



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 102 OF 2004 AND 41 OF 06 CONSOLIDATED

BOROP MULTIPURPOSE CO-OPERATIVE SOCIETY.....PLAINTIFF

VERSUS

SONOIYA ARAP SERSER.....1ST DEFENDANT
MOSES KIPKEMBOI SIONGOK.....2ND DEFENDANT
JOEL KIPKEMOI YEGON.....3RD DEFENDANT
LEAH CHESANG KORIR.....4TH DEFENDANT

RULING

The Notice of Motion dated 14/4/2011 is brought by Sonoiya Arap Serser the 1st defendant in this suit. The applicant prays that pending the hearing and determination of this suit, the court be pleased to grant an order of injunction to issue against Borop Multipurpose Co-operative Society, the plaintiff/respondent herein, restraining the respondent from cultivating or in any way interfering or dealing with the plaintiff's parcel of land No. MAU SUMMIT/SACHANGWANI BLOCK 10/137 (BOROP). The grounds upon which the application is premised are found in the body of the application and the affidavit of the applicant. It is the applicant's case that he is the registered owner of the suit land, named above, as evidenced by the title and search certificate exhibited {SS1(a) and (b)}. He claims that he had the intention of cultivating the land and planting but cannot be able to do so unless the respondent is restrained. Ms Litunda representing the applicant urged that the applicant has been denied access to his land though he is the registered owner and that he has a prima facie case with high chances of success.

The application was opposed. A replying affidavit was sworn by John Rotich, the chairman of the plaintiff/respondent and grounds of opposition were filed in reply. It was urged that the application is res judicata because the applicant had filed a similar application dated 20/2/2006, seeking similar orders. The said application was heard and dismissed with costs in the HCC No. 41/06. The said suit has been consolidated with this suit. It was also urged that the suit land which the applicant lays claim to is the subject of challenge in this matter and that the applicant has never been in possession of the suit land but that the respondent has been in occupation and utilizing the said land; So that if the court were to grant this order, it would be issuing eviction orders against the respondent. Lastly, that the applicant has not demonstrated the loss he will suffer if the orders are not granted.

I have now considered the rival arguments in this application. I do agree with the respondent that this application is res judicata, the same issues between the same parties, having been considered in the application dated 20/2/2006 in HCC No. 41/06 which was dismissed by J. Koome. HCC No. 41/06 is now consolidated with the present case. I have read the ruling of Justice Koome. One of the reasons upon which the application for injunction was dismissed is that the applicant never disclosed to the court that this suit, HCC No. 102/04 existed and that the applicant is the defendant in the said suit. It means that the applicant came to equity with unclean hands and was not entitled to the order sought due to his

conduct. The court also observed that in this case, (HCC 102/04) there are allegations of fraud made against the applicant as regards how the property in question was acquired and there was need for oral evidence to be adduced before such orders were granted.

This case was filed in 2004, over 5 years ago. The question is why the applicant did not seek these orders earlier if indeed he was utilizing the land. His affidavit does not disclose whether the respondent had removed him from the land or not. The respondent on the other hand claims to be in possession and that the order sought amounts to an eviction. An order of eviction cannot be granted at this stage because it would be final and will defeat the fair determination of the whole suit.

For all the above reasons, apart from the application being res judicata, I find that the applicant has totally failed to demonstrate that he has a prima facie case with a probability of success or that he will suffer irreparable loss. I decline to grant the application. Instead of the applicant wasting time filing such applications, the parties should prepare to have the case set down for hearing. Costs to the plaintiffs/respondents.

DATED and DELIVERED this 23rd day of September, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Oumo for the plaintiff/respondents.

Mrs Salengh the defendant/applicant.

Kennedy - Court Clerk.