



O.XXXIX r 1, 2, 3 & 9 of Civil Procedure Rule Sections 1A, 3A, 63(c)
Injunction to restrain respondents from interfering with occupation and use of land by Plaintiffs

P.O. raised on points of facts and law

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL CASE NO. 130 OF 2010

PERIS KAJUJU JOHN & 3 OTHERSPLAINTIFF
VERSUS
PARTRICK K M'RIMBERIA & 2 OTHERS.....DEFENDANTS

RULING

The Plaintiffs in this suit have by a Chamber Summons Applications brought under O.XXXIX r 1, 2, 3 & 9 of Civil Procedure Rules Sections 1A, 3A, 63(c) and (e) of Civil Procedure Act seeks prayers 2 to 7 thus

1. That an injunction be issued in respect of LR NO. ABOGETA/L.CHURE/244 and the resultant sub-divisions Nos. 1263, 1264 and 1265 restraining defendants and agents from interfering with the plaintiffs use and occupation of the suit land pending the hearing and determination of the suit land

2. Orders requiring inhibition in respect of same suit land

3. Order requiring the land registrar, Meru Central District to register the orders in the appropriate register

4. Court do issue any or better orders it may deem fit

5. That costs be provided for

6. That court be pleased to issue Penal notice for non-compliance of its orders.

The grounds for the application are cited on the face of the application have considered them. The application is also supported by the affidavit by 2nd Plaintiff/ Applicant and annexure thereto and a further Supporting Affidavit sworn on 8th November 2010 by the same Applicant. I have considered both affidavits.

The application is opposed. The 1st Respondent filed a Replying Affidavit dated 2nd November 2010 and the 2nd and 3rd Respondents filed a joint replying affidavit of even date. I have considered each of these affidavits.

Mr. Arithi for the Respondents also filed a Notice of Preliminary Objection dated 2nd November 2010. It raises the following grounds:-

1. (a) The parties in Meru HCCC No.130/2010 are the same in Nkubu LDT 1/2010.

(b) Judgment in terms of the Tribunal's award in Nkubu LDT 1/2010 was entered on 2nd June

2010 on the application of the Plaintiff's herein.

(c) The subject matter in Meru HCCC 130/2010 and Nkubu LDT 1/2010 is parcel NO. ABOGETA /L/MIKUMBUNE /244 as divided into ABOGETA/L-MIKUMBUNE/126, 1264 & 1263.

(d) This suit is no-suited and otherwise an abuse of Court process.

I have considered the submissions by Mr. Kiogora for the applicants and Mr. Arithi for the respondents.

I will first consider the Preliminary Objection raised by the respondents. It is trite that a Preliminary Objection can only be raised on a purely point of law on basis that all facts as pleaded by the opponent are correct. See MUKISA BISCUITS CO. LTD VS WESTENED DISTRIBUTORS (1969) EA 696. The grounds raised by the respondents in their Notice of Preliminary Objection raises points of both facts and law. One of the points of law raised that the instant case is resjudicata for reason of Nkubu LDT. Case No. 1/2010 was between the same parties over the same subject matter. Is contentious as it is disputed.

I have considered the Plaint filed herein and find that it seeks a declaration of Trust over the suit property. That is not a matter that could have been determined in the Land Disputes Tribunal as it lacks Disputes Tribunal as it lacks jurisdiction to determine it. For that reason the preliminary Objection raised by the Respondents must fail.

In order for an order of junction be granted an applicant must prove that he has a prima facie case with a probability of success. If the court is unable to determine the application on that ground it should be satisfied that the application on the ground it should be satisfied that the applicant stand to suffer irreparable loss which is incapable of compensation by an award of damages. If the court is still unable to determine the application on these two grounds it should go ahead and decide it on the balance of convenience. These principles were set out in the celebrated case of **Giella Casman Brown & another 1973 AA 358.**

I have considered the Supporting and Further Affidavit by the applicants herein together with the plaint filed herein. The plaintiffs

contend that the suit land is ancestral land owned by the parents of the 2nd, 3rd & 4th plaintiffs and grandfather of the 1st Defendant. The applicants contend that the land was transferred to the 1st Defendant to hold in trust for the families of the plaintiffs, and the 1st defendant. That plaintiffs have been in possession and occupation all their lives. That while he held the land in trust for the family, he had no power or right to sell the land or part of it to third parties decision the consent of all beneficiaries.

Mr. Arithi has relied on Court of Appeal decision M'IKIUGU M'MWIRICHIA & ANO. V ESTHER NTHIRA M'IKIUGU & OTHERS Nyeri CA No. 95 of 2009 where it was held that the rights of those in possession and occupation of ancestral land supersedes those of third Party purchasers for value.

The Respondent has contested the facts deponed by the 2nd plaintiff. He contends that the applicants are not in actual occupation of the suit land. He contests fact pleaded that no consent was given by the applicants before he sold the suit land to the co-defendants.

The averments urged by both parties indicate that the plaintiffs have a prima facie case which cannot be determined in application. Trust can only be proved through evidence. The plaintiff should be given an opportunity to be heard and for that reason the injunction sought herein is deserved.

Having considered this application I will grant the applicants terms:

1. That an injunction be and is hereby issued to restrain the Defendants by themselves, their servants, their agents, employees or anybody else whatsoever acting under their directives, names or instructions from trespassing or sub-dividing, cultivating and occupying LR NO. ABOGETA /

L.CHURE /244 and the resultant sub-divisions Nos. 1263, 1264 and 1265 pending the hearing and determination of the suit.

2. An order of inhibition be and is hereby issued ion respect of same suit land.

3. An order be and is hereby issued directing the land Registrar, Meru Central District to register the orders herein in the appropriate register.

4. The costs be in the cause.

Dated this 2nd day of December 2010.

**LESSIT J.
JUDGE**

2nd December 2010

Coram:

Lesiit J.....Judge

Kirmi / Mwonjaru.....Clerks

Mr. KiogoraFor Applicant

Mr. Mwirigi h/b ArithiFor Respondents

**LESIT
JUDGE**