



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 120 OF 2009

RUTH MIDECHA ADIKA PLAINTIFF
=VERSUS=
RODGERS MAKONA DEFENDANT

RULING

By her application amended on 27/1/2010, the applicant seeks an interlocutory injunction restraining the defendant, his agents, servants and /or anybody under his instructions from dealing in anyway by interfering and occupying parcel number **1438** Mautuma Central Settlement Scheme (hereinafter “**the suit parcel of land**”) pending the hearing and determination of this suit. The grounds for the application as expressed in the application are as follows:-

- 1). That the plaintiff is the administrator of the estate of **Efalina Ayago Chahonya** (hereinafter “**the deceased**”) who was the owner of the suit parcel of land.
- 2). That the defendant has without any colour of right encroached and occupied the said parcel of land.
- 3). That the defendant’s actions are illegal as the defendant is not entitled to the ownership of the said parcel of land.
- 4). That the plaintiff has been denied her rightful enjoyment of the said parcel of land.
- 5). That it is only fair and just that the prayers sought herein be granted.

The application is supported by an affidavit sworn by the plaintiff in which it is deponed, *inter alia*, that the suit parcel of land was allocated to the deceased on 31/7/2000 but without any colour of right, the defendant has interfered with the same thereby denying the applicant and other beneficiaries full enjoyment of the said parcel of land. Annexed to the application are several exhibits including copies of an allocation letter dated 15/6/1998 and letter of offer of a Settlement plot dated 31/7/2000.

The application is opposed by way of a replying affidavit sworn by the defendant in which it is deposed, *inter alia*, that the plaintiff is not the owner of the said parcel of land and that the defendant has resided thereon for over 20 years. The defendant therefore contends that, this application is misconceived and should be dismissed with costs.

The application was debated before me on 10/11/2010. Counsel substantiated their clients’ averments in their respective affidavits and urged their clients’ position before me.

I have considered the application, the affidavits filed both for and against the application and the submissions of counsel. Having done so, I take the following view of the matter. The principles applicable for the grant of an interlocutory injunction are now well settled. The same were set in the case of **Giella –vrs- Cossman Brown & Co. Ltd and Another [1973] E.A. 350**. First, the applicant must show a prima facie case with a probability of success at the trial but if the court is in doubt, it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages.

In the application at hand, the documents exhibited by the plaintiff as establishing ownership do not clearly do so. Annexure “**RA 2**” contains two plot numbers: **656 (B)** and **1438** whilst annexure “**RA3**” indicates plot number **656**. So which of the three plot numbers was allocated to the deceased?. A conclusive determination of the issue cannot be made in this interlocutory application. It has to await the trial. The defendant has in opposition to the application deponed that he has been residing on the suit parcel of land for over twenty (20) years and has substantially developed the same. The plaintiff has not challenged that averment. To the contrary, she appears to admit the same in her paragraph 4 of her supporting affidavit.

In the premises, the effect of granting the order sought will be to evict the defendant in this interlocutory application. Yet the plaintiff has not sought such an order. The prayer is not even founded in the plaint.

In the premises, I am not persuaded that the applicant has established a prima facie case with a probability of success at the trial. Strictly speaking, I need not therefore consider the other conditions for the grant of an interlocutory injunction. This application is without merit and is declined with costs to the defendant.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF DECEMBER 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Shivanda holding brief for Chepkwony for the plaintiff.

F. AZANGALALA

JUDGE

1/12/2010.