



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Suit 39 of 2008

KITINDIO KIETI:.....:PLAINTIFF/APPLICANT

VERSUS

MUTUKU NDULA

ATHI RIVER MINING LTD :.....: DEFENDANTS/RESPONDENTS

RULING

1. The Application dated 25.4.2008 is one premised on Order XXXIX Rule 1, Order L Rule 7 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act. The specific prayers sought are the following:-

“i.

ii. *That the 2nd defendant, his agents and/or any persons claiming under him be restrained by an order of injunction from making any payments to the 1st defendant /respondent in furtherance of sale agreement concerning the Plaintiff's/Applicant un registered land parcel now known as Plot No. 33 Mwanyani Site in Mutomo District.*

iii. *That the 2nd defendant/respondent be restrained from starting mining in the suit premises or any other activities or from interfering with the suit land until hearing and determination of the suit herein.*

iv. *Costs of this application be provided for”*

2. The grounds in support are:-

“a) *The plaintiff is the lawful proprietor of the suit premises.*

b) *The 1st defendant has unlawfully presented himself as the owner of the suit premises.*

c) *The 2nd defendant has ignored the plaintiff's claim.*

d) *The plaintiff has a prima facie case with a probability of success*

e) ***Unless the order sought is granted the plaintiff will suffer irreparable harm.***

f) ***The balance of convenience favours the granting of injunction.***”

3. From the Affidavit of Kitindio Kieti sworn on 25.4.2008 and the submissions by Mr. Makau for the Applicant, the Applicant claims that plot No. 33 at Mwanyani Site in Mathima Location within Mutomo District belongs to him as ***“he acquired the same under customary law... as ... the first one to possess, identify the land and mark the boundaries on or about July 1944”***. That the 2nd Defendant only came to the scene in early 2007 when he approached the Plaintiff amongst other people in the area as he wanted to use the land for mining of unknown substances, at least not from my reading of the Plaintiff and Affidavit in support. In any event, the Applicant also contends that he was paid Kshs. 25,000/= ***“ as part payment towards the purchase”*** of the land by the 2nd Defendant but later he ***“heard”*** that the 1st Defendant had claimed the land and started negotiations with the 2nd Defendant for other payments for use of the land.

4. The Applicant also claims that he will suffer irreparable harm if he is dispossessed of the land and it is in the interests of justice that the injunction be granted as prayed.

5. In his Replying Affidavit sworn on 19.5.2008, the 1st Defendant depones that he acquired the disputed parcel of land on 2.4.1982 when he fenced it off and since then has been using it to graze his cattle and collect firewood from it and that it was the Plaintiff who illegally took Kshs. 25,000/= from the 2nd Defendant on 1.8.2007 and when the 1st Defendant came to know of the issue, he reported the matter to the local chief. That the local chief, one Michael Nzau determined that it was the 1st Defendant who is entitled to engage the 2nd Defendant in any transaction. A letter dated 4.1.2008 to that effect is annexed to the Replying Affidavit as ***“MNI.”*** That subsequently, the land was sold to the 2nd Defendant for Kshs. 641,000/= on 8.2.2008 and to date the Plaintiff’s claim has not been authenticated.

6. The Defendant’s position is also supported by Michael Nzau aforesaid who swore an affidavit on 28.5.2008 and in it, he depones that together with local elders, he arbitrated over the dispute between the Plaintiff and 1st Defendant and found that the land is trust land and that the 1st Defendant is the one who has been occupying and using the land in dispute while the Plaintiff lives 4 Kms away and has no claim to the land in issue at all.

7. The 2nd Defendant’s response is contained in a Replying Affidavit sworn on 28.5.2008 by Pradeep Paunrana, the Managing Director of the 2nd Defendant Company. In it he depones that he only entered into an agreement with the 1st Defendant when he ascertained that he was the one entitled to the suit land by custom and that the Plaintiff had unlawfully obtained Kshs. 25,000/= from the 2nd Defendant when he posed as the lawful owner of the land. That the 2nd Defendant is in lawful occupation of the land and the Plaintiff has no right to an injunction.

8. I have taken into account the submissions by Mr. O.N. Makau for the Respondent and as I understand it, a party seeking an injunction under Order XXXIX Rule 1 of the Civil Procedure Rules must first heed the language and expectation of that Rule. It provides as follows:-

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

a) that any property in dispute in 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 any 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 staying 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”.

9. To prove by affidavit that he is entitled to the injunction, the Applicant must then abide by the Principles for grant of an injunction as set out by Spry V-P in **Giella vs Cassman Brown [1973] E.A. 358**, and following the earlier decision in **E.A. Industries vs Trufoods [1972] E.A. 420**. Those principles are that;

- i. there is a prima facie case with a probability of success.
- ii. that irreparable harm that cannot be compensated in damages will result if the order is not granted.
- iii. If the court is in doubt, then it will decide the matter on a balance of convenience.

10. On the first principle, sadly I see no prima facie case with a probability of success. I say so because the land in dispute is undoubtedly trust land and the law as I understand it is that the Country Council for the area holds the land in trust for persons ordinarily resident on it – see section 115 of the Constitution. Ascertainment of claims under customary law is done when the land is set apart under section 117 of the Constitution as read with similar provisions in the Trust Land Act, Cap 188. Until that elaborate process is undertaken neither the Plaintiff nor any other party can properly claim any right to enter into sale or other agreement as regards the disposition of the land held in trust. I have for example seen an ***“agreement for sale of land”*** dated 1.8.2007 in which the 2nd Defendant purports to purchase some land acquired by ***“virtue of ancestral inheritance”***. Prima facie that agreement is outside known legal regimes for acquisition of land and the 2nd Defendant may wish to seek better advice on how trust land can be properly acquired. I digress.

11. It is upto the Plaintiff /Applicant to show that he is lawfully entitled to the suit land. The land is however not surveyed, the acreage is unclear, no registration regime of law is indicated and on all fronts it is unclear on what basis the claim is made. If it is occupation and possession under customary law sadly again I have no evidence that he is the person so entitled. In any event, such occupation or possession does not include the power to tamper with the beneficial interests by disposition. As regards the Plaintiff’s claim however, the only evidence worth referring to is that of the area chief, Michael Nzau who in his letter of 14.1.2008 and in the Affidavit on record found that the 1st Defendant is the one with the better interest, however weak in law that interest may be. In the end therefore, the Applicant is in a precarious legal and factual position and cannot be said to have proved by affidavit his entitlement to the orders he seeks. The onus of proof lies on him and he has failed the test.

12. I will say little about the other two principles because if the Applicant has no lawful claim to the land, has obtained Kshs. 25,000/= in suspicious circumstances, what harm will come to him if the injunction is not granted? In any event, what is in issue is land that may be used for mining purposes and any loss to be occasioned, and I see none, can certainly be compensated in damages.

13. On a balance of convenience in any event, despite my misgiving about the whole manner in which the 2nd Defendant is going about acquiring land in Mutomo, the discretion that the Applicant seeks cannot be granted.

14. The Application dated 25.4.2008 is dismissed with costs.

15. Orders accordingly.

Dated and delivered at Machakos this **14th** day of **October 2008**.

Isaac Lenaola

Judge

In the presence of: Mr. O.N. Makau for Applicant

Mr. Mulyungi h /b for Masika for Defendant

Isaac Lenaola

Judge