



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 104 of 2008

BERNADATTA KANINI MUTUKU.....

PLAINTIFFS

VERSUS

PETER NZUKI NDETIDEFENDANT

RULING

1. The Application dated 10.7.2008 is premised on Order XXXIX Rules 1,2, and 3 of the Civil Procedure Rules and the Orders sought are that:

“a. A temporary injunction be granted to restrain the

Defendant whether by himself or through his sons, daughters, grandsons, granddaughters or any relative of the defendant or through his servants, employees or agents from trespassing, removing beacons, claiming ownership or possession, erecting any developments, planting trees or any crops, or from preventing the Plaintiff from using the land, or from removing any fence or developments erected by the Plaintiff and from preventing the Plaintiff from quietly enjoying and possessing all that land described as Mavoko Town/Block 3/4951 situated in Lukenya sub-location within Machakos District pending hearing and final determination of this suit.”

b. Costs be provided for.”

2. The specific grounds on which the Summons is brought are;

“i. The Plaintiff is the registered absolute proprietor of all that land described as Mavoko Town/Block 3/4951.

ii. The Defendant is claiming ownership of the land without any legal justification.

iii. The Defendant through his relatives have planted trees on the Plaintiff's land.

iv. The Defendant has prevented the Plaintiff from developing the land because defendant is claiming ownership.

v. If the Plaintiff asserts her rights forcefully or physically this may lead to a serious breach of

peace.

vi. ***The Plaintiff's right to quite use and enjoyment of the suit premises has been seriously impaired by the attitude and overt acts of defendant and his relatives.***

vii. ***Damages would not an adequate remedy in the circumstances. (sic)***

3. In her Supporting Affidavit sworn on 10.7.2008, the Plaintiff/Applicant depones that she is the registered proprietor of title Number Mavoko Town/ Block 3 /4951 and I have seen a copy of the title issued on 20.12.2006 in the names of the Plaintiff. She further deponed that in April 2008 she allowed an unnamed potential land developer to visit the suit land in the company of one Musyoka Mutua and the two were turned away by the Defendant's relatives. That trees had also been planted on the land without her consent and a beacon removed.

4. The Applicant at paragraphs 11-13 of her Affidavit gives details of attempts made by her advocate and Musyoka Mutua aforesaid to resolve the dispute amicably with the end result that on 25.6.2008 the Defendant made it plain that he does not recognize the Plaintiff's title as the land did not belong to her. That she is apprehensive that unless this court intervenes, she would not have the benefit of her land lawfully acquired.

5. The advocate for the Plaintiff reiterated the above matters in his submissions and relied on the decision in **Shariff Abdi Hassan vs Nadhif Jama Adan C.A. 121/2005** where it was held inter-alia that where there is a dispute over land between the registered proprietor and a trespasser, it is the trespasser who should give way pending determination of the dispute.

6. The Defendant's response to the Application is contained in a Replying Affidavit sworn on 18.9.2008 and in submissions by his advocate. His case is simple; the title held by the Plaintiff is contested as it was obtained fraudulently through the actions and/or connivance of one Priscilla Musyawa Mwanja Mutheke who caused that title to be excised out of title number Mavoko Town /Block 3/4951. That the latter title was in the names of Joseph Mwanja Mutheke (deceased) who was holding it in trust for the Defendant and the entire Ndeti family. At Paragraphs 4-9 of the Replying Affidavit, the history of the alleged acquisition of the land originally belonging to Lukenya Ranching and farming Co-operative Society Limited is given. That he avoided the Rules of that Society by registering members of his family as "**shadow members**" with the result that he acquired 20 acres of land through himself and his "**shadow members**" including Joseph Mwanja Mutheke (deceased) and the land had since been in his possession and that of his immediate family.

7. It is the Defendant's further argument that since the Plaintiff acquired the title fraudulently and there is also his claim for a trust, evidence should be adduced to show which claim is sustainable and which one is not.

8. I have carefully read the Plaintiff's Affidavit dated 10.7.2008 and the Defence and Counter-claim dated 25.8.2008. It is clear from those pleadings and the rival Affidavits that the Plaintiff has never had possession of the suit land and that it is occupied and developed by the Defendant and his family. It is also patently clear to me that the history of the acquisition of the land is convoluted and Defendant's claim is prima facie shrouded in the mystery known only to land speculators. I say this, with respect, because he admits that it was he who had Joseph Mwanja Mutheke (deceased) registered as a shareholder of Lukenya Ranching and Farming Co-operative Society Ltd with the intent that he would hold the land as a mere nominee and in trust for the Defendant. All these allegations have not been strongly denied and are in fact merely denied in the Reply to Defence and Defence to Counter-claim dated 25.8.2008. Yet the Plaintiff has title whose history has not been properly explained in light of the counter-claim and yet it is not a first registration.

9. To my mind a party seeking an interlocutory injunction ought to show initially a prima facie case with a probability of success as was well set out in **E.A Industries vs Trufoods (1972) E.A. 420**, where Spry V-P stated 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.”

10. 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.

11. In this case I am certain that the Plaintiff, even with title to the

land has made out such a case in light of the prayers in the counter-claim. Coupled with the fact that she has never occupied the land and in fact intended to either dispose of it or somehow alienate it before the dispute is settled, it would be unsafe to grant the orders sought.

12. I am also certain that in the circumstances of this case, damages

would be an adequate remedy and if I am wrong, then I am quite certain that all my doubts in the case, and on a balance of probabilities, would tilt in favour of the Defendant.

13. I will dismiss the Application dated 10.7.2008 but will make no

order as to costs. Let the costs be awarded to the party that succeeds at the hearing of the suit.

14. Orders accordingly.

Dated and delivered at Machakos this 18th day of November 2008.

Isaac Lenaola

Judge

In the presence: Mr.Mbindyo for Defendant/Respondent

No appearance for Plaintiff/Applicant

Isaac Lenaola

Judge