REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 44 of 2006

LYDIA MUTHONI NABEA ….....…… PLAINTIFF

VERSUS

BENSON KIRIINYA ……..…….. 1ST DEFENDANT

CATHERINE KAARI…….. 2ND DEFENDANT

MERCY GAKII ….…….. 3RD DEFENDANT

RULING

The applicant has simultaneously with the plaint herein filed the instant chamber summons in which she seeks temporary order of injunction to:-

"…….restrain the 1st, 2nd and 3rd respondent (sic) from entering, occupying, using, plucking tea bushes, damaging, wasting, alienating, trespassing or in any way dealing with the applicant's land parcel No. MWIMBI/CHOGORIA/3702 either by themselves, their agents or servants or persons acting at their behest ……..until this application is heard and determined."

There is also a prayer that the order be served upon the O.C.S. Chogoria Police Station for compliance.

I pause here to observe that the orders sought are only expected, in terms of the prayers set out above, to subsist until this application is heard and determined yet the applicant is seeking in the plaint an order of permanent injunction. In situations such as this the applicant ought to have framed two prayers for temporary injunction, one, for the *ex parte* stage and the other pending the hearing and determination of the suit. The other observation regarding the second prayer is that courts will be reluctant to involve the police in effecting court orders in purely civil proceedings.

In very rare and exceptional case will the court direct the police to be involved in the execution of its order issued in the exercise of its civil jurisdiction. But even then the applicant must demonstrate that there is a real threat to peace and tranquility in which case the role of the police will only be confined to maintenance of law and order.

In reply to the averments in the application the 2nd and 3rd respondents have filed two separate replying affidavits. The 3rd respondent's replying affidavit was expunged from the record for having been filed without leave. The 2nd respondent has deposed that the suit land is part of the estate of Erastus Nabea Matiri, who was the husband of the applicant and 2nd respondent and the father to 1st and 3rd respondents.

It is also averred that all the parties herein reside on the suit land where they share one large house. Further it is stated that the applicant has fraudulently transferred the suit land to herself by secretly filling Chuka P.M. Suc. Cause No. 11 of 2008.

The respondents, on their part have filed H.C. Misc. Succession Cause No. 51 of 2008 seeking revocation of the grant issued to the applicant on the grounds that the same was obtained fraudulently by concealment of material facts, namely that the deceased was survived by a family of three widows and fourteen (14) children.

I have considered the application and the replying affidavits as well as submissions by counsel for both sides. I have reproduced in part the relief sought in this application. The applicant seeks that the respondents be restrained from entering, occupying, using, trespassing, etc the suit land.

The respondents' averment in the replying affidavit that they live on the suit land has not been challenged. It follows therefore that the orders sought if granted would have the effect of a mandatory of injunction which would direct the respondents to vacate the suit property. It is now settled that mandatory injunction can be issued both at the interlocutory stage and at the trial. However, it will not issue at interlocutory stage unless in very clear and uncontroverted cases.

In this case, the respondents live on the suit land which they claim they are entitled to. They cannot be excluded from it by an order of injunction without any justification. But can a prohibitory injunction issue to restrain the respondents from doing the acts set out in the prayer reproduced in the previous paragraph?

First, the applicant has to demonstrate that she has a *prima facie* case with a probability of success at the trial. Secondly, it must be borne in mind that an interlocutory injunction will not normally issue unless the applicant stands to suffer irreparable loss which is not capable of being compensated in damages if the injunction is not issued. But in case the court is in doubt then the matter must be decided on a balance of convenience.

While considering whether the application has a *prima facie* case the court is not called upon at this stage to make any definite findings of either points of law or facts. What constitutes *prima facie* case was considered by the Court of Appeal in the case of Mrao Ltd V. First American Bank of Kenya Ltd (2003) KLR 125. It is a case in which, on the material available to a court, it can be concluded that the applicant's right appears to have been infringed by the respondent as to require the latter to explain or rebut the allegation.

In paragraph 7 of the applicant's plaint, she has deposed that there are no proceedings pending between her and the respondents. That is not true in view of the pending application for revocation of the grant. Coming to a court of equity the applicant has failed to demonstrate outmost good faith. Secondly, the applicant has not rebutted the respondents' assertion that they are entitled, just like her, to the suit land. Similarly, she has not displaced the averment that the respondents live on the suit land.

For these reasons, the applicant, besides being undeserving of an equitable relief, has also failed to demonstrate that her suit has any chance of success. In view of the fact that the respondents live on the suit land and the dispute being land-related, I find that an award of damages will not be adequate compensation and further that the balance of convenience is in favour of the respondents.

In the result, the application dated 11th April 2008 is dismissed with costs.

Dated and delivered at Meru this 14th day of November 2008.

W. OUKO

JUDGE