



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE 75 OF 2009

MARSELLUS OKUTHE NYAMBECHÉ PLAINTIFF

VERSUS

JOSEPH OGINGA OKUTHE DEFENDANT

RULING

On 14th May, 2009 the Defendant was present in court and was allowed 7 days within which to file and serve a response to the application. The application was listed for hearing on 25th May 2009. Come this day, the Defendant was absent and had not filed any Grounds of Opposition or Replying Affidavit. Consequently, the application was not opposed.

In the suit filed on 21st April, 2009 by the Plaintiff against the Defendant, the former pleaded that he was the registered owner of Land Parcel No. **KABUOCH/K.K. KOGUTA/224**. According to the Title Deed annexed to the affidavit sworn in support of the present Chamber Application brought under **Order 39 rules 1, 2A and 9 of the Civil Procedure Rules** and **sections 3A and 63(e) of the Civil Procedure Act**, this is a title under the **Registered Land Act Cap 300 Laws of Kenya**. I agree with **Mr. Oguttu** for the Plaintiff that under **sections 27 and 28 of the Act** the title cannot be defeated.

In the Plaintiff it was alleged that on the 21st March 2009 the Defendant had without any lawful excuse, basis or color of right entered upon the land and commenced construction of a temporary structure thereon. The Plaintiff sought, among other things, a mandatory injunction directing the Defendant and those acting under him to vacate the suit premises.

The law as was enunciated in the case of **Locabail International Finance Ltd. vs. Agro export and others [1986] 1 ALL ER 901 at pg. 901** (which has received full approval by local courts in various decisions including **Kenya Breweries Ltd and others vs. Washington O. Okeyo Civil Appeal No.332 of 2000 at Nairobi** and **Shariff Abdi Hassan vs. Nadhif Jama Adan Civil Appeal No.121 of 2005 at Nairobi**) is that:

“A mandatory injunction ought not to be granted on an
interlocutory application in the absence of special
circumstances, and then only in clear cases

either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

In the instant case the Plaintiff is the registered owner of the parcel of land and he states, without anything else to the contrary, that the Defendant is a trespasser who is constructing on his land. Without in any way attempting to pre-decide this case or to influence a decision thereon, the Defendant is a trespasser who should give way pending the determination of the dispute and it cannot be said that the alleged acts of trespass can be compensated in damages. As was stated in the case of **Jai Super Power Cash and Carry Ltd vs. Nairobi City Council and two Others Civil Appeal No.111 of 2002**, a wrong doer cannot keep what he has taken because he can pay for it.

I order a mandatory injunction to issue against the Defendant directing him to vacate the suit land and to remove whatever structures or property he has put thereon.

He will also pay costs of this application.

Dated, signed and at KISII this 14th day of July 2009

A. O. MUCHELULE

JUDGE

14/7/09

Coram: Muchelule J

cc. Mongare.

Mr. Gichana for Applicant.

Court: Ruling in open court.

A. O. MUCHELULE

JUDGE