

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISII

Civil Case 58 of 2009

MARTIN NYAKUNDI MISOKA PLAINTIFF/APPLICANT

VERSUS

COLLIN NDEMO MACHAKADEFENDANT/RESPONDENT

RULING

This is a Chamber Application essentially brought under **Order 39 rules 1, 2A, and 9 of the Civil Procedure Rules** in which the Plaintiff/Applicant seeks an order of temporary injunction restraining the Defendant/Respondent by himself, his agents, servants and/or anyone claiming under him, from entering into, trespassing onto, cutting trees, cultivating, tilling, interfering with or in any manner whatsoever dealing with Land Parcel **NO.BASSI/MASIGE/4648** pending the hearing and determination of the suit. The application is premised on the grounds on its face and Supporting Affidavit sworn by the Applicant and filed on 12th March 2009. The application was filed at the same time with the suit. Service was effected and the Respondent made no move to defend the Summons.

The factual position as shown in the Complaint and the Supporting Affidavit is as follows. The Applicant was the registered owner of **L.R. NO.BASSI/MASIGE/1067**. On or about 30th January, 2008 the Applicant agreed to sell a portion of the land to the Respondent at Kshs.215,000/-. The area to be sold measured 100ft by 650 ft. Pursuant to that Agreement the Respondent paid Kshs.101,000/= and undertook to pay the balance before 30th June, 2008. It was agreed that on payment of that balance the Applicant would obtain relevant Land Control Board consent to enable the transfer of the sold portion to the Respondent. On 11th February, 2008 the Applicant caused a sub-division of his land into two parcels, namely **L.R.BASSI/MASIGE/4648** and **L.R.BASSI/MASIGE/4649**. It would appear that the land meant for the Respondent was **L.R.BASSI/MASIGE/4648**. The Respondent failed to pay the balance but, before the Applicant had obtained consent to transfer, entered into the land without permission and begun to cultivate. He also constructed a temporary structure of the land. This is what moved the Applicant into filing the present suit and application. In the suit he sought a declaration that the Sale Agreement between them was null and void for lack of consent to the Land Control Board. He also sought a permanent injunction against the defendant in regard to **L.R BASSI/MASIGE/4648**.

The application was prosecuted by Mr. Nyamurongi. I have considered the skeleton submissions which were filed on behalf of the Applicant.

I have stated in the foregoing that the facts are not in dispute. The Respondent has already occupied the land in dispute. He is cultivating it and has erected a house thereon. He is not threatening to enter the land which would be the basis for an interlocutory injunction. I understand the Applicant to be seeking an order to remove the Respondent from the parcel of land and to be so removed until this suit is heard and determined.

Order 39 rule 1 of the Civil Procedure Rules cannot be invoked for injunction where there is no allegation that any property in dispute in the suit is in danger of being wasted, damaged or alienated or wrongfully to be sold (**Agip(K) Ltd v Maheshchandra Himatlal Vora & Others [2000] 2EA 285**). It is only a mandatory injunction that would have been appropriate to remove the Respondent from the land in dispute and to destroy the house he has already erected thereon. (**East African Fine Spinners Ltd and Others v Bedi Investment Ltd, Civil Application No.Nai 72 of 1994**). The Applicant did not seek

a mandatory injunction.

Quite unfortunately, the application, although not opposed, cannot be granted. The same is dismissed with costs.

DATED at **KISII** this 12th day of May, 2009

A. O. MUCHELULE

JUDGE

Delivered in open court in the presence of:

Mr. Oguttu for Applicant.