



REPUBLIC OF KENYA

HIGH COURT AT MACHAKOS

CIVIL CASE 238 OF 2008

CHARLES NZIOKA NZUKI PLAINTIFF/APPLICANT

VERSUS

KENYA AFRICAN NATIONAL

TRADERS & FARMERS UNION DEFENDANT/RESPONDENT

RULING

1. The Applicant herein claims to be the registered proprietor of land parcel No. Donyo Sabuk/Komarock Block 1/486 and by his Chamber Summons dated 10/12/2008 he seeks orders that the Defendant be restrained from alienating, or obstructing the Plaintiff or his authorized agents from accessing that land pending the hearing and determination of the suit herein. The Application is premised on Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules.
2. It was his case that the Defendant has no legal interest over his land and that he had already sold the land to Ramokia Housing, Co-operative Society Ltd who, on trying to send a surveyor to the land was blocked by agents of the Defendant. In his Supplementary Affidavit sworn on 16/4/2009, the Applicant exhibited the extract of title in respect of title No. Donyo Sabuk/Komarock Block 1/490 which shows that the Defendant is the registered proprietor of that title and is not even the registered proprietor of title No. Donyo Sabuk/Komarock Block 1/489 which is adjoining to title No. 486.
3. The Defendant's Response to the Application is contained in a Replying Affidavit sworn on 21/12/2009 by one Kimani Wanyoike. It is its case that the land in dispute belongs to the Defendant and the Plaintiff obtained his title fraudulently and that the orders sought should not be issued.
4. I have considered the submissions made and I have read the annexures to the Affidavits filed by parties. It is clear that the registered proprietor of title No. 486 is the Plaintiff who obtained title only on 18/7/2008 and on 28/10/2008 he entered into a sale agreement to sell the land to Ramokia Housing Co-operative Society Ltd but the Defendant claims that the said title was only part of plots Nos. 234A and 235A which belonged to one John Kilonzo, a shareholder of Komarock Ranching & Farming Co-

operative Society Ltd. That John Kilonzo aforesaid later sold the plots to the Defendant and the Plaintiff fraudulently had title issued to him in respect of part of the two plots. It admits stopping the Plaintiff from accessing the land for the reason that he has no right to it and therefore no orders of injunction should issue.

5. Advocates for the parties reiterated the above issues and as regards the Application before me, it is the law that a party seeking an interlocutory injunction should establish;

a. a prima facie case with a probability;

b. that damages would not be an adequate remedy if the orders are not granted;

c. if the court is in doubt, then it should determine the matter on a balance of convenience – see **Giella vs Cassman Brown Ltd (1973) E.A 358.**

6. In the instant case, all that the Plaintiff is using to seek the interim orders is a title issued a few months before the suit was filed. The Defendant has challenged that title but in the extract of title for parcel No. 486, it would seem that one Francis Mutuku was the prior owner of the land and the Plaintiff has not explained how he acquired the land and its title. That may be an oversight but a significant one. I say so because the Defendant has raised the fact that title No.486 is a sub-division of a prior parcel of land and the question is, is there a possibility that one title is imposed on another? At this stage, that may well be a possibility. If so, I am not satisfied that the Plaintiff has made out such a case that I can say is *prima facie*, one with high chances of success.

7. On damages, the Applicant does not live on the land, does not use it for any purpose but says that he has already sold it. That may be so but no transfer has been made and whatever monies he has received, he can refund to the 3rd party.

8. In any event and on a balance, I am not minded to grant the injunction sought on the terms proposed.

9. Having so said, I think that in the circumstances of this case some preservative orders should be made. I say this because in **Kiprotich vs Gathua (No. 2) (1976 – 1989) KLR 420 at 423** Law V-P stated that preservative orders under order XXXIX of the Civil Procedure Rules can be made to stop any party from wasting, alienating or damaging disputed land.

10. The preservative orders to be made and in determining the issues before me are;

Let each party be restrained from alienating, wasting or damaging the suit land until further orders of this court. In the meantime the District Surveyor Machakos is hereby ordered to visit the disputed land and determine its location, size and file a report of present status and the registration thereof. The report to be filed within 60 days and his costs to be borne equally by the parties.

11. I shall make no order as to costs.

12. Parties at liberty to apply.

13. Orders accordingly.

Dated and delivered at Machakos this 18th day of **September** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Mbindyo for Applicant**

N/A for Respondent

ISAAC LENAOLA

JUDGE