



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 41 OF 2011

ABDULLAHI HAJI MOHAMED.....1ST PLAINTIFF
HABIBA ALI NUR.....2ND PLAINTIFF
ZAINAB MOHAMED ABDI.....3RD PLAINTIFF

VERSUS

ABDULLAHI DAGANE BARE.....1ST DEFENDANT

RULING

The Plaintiffs pleaded that they are members of Harage Family who were allocated Harage Marmutu farm in 1982 by the County Council of Garissa. The farm measured 500 acres. They allege that during the drought spell the Defendant requested to temporarily utilize part of this land but has since, and without consent, set up structures thereon and allowed strangers and peasants to till the same; and that the Defendant is illegally leasing the farm. The Plaintiffs state that they are carrying out agricultural activities (including bee keeping, dairy farming, camel rearing and cultivation of subsistence crops) which the Defendant is interfering with and obstructing them from undertaking. These activities have occasioned the Plaintiff substantial loss and damage. This suit was filed on 12th April 2011 seeking the eviction of the Defendant, a permanent injunction and general damages.

Along with the suit was filed a motion under Order 40 rules 1, 2, and 3 of the Civil Procedure Rules and Sections 3A of the Civil Procedure Act for a temporary injunction to restrain the Defendant by himself, his servants and/or agents from erecting, interfering, tilling, leasing, subletting, offering for letting and/or continuing trespassing into the farm. Also sought was an order for eviction and that the OCS Garissaa police station ensures compliance with the orders after they have been issued. The supporting affidavit was sworn by 1st Plaintiff whose evidence was that the farm was allocated to them by the County Council Garissa by its minutes No. 17/82 (“AHM1”) on 29th November 1982. They took possession and began paying for the same (“AHM2”). On 26th August 1982 (“AHM3”) and on 13th May 1985 (“AMH4”) the Council’s Clerk wrote to confirm them to be the owners of the farm. The 1st Plaintiff went on to state that on 29th October 1996 a Part Development Plan (PDP) was approved by the Commissioner of Lands. This is the land that the Defendant has allegedly trespassed on and is utilizing without consent and has not heeded requests to vacate.

The Defendant swore a replying affidavit to deny that he has trespassed on this farm, or at all, or that he has erected any structures or is utilizing the farm. His case is that he jointly owns Baraka farm with one Roble Haji Mohamed having bought the same in 1982 from one Suleman Kunyo Ali vide a written

agreement (“ADB1”). He produced the Ministry of Agriculture Form (“ADB2”) to show that he owns the farm, and further stated that his farm was surveyed and a PDP (“ADB3”) prepared on 24th May 2004. He produced copies of letters from Ministry of Lands dated 28th February 2005, 29th January 2006, 7th December 2006, 8th December 2006 and 21st January 2011 (all marked “ADB4”) to show that Baraka farm exists. The Defendant went on to state that in 2009 the 2nd Plaintiff approached him to allow her and other members of her group to keep bee hives in the farm. She is a lady and therefore he asked her to come with a man. She came with one Khalif Abdi Ali Yare with whom he entered into an agreement (“ADB5”) dated 13th December 2009 allowing them to keep bee hives in the farm. The agreement mentions “Mrs. Zuli Mohamed” which name the Defendant says the 2nd Plaintiff is commonly known by. The agreement allowed Khalif and members of his group to keep bee hives in the farm. On 9th February 2011 the Defendant asked the group to vacate. This is when the 2nd and 3rd Plaintiffs reported him to the Chief who summoned him. He gave his version of what had transpired and the Chief asked that he allows the group to continue keeping bee in the farm. Later on the 2nd and 3rd Plaintiff reported him to the District Officer and ultimately to the District Commissioner. The District commissioner asked each side to produce its documents of ownership. He produced his but the Plaintiffs were unable. Subsequently, one Roble Haji Mohamed, who is brother to 1st and 3rd Plaintiff and brother in-law to the 2nd Plaintiff, wrote to confirm that the Defendant was not occupying any farm belonging to the Plaintiffs. The letter is annexure (“ADB6”). Khalif also wrote (“ADB7”) to say that the Defendant had allowed them on Baraka farm to keep bee hives.

Lastly, the Defendant state that Harage farm together with other farms have been taken over by the Prisons Department and that the Plaintiffs have in fact been seeking compensation from the Government. He produced a letter (“ADB8”) as evidence.

1st Plaintiff swore a supplementary affidavit to deny the averments by the Defendant. He denied that Roble Haji Mohamed who is his brother owns Baraka farm. He stated that there is an entity called Baraka Self Help Group Bee Keeping Project which keeps bees on Harage farm with their consent. He stated that the PDP produced by the Defendant was not approved and that, in any case, there is nothing like Baraka Farm.

The court will at the hearing of this case decide whether there presently exists Harage Marmutu farm belonging to the Plaintiffs and whether there exists Baraka farm belonging to the Defendant. It will also decide whether the Defendant occupies Harage Marmutu farm or occupies Baraka farm. Lastly, it will be decided whether the Defendant has trespassed on Harage Marmutu farm. At this stage, the court is supposed to determine whether the Plaintiffs have established a *prima facie* case with a probability of success in terms of ***GIELLA VS CASSMAN BROWN & CO. LIMITED [1973] EA 358***. Normally the court will issue an interlocutory injunction if an applicant shows he may otherwise suffer irreparable damage. If the court is in doubt, it will decide the matter on the balance of convenience.

What is apparent at this stage is that the Plaintiffs were in 1982 allocated 500 acres comprising Harage Marmutu farm. However, from their own annexed letters dated 21st June 2003 and 18th July 2003 it does appear that the farm was taken over by the Prisons Department and as a result the Plaintiffs are seeking to be compensated by the Government. This was the contention of the Defendant. There is a letter dated 22nd July 2003 (AHM6”) produced by the Plaintiffs in which the Clerk of the Garissa County Council is responding to a letter 18th July 2003 from the District Commissioner Garissa who had asked that an alternative land be found for the Plaintiffs. The response by the Council was that it did not have an alternative land. In the letter of the District Commissioner he had written to the council to say:

“It is my considered opinion that Harage Maramutu Family be allocated an alternative land to compensate them as the Prisons Department has started developing their land,”

If Prisons Department has taken over the Plaintiff’s farm as a result of which they are seeking compensation from the Government, it cannot be said that the same farm is being occupied by the Defendant. It follows that the Plaintiffs have not established a *prima facie* case. It is also notable that the

Ministries of Agriculture and Lands acknowledge the existence of Baraka farm. This is the farm the Defendant says he is occupying.

If the Plaintiffs have not established a *prima facie* case, the prayer for eviction cannot be granted. An eviction prayer would be the same as a mandatory injunction prayer. It is now accepted that a mandatory injunction can only be granted at this interlocutory stage in exceptional circumstances where the applicant has a clear and obvious case. (***MUCUHA VS THE RIPPLES LIMITED Civil Application No. 186 of 1992 at Nairobi***). The Plaintiffs do not have such a case.

The result is that the application is dismissed with costs.

DATE, DELIVERED AND SIGNED AT EMBU THIS 26th DAY OF JULY 2011.

**A.O. MUCHELULE
JUDGE**