 2 orders;-

(a) That the Honourable court be pleased to vacate its orders made on 26th July 2010 granting stay of execution of the Judgment made on 10th June 2010.

(b) That the 1st Defendant/Respondent herein be restrained from interfering with the peaceful enjoyment of the portion of land occupied by the Plaintiff/Applicant and to desist from harvesting the Plaintiff's/Applicant (sic) tea.

The same is supported by the Plaintiff's affidavit dated 4/10/2010. The gist of the affidavit is that it is not true that the Plaintiff tried to evict the defendant from his land and further that the Defendants have started harvesting the Plaintiff's tea.

In his replying Affidavit dated 29/10/2010, the 1st Defendant/Respondent denies picking the Plaintiff's tea and urges the court to dismiss the application.

When the application came up for hearing, I urged the parties to discuss the matter and try to reach an agreement even as they await the outcome of the Appeal. They took a few minutes and came back saying they could not agree at all. Both counsel addressed me on the Application. I have considered the affidavits and oral submissions of both counsel. To start with, this court has been moved through the wrong provisions of the law. Section 3A should only be invoked when there are no other applicable provisions of the Civil Procedure Act/Rules. The applicant's prayers are for setting aside (vacating) my earlier orders and also for injunctive orders. There are specific Rules governing those prayers and he should have moved the court properly. This application is therefore bad in law and that calls for its dismissal.

Secondly, this in my view is a matter which no court will resolve amicably. It involves a son who strongly believes that his old father 1st Defendant has a duty to provide for him. According to the father, the Plaintiff must reciprocate by giving him the respect that is due to him as a father but which the Plaintiff has refused to give him.

Whichever way the court rules, one of the parties will always be disgruntled. They want to keep tossing each other to and from court like ping pong balls. This court needs to tell them that now that they have refused to sit down and reconcile, and they have filed the Appeal, they should first pursue the Appeal.

This Application is therefore dismissed for being devoid of merit. Each party is ordered to bear its own costs.

W. KARANJA

JUDGE

Signed by the above but delivered and dated at Embu this 17th day of March, 2011 by the undersigned.

M. WARSAME

JUDGE