



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
HCC NO. 381 OF 2009
NDULULU KAVYATI MALOMBE PLAINTIFF
VERSUS
SAMMY NZIOKIDEFENDANT

R U L I N G

The Plaintiff has pleaded that he is the registered proprietor of land parcel **L.R. KATHONZWENI/THAVU/214**. The land measures some 25 hectares (61.75 acres). The Plaintiff has further pleaded that the Defendant has trespassed into the land and occupied therein some 8 acres upon a sale to him by the Plaintiff's sons, which sale the plaintiff did not consent to. He has further pleaded that there was no land control consent for the sale. The Plaintiff also pleads that the Defendant is committing acts of waste upon the land.

The Plaintiff has sought two main reliefs in the plaint:-

- 1) Eviction of the Defendant from the land.
- 2) A permanent injunction to restrain the Defendant from further trespass.

In his statement of defence, the Defendant has pleaded that he duly bought from the Plaintiff and her sons some 12 acres from the suit land for valuable consideration which he paid. He has further pleaded that the Plaintiff duly put him in possession of the 12 acres in the year 2004 and that he has been in occupation of the same since then. He has denied that he is wasting the suit land; he pleads that he is cultivating the same and putting it to good use. He has therefore denied the Plaintiff's claim.

Together with the plaint the Plaintiff filed **notice of motion dated 14th December 2009**. He seeks the main order that the Defendant be restrained by **mandatory injunction** "from remaining on the suit land or trespassing thereon or doing any other act prejudicial to the Plaintiff's interest" pending disposal of the suit. The application is opposed by the Defendant.

I have read the supporting and replying affidavits. I have also considered the submissions of the learned counsels appearing. No authorities were cited.

The effect of the order sought by the Plaintiff, if granted, would be to evict the Defendant from the suit land. That is precisely the relief sought by the Plaintiff in the plaint. Granting the order will thus have the effect of determining the suit unheard. I must point out that the application before the court is not one for summary judgment or for striking out the defence.

The court will usually be reluctant to grant an interlocutory order whose effect would be to determine the suit unheard, unless such order is warranted by any application that might be before the court, or by the circumstances of the case.

In the present case there are no circumstances that would warrant giving the orders sought. I find no merit in the application by notice of motion dated 14th December 2009. The same is hereby dismissed with costs to the Defendant. It is so ordered.

DATED AT MACHAKOS THIS 20TH DAY OF JULY 2010

H.P.G. WAWERU
JUDGE

DELIVERED THIS 30TH DAY OF JULY 2010