



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 15 of 2007 (O.S)

KENYA AFRICAN NATIONAL TRADERS & FARMERS UNION

ALSO KNOWN AS KANTAFU COMPANY PLAINTIFF/RESPONDENT

VERSUS

JONAH PAUL NGULI 1ST DEFENDANT/APPLICANT

FRANCIS NGIGE WAWERU 2ND DEFENDANT/APPLICANT

LUKENYA RANCHING & FARMING CO-OP. SOC..... 3RD DEFENDANT/APPLICANT

RULING

1. The Application dated 3/7/2008 seeks orders of injunction under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules to restrain the Plaintiff, his servants and/or agent from developing and/or constructing any structures on L.R. No. Mavoko Township Block 3/2103 until the hearing and determination of the suit herein. Costs are to be provided for in any event but the Applicant who is the 2nd Defendant, in his Supporting Affidavit sworn on 3/7/2008 depones as follows:-
2. That he is the registered proprietor of the land in dispute having purchased it from the 1st Defendant. An extract of the title is exhibited and it shows that he purchased it for Kshs.6,000,000/= and that he was registered as proprietor thereof on 16/11/2006 and title issued the same day. That he also states that he immediately took possession and was surprised to see the Originating Summons dated 20/2/2007 and the claim therein by the Plaintiff that it has been in occupation thereof since 1994 having allegedly bought the land from the 1st Defendant.
3. The Applicant has also exhibited photographs indicating that the Plaintiff may have commenced the construction of some structures on the suit land and he is apprehensive that the land may be wasted before the Summons is heard and determined. Further, that he is being denied the enjoyment of property lawfully obtained and he will suffer irreparable loss.
4. The 1st Defendant, supports the Application but the Plaintiff's only point in opposition is that under order XXXIX Rule 2 of the Civil Procedure Rules, a Defendant cannot benefit from injunctive reliefs.
5. I have noted the submissions made by the advocates for the parties and I should begin by addressing the point of law raised by counsel for the Plaintiff above. I think that the issue is pedestrian because

Order XXXIX Rule 1 of the Civil Procedure Rules provides as follows:-

“1. Where in any suit it is proved by affidavit or otherwise-

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of saying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

6. It is clear that whereas Rule 1 (b) specifically targets an errant Defendant, Rule 1 (a) refers to any party to the suit whether a Plaintiff or Defendant. In this case, it is the Plaintiff’s conduct that is under attack and I see nothing to stop this court from granting a Defendant injunctive reliefs.

7. Further, I need not belabour the issue but the principles for grant of an injunction generally are now well settled. In **E.A Industries vs Trufoods (1972) E.A 420**, Spry V-P states as follows:

“There is, I think, no real difference of opinion as to the law regarding interlocutory injunctions, although it may be expressed in different ways. A plaintiff has to show a prima facie case with a probability of success, and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.”

8. The learned Judge re-expressed those same principles in **Giella vs Cassman Brown & Co. Ltd. (1973) E.A. 358** and there is now no debate that a party seeking an interlocutory injunction must abide by those principles.

9. In the present case and applying the first principle, the 2nd Defendant’s case is that he is the registered proprietor of the suit land and the 1st Defendant who sold it to him concedes the point. The Plaintiff has instead filed no serious response to the Application so that prima facie I can but only conclude that the 2nd Defendant has made out a case for grant of an injunction. I say so well knowing that in fact the Originating Summons is a claim for adverse possession and also aware that there is pending before this court, an Application to strike out the said summons. My finding on the Application before me is based purely on matters before me and would not affect the outcome of either of the other two matters.

10. On the question of irreparable loss, I heard little on the subject but on a balance of convenience, the 2nd Defendant has made out a good case to warrant the injunction as the Plaintiff who has the most to lose if it were granted, chose a rather pedestrian approach to it and in the end the Application was akin to one that had no opposition. Where a registered proprietor of land shows that he has a valid complaint against an admitted trespasser who seeks to advance the old claim of adverse possession but chooses to ignore interlocutory proceedings, this court can but only listen to the complainant.

11. The Application dated 3/7/2008 has merit and is allowed as prayed with costs.

12. May parties now take dates for the Application dated 9/5/2007.

13. Orders accordingly.

Dated and delivered at Machakos this **15th** day of **October** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mrs Nzei for Defendant**

ISAAC LENAOLA

JUDGE