



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

Civil Suit 69 of 2006

ENOCK CHIRCHIR KATAM 1ST PLAINTIFF

MARK KIBIEGO KATAM 2ND PLAINTIFF

MUSA K. ARUSEI 3RD PLAINTIFF

VERSUS

WILLIAM MAIYO DEFENDANT

R U L I N G

The three Plaintiffs herein filed this suit against the Defendant on 21st June, 2006. The Plaintiffs seek the following reliefs:-

- (a) A declaration that the Defendant is a trespasser and has no interest in the parcel of land known as Uasin Gishu/Illula/108.
- (b) Permanent injunction to restrain the Defendant, his agents/servants from entering, trespassing or damaging or in any way dealing with the Plaintiff's parcel of land known as Uasin Gishu/Illula/108.
- (c) Mesne profits.
- (d) Costs of this suit.
- (e) Interest.

The Plaintiffs claim that the First Plaintiff is the

registered proprietor of the suit property which is 6.6 hectares. They claim that this was acquired in 1983 and he took possession in the same year. That in 1997 the First Plaintiff carried out a sub-division and sold two portions to the Second Plaintiff and Third Plaintiff respectively. That upon purchase the said two Plaintiffs took possession of their respective portions.

The Plaintiffs contend that on March, 2006 the

Defendant without any colour of right or interest in the said parcel of land and without any authority or

consent entered into the Plaintiffs' said parcel and thereupon started preparing the said parcels for purposes of carrying out farming activities for the year 2006.

The Defendant in his Defence denied the allegations. He also filed a counterclaim with the Defence. The Defendant claims that the suit property belongs to his family including his mother Kimoi Kimaiyo who was allocated the suit property after surrendering two (2) acres of their land to Kapsamich Primary School in 1983. The Defendant claims that his family has been in occupation of the plot since then. In the counterclaim, the Defendant alleged that the First Plaintiff had the property registered in his name through fraud. He seeks cancellation of the title and declaration that he is the sole and absolute owner of the parcel of land. He also seeks an injunction to stop the Plaintiffs from trespassing on the land.

The Plaintiffs duly filed a Defence to the Counterclaim.

The Plaintiff on 16th November, 2006 filed this application seeking, inter alia, orders:-

- That the Honourable Court be pleased to issue mandatory injunction to compel the Defendant by himself, his servants or agents to harvest or remove from the Plaintiffs' parcel of land known as Uasin Gishu/Illula/108, the current season maize crop, the fence, illegal temporary structure and restore the status quo that existed before the Defendant committed wrongful acts.
- That the Defendant by himself, his agents or servants be restrained by way of temporary injunction from trespassing further, carrying on farming activities, disposing, selling, marketing, leasing, fencing, putting up structures illegally or in any other way dealing with the Plaintiffs' parcel of land known as Uasin Gishu/Illula/108 pending the hearing and determination of the suit.

I have considered the Complaint, Defence, Counterclaim,

Application, the Affidavits and Submissions by Counsel. It is the Plaintiffs' case that the Defendant entered the land in March, 2006. The suit was filed on 21st June, 2006, almost four (4) months later. The Defendant has set up a counterclaim seeking similar declarations as the Plaintiffs. The Defendant claims that he has been on the land from 1983.

After perusal of the annexures to the Defendant's

Replying Affidavit, I do find that the disputes between the First Plaintiff and the Defendant goes back to the early 1980's. From the evidence on record, the Defendant's entry into the land certainly was not in March 2006. The Defendant and his family appear to have been on the land much earlier. The question of ownership is now before this Court for determination.

It is this Court's view that what the Plaintiffs are seeking is in the nature of a mandatory injunction since the Defendant is in occupation on the land. This Court cannot tell at this stage whether he occupies the entire land or a portion thereof. What is clear is that the Defendant is on the said land. The effect of the grant of such an injunction is that the Defendant and his family will be evicted from the suit premises. The Plaintiffs would have obtained the reliefs in the suit through the interlocutory application. It is noted that the Second and Third Plaintiffs are claiming under the First Plaintiff's title.

It is trite law that a mandatory injunction at an interlocutory stage is rarely granted. It may only be granted when the Plaintiff's case is "clear and incontrovertible". (**MALINDI AIR SERVICES –V- HALIMA ABDINOOR HASSAN – CIVIL APPLICATION NO. NAI. 202 OF 2002**).

From the facts in the present case, it would be unsafe to grant the orders sought herein. This Court also notes that the Plaintiffs claim mesne profits against the Defendant. This suggests that the Defendant is in occupation of the land and is making use of it.

In the light of the foregoing, the Plaintiffs are not entitled to the interim orders sought. The application is dismissed with costs to the Defendant.

DATED AND DELIVERED AT ELDORET ON THIS 6TH DAY OF JUNE, 2008.

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M. K. IBRAHIM

JUDGE

In the presence of:-

Mr. Kimani for the Defendant

No appearance for the Plaintiffs