

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 183 of 2009

HOMCO K LTD.....PLAINTIFF

VERSUS

JACKSON K. RUTO.....DEFENDANT

RULING

This ruling is on the plaintiff's application for injunction dated 29th June 2009 and brought under the provisions of Section 3A of the Civil Procedure Act and Order 39 Rules 1, 2, 3 and 9 of the Civil Procedure Rules. It seeks in the main a temporary injunction to restrain the defendant by himself, his servants, employees and/or authorized agents from trespassing onto, entering, digging, depositing building material on and/or interfering with the plaintiff's piece of land situate in Eldama Ravine Township and known as L.R. No. 498/533 (the suit land) until this suit is heard and determined.

The application is based on the affidavit of Raymond Kipruto, a Director of the plaintiff company in which he has deposed that the plaintiff is the registered proprietor of the suit land and annexed thereto a Grant in respect of the land issued to the plaintiff on 18th August 1995. He has further deposed that on 29th May 2009 he found people digging trenches for a building foundation on the land and depositing building materials thereon. Having failed to convince the defendant to refrain from trespassing on the piece of land he filed this suit and immediately sought an injunction. He concludes that unless restrained, the defendant will continue with the construction on the suit land and compromise the plaintiff's right to the suit land.

Basing himself on these averments, Mr. Gai for the plaintiff has submitted that the plaintiff is opposing this application to enable him continue with the illegal construction on the suit land. He has cast doubt on the authenticity of the Certificate of Lease issued to the defendant and also dismissed the defendant's counsel's submissions that there is no proof that Raymond Kipruto has authority from the plaintiff company to swear the affidavit in support of the application.

The defendant on the other hand claims to be the owner of the suit land and has annexed to his replying affidavit a Certificate of Lease issued to him on 26th July 2007. He contends that he has already constructed buildings on the land in which he is running a school and that if the injunction sought is granted the students in that school will suffer.

Also basing himself on the averments in his client's replying affidavit, Mr. Okeke for the defendant has challenged the competence of both this application and the suit itself on the ground that Raymond Kipruto, the deponent of both the verifying and supporting affidavits having not exhibited proof of authority from the plaintiff to swear those affidavits on its behalf they should be struck out and if they are both this application and the suit itself will fall with them as they will have nothing to stand on. He also submitted that even if the plaintiff was issued with the Grant a copy of which is exhibited in the supporting affidavit, having not developed the suit land within two years as stated in that Grant, the Commissioner of Lands was entitled to revoke the allocation of the land to the plaintiff and allocate the same to the defendant. These two points failing he concluded that the plaintiff having not carried out any development on the suit land an award of damages will more than adequately compensate it if the injunction is denied.

I have considered these submissions. As I stated in my ruling of 30th July 2009 in this suit there is no proof that the defendant has completed construction and is running a school on the suit piece of land. If the submissions by counsel for both parties that the Grant and the Certificate of Lease, copies of which have been exhibited relate to the same piece of land are correct, it is clear that this is a case of double allocation. Counsel for the Defendant argues that the plaintiff having not developed the piece of land within two years as required the Commissioner of Lands was perfectly entitled to revoke the allocation to it and re-allocate the land to the defendant. There is nothing on the record to show that that is what happened. If there is anything like that the court will be told at the hearing. Before then I find that the plaintiff has made out a prima facie case and is entitled to the injunction sought and I accordingly grant it in terms of prayer 3 of this application. The costs of the application shall be costs in cause.

DATED and delivered this 28th day of October, 2009.

D. K MARAGA

JUDGE.