



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 19 of 2007

1. DAVID MUSILI MULWA

2. JULIUS MUTAVA KIOKO

3. NDILA MUTUA PLAINTIFFS

VERSUS

KIMEU KIMOLO DEFENDANT

(Being an application for Injunction)

RULING OF THE COURT

1. The application before me is the Chamber Summons dated 6/03/2007 and filed in court on the same day. The same is brought under Order 39 Rules 1 (a) and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The applicant seeks one substantive order by which he wants the defendant restrained by himself his employees, family, servants and/or agents from disposing of, entering upon, working or in any other manner dealing with the property known as MUVUTI/KAANI/1212 (the suit land) or interfering with the 1st plaintiff's quiet occupation thereof pending the hearing and final determination of this suit.

2. The grounds upon which the application is premised are that:-

- a. The suit premises herein belonged to the great grand father of the parties hereto and the 1st plaintiff has been in occupation thereof for more than 20 years.
- b. The defendant has over the last few months stopped the 1st plaintiff from cultivating on the said land, and has now threatened to demolish his family's residential house.
- c. The defendant has fraudulently secured registration of the suit premises in his name although he knows it is family land.

3. The application is also supported by the sworn affidavit of DAVID MUSILI MULWA dated 28/02/2007 in which he says that he has been in occupation of a portion of land measuring approximately ten (10) acres comprising part of the suit property herein for over the last twenty (20) years on which he says stands his family residential house where he lives with his wife, five children and aged mother. He also says that upon the demise of his father in the year 2004, the defendant has continued to threaten him and that in the year 2005 in particular, the defendant and members of his (defendant's) family started

committing acts of nuisance by deliberately loosing their goats and cattle to stray into the plaintiff's portion of land and to destroy the crops thereon that were ready for harvesting.

4. The applicant also says that in the year 2006, the defendant and members of his family invaded the plaintiff's land and planted thereon their own crops, thereby denying the plaintiff the opportunity to use his land and that as a result, the plaintiff and his family has been put to great loss as they also face the prospect of starvation. The applicant also says that he is constantly in fear of having his residential house demolished by the defendant.

5. Earlier on, on the 28/02/2006, the plaintiff filed suit and averred therein that the suit land is registered in the name of their great grandfather, Mutyambu, and that in or about 1974, the plaintiff's family chose the defendant herein to champion the interests of the family in the suit land against outsiders, and in particular against the family of one MII KAVUO. The plaintiff also avers therein that though the defendant did indeed champion the family's interest in the suit land against outsiders, he (defendant) later became fraudulent when he transferred the entire suit land into his (defendant's) own name. In the plaint the plaintiff seeks, among other reliefs, a declaration that the defendant holds the suit land in trust for the plaintiffs and other heirs of the Mutyambu family and a revocation of the Title Deed issued by the Land Registrar to the Defendant as the sole owner of the suit land.

6. The application is opposed. The Replying Affidavit is sworn by KIMEU KIMOLO on 12/03/2007. He says that apart from this particular suit, the 1st plaintiff has filed other suits/applications among them Machakos H.C.C.C No. 92 of 2006 which was struck out by the court on 8/11/2006. He also says that there is a valid court decree in Civil Misc. 74 of 2005 which confirmed the Embu Provincial Land Disputes Appeals Committee finding and that this being the case, this particular application and the attendant suit are res judicata. The record shows that on 11/10/2006, an order of injunction similar to the one sought by the applicant in this application was issued by the court in Civil Case No. 92 of 2006.

7. With leave of the court, DAVID MUSILI MULWA filed a Supplementary Affidavit on 11/10/2007. He says that all the suits/applications referred to by the defendant/respondent have since been withdrawn and in particular CMCC No. 24 of 2006 and the Provincial Appeals Committee Tribunal Case No. 67 of 2005. He has also tried to explain the discrepancy between the dates of the Supporting Affidavit (28/02/2007) and the date of the application (6/03/2007).

8. At the hearing of the application, Mrs Kalinga appeared for the applicants while Mr Ngolya appeared for the defendant/respondent. Mrs Kalinga relied on the grounds and the averments of both the Supporting and Supplementary Affidavit and also relied on the case of M/S GUSII MWALIMU INVESTMENT CO. LTD & 2 OTHERS vs M/S MWALIMU HOTEL KISII LTD- Court of Appeal (Nairobi) C.A. No. 160 of 1995.

9. For his part, Mr Ngolya submitted that the applicants have not established a prima facie case with a probability of success and further that the present suit and this application are res judicata.

10. The principles of injunctions which this court should apply in this matter were set out in the case of GIELLA vs CASSMAN BROWN & CO LTD (1973) EA 358. For the court to grant an order of injunction:-

- a. the applicant must show a prima facie case with a probability of success;
- b. an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;
- c. when the court is in doubt, it will decide the application on the balance of convenience.

11. Have the applicants met the above three conditions? My finding is that they have not done so. In the first place, the applicants have not shown that they have a prima facie case with a probability of success. It is not in dispute that the suit land is registered in the defendant's name. It is also not in

dispute that the applicants, and particularly the 1st applicant has been at war and in and out of court with the defendant over the same matter since 2005 and at each stage, the applicants have lost. The fact that the 2nd and 3rd applicants are now part of the present suit does not change the state of things in this matter. I think that the applicants are vexatious litigants who have failed to demonstrate to this court that their claim to the suit land is likely to succeed. I find that the authority cited by applicant's counsel is irrelevant to this application.

12. Secondly, the applicants have not shown what irreparable loss they are likely to suffer if the order sought is not granted. The court has not even heard the story of the 2nd and 3rd applicants. Neither of them swore any affidavit nor does the 1st applicant say that he has sworn the two Affidavits on his own behalf and on the behalf of the said 2nd and 3rd applicants. Even if it were to be assumed or accepted that the 1st applicant swore the affidavits on behalf of all the applicants, he has shown that he obtained their written consent of the 2nd and 3rd applicants to do so. No such authority is exhibited on the court file

13. Thirdly, even if this case were to be decided on a balance of convenience, I find and hold that the same tilts in favour of the defendant/respondent. The defendant has title to the suit land which is not denied. This matter has been before other courts and dismissed and though the 1st applicant says that all these other suits have since been withdrawn, the 1st applicant's conduct shows that he is not truthful. Equity demands that he who comes to court must do so with clean hands. The 1st applicant, who has put himself forth as the voice of the other applicants has not come to court with clean hands. Until the defendant filed the Replying Affidavit the 1st applicant had been content with giving the court only half the story relating to the suit land.

14. It is for these reasons that the applicants' application must fail. The application must also fail on the ground that it is not supported by an affidavit as required by law. The application is dated 6/03/2007, yet the affidavit in support is dated 28/02/2007. By 28/02/2007, there was no application which the applicant was purportedly supporting.

15. In the result, I find and hold that the application before court lacks merit. The same is dismissed in its entirety with costs to the respondent. It is so ordered.

Dated and delivered at Machakos this 29th day of January, 2008.

R.N. SITATI

JUDGE