



CIVIL

- ***Injunction:- The principles to be considered.***

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 59 OF 2011

PETER NCHEBERE PLAINTIFF

VERSUS

M'INANGA M'AKWALU 1ST DEFENDANT
KIUNGA M'AKWALU 2ND DEFENDANT
SILAS ITONGA 3RD DEFENDANT
STEPHEN MUGAMBI AMBURUGUA 4TH DEFENDANT

RULING

The plaintiff by his Notice of Motion dated 19th April 2011 seeks from this court an order of temporary injunction to restrain the respondents from threatening to evict the plaintiff from L.R. Nos. 3543, 1684, 1504 and 5930 *Athing'a/Athanja Adjudication Section* Tigania East District. The plaintiff by his plaint seeks a declaration that the above properties belong to him. He prays further for an order directing the District Land Adjudication officer Tigania East District to transfer parcel Nos. 3543, 1684, 1504 and 5930 to the plaintiff. He finally prays for an order for permanent injunction restraining the defendants either by themselves or through their servants, employees and/or assignees from evicting the plaintiff from those parcels of land. In his affidavit in support of the Notice of Motion dated 19th April 2011 the plaintiff deponed that he was in possession of those parcels of land. He referred to a previous proceeding before the land adjudication officer being objection No. 107 which related to those parcels of land. The conclusion of that objection proceedings was on 13th November 2007. The decision of the land adjudication officer was that those parcels of land be registered in the names of the defendants herein. The land adjudication officer reached his decision after the plaintiff failed to participate in the *Njuri Cheke 'Nthenge Oath'* to confirm the ownership of the parcels of land. The plaintiff filed a judicial review matter before this court being High Court Meru Misc. Appl. No. 18 of 2008. This court delivered its judgment in respect of that judicial review matter on 19th November 2010. The court made a finding that the *'Nthenge Oath'* was not recognized under the law and therefore should be quashed. The court did indeed order for the removal of that order for *'Nthenge Oath'* to this court and proceeded to quash the same. The plaintiff faulted that judgment of 19th November 2010 on the basis that it failed to resolve the ownership dispute of those parcels of land. The plaintiff further deponed in his affidavit that the defendants were by means of brute force trying to evict him from those parcels of land. He stated that those parcels of land are registered in the defendant's name. He prayed for the protection of this court from eviction and harassment by the defendants on those parcels of land. The defendants by the replying affidavit sworn by the 1st defendant opposed the application. In opposing they annexed to the affidavit evidence of their ownership of those parcels. This is letters written by the District Land Adjudication and Settlement officer confirming that those parcels of land are registered in their names. Further, the defendants by their replying affidavit stated that the parcels of land are ancestral land which had subsequently being subdivided. That they had further extensively developed those parcels by planting tea bushes, bananas, *miraa* and other trees and had also built houses. They denied that the plaintiff had developed those parcels. They stated that the plaintiff had his own land which is near those parcels of land. That the plaintiff lives on that land together with his family. The defendants denied either destroying the plaintiff's property or threatening to evict him but they stated that the parcels of land are their property and that they were in occupation. The defendant further deponed that the plaintiff by this action seeks to gain deceitfully ownership of those parcels. Further that the dispute over the ownership of this parcels of land was determined by the decision of the adjudication officer of 13th November 2007. It was after that decision that the defendants were registered as owners of the parcels of land.

The plaintiff in order to succeed in his application needed to satisfy the principles of granting an injunction which were set out in the case **Giella vs. Cassman Brown & Co. Ltd** [1973] E.A. Those principles are:-

1. ***An applicant must show a prima facie case with a probability of success.***
2. ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.***
3. ***When the court is in doubt, it will decide the application on the balance of convenience.***

I would begin by asking a rhetorical question. Has the plaintiff shown a *prima facie* case? The plaintiff as well as the defendants claim to be in possession of the suit property. The plaintiff alleges that the defendants by use of brute force have attempted to evict him. He alleges that his property in the process has been destroyed. In making those allegations, the plaintiff has not shown that he has reported such alleged illegal acts to the police or even to his local chief. In my view, the allegations are not believable in the absence of such reporting. It should be borne in mind that the parcels of land since the year 2007 are registered in the names of the defendants. With that and in view of the fact that there is no evidence of the plaintiff reporting destruction of his property to the police, I find that the plaintiff has not shown a *prima facie* case with probability of success. I also find that the plaintiff, if he would suffer any loss, such loss would be compensated by damages. The plaintiff therefore, has also failed to show that the 2nd principle of granting an injunction is applicable to him. In considering the plaintiff's application, I caution myself by referring to a holding in the case of **Mbuthia vs. Jimba Credit Finance Corporation & Another** [1988] KLR where the Court of Appeal held as follows:-

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits.”

In the end, I find that the plaintiff's Notice of Motion dated 19th April 2011 is without merit and the same is hereby dismissed with costs being awarded to the defendants.

Dated, signed and delivered at Meru this 10th day of August 2011.

MARY KASANGO
JUDGE