



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 27 OF 2011
(FAST TRACK)

ATHMAN OMAR DZUNGA PLAINTIFF
V E R S U S
1. SAUMU HUSSEIN MARIJAN
2. FATUMA HUSSEIN MARIJAN DEFENDANTS

RULING

The plaintiff, ***Athman Omar Zunga*** is aggrieved and unhappy about the defendants possession and use of LR No 1043/111/43 (hereinafter the suit land). In the application before court dated 22nd February, 2011 the plaintiff seeks the following orders:

“That a temporary injunction to issue restraining the defendants / respondents by themselves, their servants and / or agents or otherwise from entering upon, constructing, removing, fencing or securing or in any way interfering with the plaintiff’s title and quiet enjoyment of the property known as Mazeras L. R. No. 1043/111/43 (the suit property) pending the hearing and determination of this application.”

The application is supported by the affidavit of the plaintiff sworn on 24th February, 2011. The plaintiff is the registered owner of the suit Land having been issued a grant over it by the Commissioner of Lands. He says that sometime in April 2008 the Defendants encroached onto the suit land and put up temporary structures. On 2nd of May 2008 the Provincial Surveyor visited the suit Land, identified the boundaries to the property and placed beacons thereon. Soon thereafter the Defendants uprooted the beacons and commenced construction of a permanent house. On their part the defendants controvert the allegations of ownership made by the plaintiff and outline their source of ownership over the suit land. The allegations and counter allegations are matters which can only be settled upon full hearing of the suit. It is the duty of the trial court to resolve the rival claims put forward by the parties. I shall leave that function to that court.

What is not in dispute is that the defendants have been in occupation of the suit Land, at least, from April, 2008. Of course the defendants claim that they entered the land much earlier than that time.

An application for injunction is an application in equity. This court must take into account the principles established by equity before granting that order. One such principle is captured by the maxim ‘equity, like nature, will do nothing in vain’. Let us now examine in closer detail the order sought by the plaintiff. Prayer 2 of the Notice of Motion bears repetition:

“That a temporary injunction to issue restraining the defendants / respondents by themselves, their servants and / or agents or otherwise from entering upon, constructing, removing, fencing or securing or in any way interfering with the plaintiff’s title and quiet enjoyment of the property known as Mazeras L. R. No. 1043/111/43 (the suit property) pending the hearing and determination of this application.” (emphasis are mine)

The plaintiff seeks to restrain the defendants from entering upon and constructing on the suit land yet the plaintiff himself in paragraph 4 of his affidavit of 24th February 2011 states that the defendants entered and commenced construction on the suit land sometimes in April 2008. It is also clear from the affidavit of the plaintiff that the defendants have remained in occupation of the suit Land since then. One cannot seek to restrain what has already happened. Secondly, no explanation has been given by the plaintiff as why he had to wait from April 2008 upto February, 2011, a period of about 34 months after the alleged act of invasion to bring this application. It is trait that equity will only come to the aid of the agile and quick footed.

When this court juxtaposes, as it should, the application and the supporting affidavit it is quite clear that the plaintiff is seeking is to reverse the status quo on the ground. To allow the plaintiffs application, would amount to restraining the defendants from ***“entering upon, constructing, removing, fencing or securing or any way manner interfering with the plaintiffs title and quite enjoyment”*** of the suit land. This can only be done by evicting the defendants from the suit land and placing the plaintiff thereon. In truth the plaintiff is seeking a mandatory injunction without saying so. Although this court would not ordinarily grant an order which is not specifically sought, I shall nevertheless consider whether or not a case has been made out by the plaintiff to merit the grant of a mandatory injunction. In arriving at that decision this court is guided by often quoted decision of the Court of Appeal in **Gusii Mwalimu Investment Co. Ltd & Another –Vs- Mwalimu Hotel Kisii Ltd Civil Appeal No. 160 of 1995**. As seen from that decision, an order for mandatory injunction is a drastic one and will only be granted in exceptional circumstances. As I have already noted the defendants have been in possession of the suit land at least from April 2008. I have given a careful consideration to the plaintiffs supporting affidavit and I am unable to find anything in that affidavit which suggests that an event of such exceptional nature has happened lately that can warrant this court to summarily remove the defendants from land which they have occupied since April, 2008.

In addition, even a cursory comparison of the prayers sought in the plaint and that in the application for injunction reveals that to grant the injunction sought would be to determine a substantial part of the suit at an interlocutory stage. The plaintiff seeks the following prayer in paragraph (a) of the plaint:-

“A permanent injunction restraining the defendants, their servants and/or agents from entering upon constructing, remaining, continuing in occupation or in any other way interfering with the suit property or the plaintiff’s quiet possession of the suit property, namely L.R No. 1043/III/43.”

The plaintiff has not placed sufficient material to assure this court that prayer (a) of the plaint should be resolved in summary fashion.

I understand the plaintiff to be saying that he is a holder of a title under the Registration of Titles Act (Chapter 281, Laws of Kenya) and by virtue of Section 23(i) thereof his ownership is absolute and indefeasible. In my view the plaintiff may translate this stance into tangible victory by either quickly processing the hearing of the suit or by seeking that the defendants statement of defence be struck out under the provisions of Order 2 rule 15 of the Civil Procedure Rules. He may not, and cannot, do so through an application for mandatory injunction brought under Order 40.

I have said enough to show that the application before court is without merit and cannot succeed. I hereby dismiss it with costs.

Dated and delivered at Mombasa this 24th day of October, 2011.

F. TUIYOTT
JUDGE