



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 31 of 2010

ANDREW KIRIINYA 1ST PLAINTIFF

GEDION KIGORWE 2ND PLAINTIFF

FREDRICK MURERWA 3RD PLAINTIFF

VERSUS

JAMLICK MAINA WANJOHI 1ST DEFENDANT

CYPRIAN MUTHAMIA M'ITIRI 2ND DEFENDANT

SAMUEL NJUGUNA NDUKU 3RD DEFENDANT

JOSEPH MWANGI WAITHAKA 4TH DEFENDANT

RULING

The plaintiffs in this action seeks for compensation for loss suffered when they were evicted by the defendants from parcel number *Kiirua/Naari/2181*. They were evicted on 24th December 2009. It is considered that that parcel of land is registered in the names of the 1st, 3rd and 4th defendants. Those defendants hold that property as trustees of Mutindwa Self Help Group. The property was registered in the names of those defendants on 22nd August 2007. The plaintiff has filed an Interlocutory Application by way of a Chamber Summons dated 5th May 2010. That application is brought under Order XXXIX Rules 1, 2, 2A (1) and 3 of the Civil Procedure Rules. By that application, the plaintiffs seek an interlocutory injunction to restrain the defendants from working, entering or in any other way dealing with that suit property. The plaintiffs in arguing that application alleged that the 1st, 3rd and 4th defendants purchased the suit property whilst their suit namely, HCC Meru 88 of 2007 (O.S.) was subsisting. That action is an Originating Summons where the plaintiffs seek a declaration that they have obtained the title of the suit property by way of adverse possession. The plaintiff in arguing the application before court went into a litany of allegations of wrong doing by the defendants in obtaining the eviction rights which resulted in their eviction from the suit property. It however should be borne in mind that what I am dealing with is an interlocutory injunction application. The court cannot make final determination on the issues raised even though the parties invited it to. In this regard, I am well guided by the case **Mbuthia V. Jimba Credit Finance Corporation & Another** [1988] KLR:-

“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.”

of fact on

I have considered the submissions that were made before me and the affidavit evidence. I have also perused HCC Meru No. 88 of 2007 (O.S.) and CMCC LDT No. 32 of 2007. My take on all the issues that are raised is that the plaintiffs are seeking compensation for damage suffered as a result of what they

allege was illegal eviction. Order XXXIX Rule 1 which the plaintiffs relied on provide as follows:-

“1. Where in any suit it is proved by affidavit or otherwise –

- (a) **that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**
- (b) **That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.**

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

Considering the provisions of that Rule, there is no property which is in dispute in this action which is in danger of being wasted, just to reiterate what the plaintiffs seeks is compensation for damage caused to their chattels during eviction. The suit property, its ownership or occupation of it is not in dispute in this case at all. The application for injunction, in my view, is misplaced. Additionally, considering that the plaintiffs are no longer in occupation of the suit property the tenor of the present application in around about way is to allow the plaintiffs to regain possession of the suit property. That is tantamount to granting the plaintiffs a mandatory injunction. A mandatory injunction can only be granted in exceptional circumstances. The Court of Appeal in the case **Stephen Kipkebut t/a Riverside Lodge & Rooms Vs. Naftali Ogola** Civil Application No. Nai 146 of 2008 [UR 93/08] when considering when mandatory injunction should be granted, had this to say:-

“.....many past authorities such as East African Bedi Investments Ltd Civil Appl. Nai 72/94 (ur) where Shepherd Homes Ltd Vs. Sandahm Fine Spinners Ltd (in receivership) & 3 others Vs. Gicheru, JA (as he then was) cited Megarry J. (as he then was) in [1971] 1 ch. 34, stating in part:-

“....., it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the defendant has rushed on with his work in order to defeat the plaintiff's attempts to stop him, then upon the plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the plaintiff's promptitude is a badge of the seriousness of his complaint.”
(Emphasis added).

As stated earlier, there are no dates in the pleadings on record to show when the respondent entered into the parcel of land or that he was stealing a march on the applicant. Megarry J. continued:-

“The matter is tempered by a judicial discretion which will be exercised so as to withhold an injunction more readily if it is mandatory than if it is prohibitory. Even a blameless plaintiff cannot as of right claim at the trial to enforce a negative covenant by a mandatory injunction. Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the trivality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a “fair result,” and this involved the exercise of a judicial discretion. Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction that it would be to grant a comparable prohibitory injunction. In a normal case, the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard that is required for a prohibitory injunction.” (Emphasis added).

In the absence of special circumstances, a mandatory injunction will not be granted to the plaintiffs. The plaintiffs' application seeks to deny the registered owners right to occupy and to work on the suit property. The learned Judge Ojwang' in the case **John Mwatela Shede vs. Vitalilibhai Bhulabhai Patel** Misc. Civil Case No. 109 of 2009 (O.S.) when considering a claim in adverse possession had this to say in respect of the right of the registered owner to

occupy property.

“Professor E.H. Burn in Maudley And Burn’s Land **Law: Cases and Materials, 7th ed.** (London:
Butterworths, 1998) at P. 186 (quoting **Slade, J. in Powell Vs. McFarlane (1979) 38P & CR 452**) notes that:-

**In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be
in possession of the land, as being the person with the prima facie right of possession. The law will thus,
without reluctance, ascribe possession either to the paper owner or to persons who can establish a
title as claiming through the paper owner.”**

In the end, the Chamber Summons dated 5th May 2010 is without merit and is dismissed with costs being awarded to all the defendants. On the other hand, having perused the files that were placed before me as a result of the request by the plaintiff’s counsel, I have formed the opinion that the issues raised in HCC Meru No. 88 of 2007 (O.S.) and in this action are the same and ought to be considered together. I therefore hereby consolidate this case with HCC Meru No. 88 of 2007 (O.S.). The lead file shall be HCC Meru No. 88 of 2007 (O.S.). In view of the controversies that were very clear as this matter was being argued before me, I direct that these files be placed in the strong room.

Dated and delivered at Meru 9th day of July 2010.

MARY KASANGO
JUDGE