



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Case 73 of 2009

M’KIRIGIA M’MWITARI PLAINTIFF

VERSUS

PATRICK CHOMBA KANAMPIU DEFENDANT

RULING

The plaintiff brings this action on the basis that he is the registered owner of parcel No. Daiga/Umande Block 8/561 (Gitugi). In his plaint, he pleaded that he was issued with a title deed of that land on 21st January 2008. He further pleaded that the defendant unlawfully entered on that land in February 2008 and took possession. He therefore prayed for eviction of the defendant and permanent injunction to stop that trespass. By an interlocutory chamber summons dated 10th June 2009 brought under Order XXXIX Rule 1, 2, 2(a) 3 and 9 of the Civil Procedure Rules he seeks interlocutory injunction to restrain the defendant from trespassing, entering into, developing or farming the suit property. In his replying affidavit, the defendant stated that he took possession of the suit property in 1995 when he purchased shares from the land buying company. That averment was denied by the plaintiff who reiterated that the defendant took possession in February 2008 as pleaded in the plaint and in the supporting affidavit. The defendant further alleged in his replying affidavit that the transfer of the property into the plaintiff’s name was fraudulent because the said transfer went against the order of CMCC Nyeri No. 851 of 2006. The defendant annexed a copy of the plaint in that case to his replying affidavit. I have looked at the same and it is clear that the suit in Nyeri Court did not involve the parties that are before court in this matter. Further, it is clear that an extracted order in that case in Nyeri of 1st December 2006 was an interim order which was to last up to 14th December 2006 when the application before Nyeri Court was to be heard *interparties*. For that reason, I find that the suit before Nyeri does not assist this court in considering the present application. What however is a concern to me is that the plaintiff by the prayers in the present application essentially seeks a mandatory injunction. This is because although the parties do not agree on the exact date when the defendant entered on the suit property, it is accepted by all that the defendant is on the suit property. The plaintiff even concedes that the defendant has been on the suit property since February 2008. It is material to note that even if the defendant has been on the suit property since

February 2006, if the plaintiff's evidence is to be accepted, the plaintiff waited until 10th June 2009 to bring the present action and to seek interlocutory orders to stop the defendant continuing to be in occupation of the suit property. In my view, that delay on its own defeats the plaintiff's interlocutory application for injunction. As I find that what the plaintiff seeks is mandatory injunction, the principles that would govern the granting of such an injunction were discussed in the case of **Kenya Breweries Ltd & Another Vs. Washington Okeyo** Civil Appeal No. 332 of 2000 (Nrb) (unreported) where the Court of Appeal held that the test of granting a mandatory injunction or not was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which provides:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff.....a mandatory injunction will be granted on an interlocutory application.”

Also in **Locabail International Finance Ltd Vs. Agroexport and others** [1986] ALL ER 901 at page 901 it was stated:-

“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 march on the plaintiff. Moreover, before granting a mandatory 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 that was required for a prohibitory injunction.”

Considering the evidence brought before me by the plaintiff, I find that the plaintiff has not established that there exists a special circumstance which would enable this court to grant mandatory injunction as he sought. As stated before, the defendant has been in occupation of the suit property at least for a year and six months before the application was filed to injunct him from continuing to occupy the land. In those circumstances, the plaintiff needed to show what has transpired after one year 6 months which would move this court to find that there is a special circumstance needing mandatory injunction to be issued. I find that there is no merit in the plaintiff's application and accordingly, the notice of motion dated 10th June 2009 is hereby dismissed with costs being awarded to the defendant.

Dated and delivered at Meru this 26th day of November 2009.

MARY KASANGO

JUDGE