REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 105 of 2006

SIMON KILULU NGUMI …….…..…… PLAINTIFF/APPLICANT

VERSUS

SEBASTIAN MATHEKA ……..…… DEFENDANT/RESPONDENT

(Being an application for injunction under Order 39 Rules 1 and 2 of the Civil Procedure Rules)

RULING OF THE COURT

1. By his application dated 13/10/2006 brought by way of Chamber Summons under the provisions of Order 39 Rules 1 and 2 of the Civil Procedure Rules, the applicant prays for orders THAT:-

a. This application be declared urgent and be heard ex-parte.

b. The respondent, his agents and servants be restrained from constructing a house damaging grass and vegetation and preventing the applicant/plaintiff from preparing the land for planting, constructing a house on the land and in any way interfering with the possession and occupation of the land parcel ATHI-RIVER/ATHI-RIVER BLOCK 1/43 until further orders of the court.

2. The application is premised on seven grounds on the face thereof, inter alia, that the Applicant is the proprietor of the piece of land known as ATHI-RIVER/ATHI-RIVER BLOK 1/43 (the suit land) and that despite that title notwithstanding, the respondent did in or about the month of July 2006 attempt to enter the suit land with the intention of preparing a garden and a site for building a house. The other grounds are that the respondent is illegally constructing a house on the suit land, as well as cutting down trees and vegetation thereby causing irreparable damage on the land and that unless the order sought is granted, the applicant will suffer irreparable damage. The applicant also says that he has a good case with a probability of success, and that in any event, the applicant is ready and willing to compensate the respondent in costs and other damages in case the applicant loses the case.

3. The applicant also swore an affidavit dated 13/10/2006 in support of the application and says therein that he is the owner and proprietor of the suit land. However, no annextures to show such ownership were attached to the affidavit. The applicant also says that the respondent is entitled to plot No. 510 which plot the applicant says belongs to the respondent's father but that the respondent has refused to settle on the said plot No. 510 and has instead trespassed on the suit land on diverse dates between July and September 2006.

4. The applicant also says that as a result of the respondent's acts of trespass, the applicant has been prevented from erecting his own house on the suit land as the respondent also causes wanton destruction

of vegetation.

5. The applicant filed plaint together with the Chamber Summons. The applicant avers that he is the registered proprietor of the suit land which measures 0.8256 hactares situate at Kyumbi, Athi-River Division of Machakos District. The applicant says that the defendant also works and resides at Kyumbi, and according to the applicant the respondent should be living in land parcel number 510. The applicant reiterates the averments in both the grounds on the face of the application and the affidavit in support of the application. He also avers that despite the fact that the respondent has been ordered by the Administration to vacate the suit land, he has refused to do so, hence these proceedings.

6. From the record, the respondent has neither entered appearance nor filed defence; though he was duly served on 31/01/2007. On 7/03/2007, the respondent was present in court but applied for adjournment on the ground that he still needed time to file his Replying Affidavit to the application which he said was served upon him on 9/02/2007. He also intimated that he needed time to hire the services of an advocate. The respondent's request was granted and the application fixed for hearing on 19/07/2007. The respondent did not appear in court on 19/07/2007 despite the fact that the hearing date was fixed in court and in the presence of both the respondent and counsel for the applicant. On the hearing day, the application proceeded exparte since no explanation was given for the respondent's absence from court.

7. The guiding principles that are applicable in application for injunctions were set out in the case of GIELLA vs CASSMAN BROWN & CO. LTD (1973) EA 358, namely:-

i. an applicant must show a prima facie case with probability of success;

ii. an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;

iii. when the court is in doubt, it will decide the application on the balance of convenience.

8. What is the situation in this case? I am persuaded that the applicant has shown by his pleadings, that he has a prima facie case with a probability of success. Though the respondent was duly served with the application and the summons to enter appearance together with copy of the plaint, he has said nothing in response to the applicant's allegation that he (respondent) is an intruder and a trespasser onto the suit land. The applicant says that he is the registered owner of the suit land. That allegation has not been controverted and I am satisfied that the suit against the respondent is likely to succeed if the applicant is able to adduce documentary evidence to support his claims when the case finally comes up for hearing.

9. Secondly, the applicant has averred that unless the respondent is injuncted, he will continue to suffer damage as he may not be able to access the suit land and cultivate the same and or put up his house. To be prevented to work one's land is a serious matter, for it is from the land that man is able to feed himself and his family. To be exposed to the dangers of food scarcity by the acts of another is irreparable injury that can even result in the death of family members. Such injury cannot be compensated by damages.

10. Thirdly, I find that the balance of convenience tilts in favour of the applicant. The respondent failed to file a Replying Affidavit to controvert the applicant's claims despite the fact that on the 7/03/2007, the court granted the applicant an opportunity to file and serve his Replying Affidavit within fourteen (14) days from that date.

11. Even if it were to be argued that the fourteen days were not sufficient for the respondent to file and serve the Replying Affidavit, he would have been at liberty to ask for an extension of such time if he had appeared in court on the 19/07/2007 when the application was fixed for inter partes hearing. Instead, the respondent chose not to attend court on the said date.

12. In the result, the applicant's application is allowed in terms of prayer (2) thereof pending the hearing and determination of this suit. As the applicant did not include a prayer for costs, I make no order as to

costs for this application.

13. Orders accordingly.

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

R.N. SITATI

JUDGE