



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

Civil Case 101 of 2004

KASSIM ASSENA GOHALE.....PLAINTIFF.

VERSUS

JAVAN OGADA CHALI.....DEFENDANT.

R U L I N G.

The defendant has brought an application pursuant to the provisions of sections 3 and 3A of the Civil Procedure Act.

He asks this Honourable court to execute the transfer forms or any other relevant documents, which would enable him to have the suit property, LUGARI/LIKUYANI/BLOCK 1/VIHIGA 248, transferred to his name.

When the application came up for hearing on 6th March, 2007, the plaintiff and his advocate were not in court. However, after perusing the affidavit of service sworn by Monica Njuguna on 9th November, 2006, I was satisfied that the plaintiff's advocates had been duly served: I therefore permitted the defendant to prosecute the application.

The defendant informed the court that the plaintiff had declined to sign the transfer forms for the suit property. He also said that, notwithstanding instructions issued by the District Officer, Likuyani, the plaintiff had failed to attend before the Land Control Board.

Therefore, defendant had now come to this court, in the hope that it could execute the requisite transfer forms, which would enable him transfer the property to his name.

When giving consideration to the application, I noted that the plaintiff's claim, as expressed in the plaint, was for an order that he was the sole and registered owner of the suit property. He therefore sought an eviction order against the defendant.

In answer to the suit, the defendant not only pleaded, in his defence, that he had bought the said property; but he also lodged a counterclaim in which he claimed 0.3 acres, which was to be curved out from the suit property.

The Defence and Counterclaim was filed in court on 23rd November, 2004.

Although it is not clear from the court records when the plaintiff was served with the said Defence and Counterclaim, it is clear that on 24th November, 2004, the plaintiff filed an injunction application, under a

certificate of urgency.

Through that application, the plaintiff sought an injunction to restrain the defendant from wasting, damaging, felling trees, erecting structures, selling or in any other way, committing acts of waste or nuisance as to defeat the plaintiff's right to the suit property.

The plaintiff also sought the striking out of the Defence and Counterclaim, as well as a mandatory injunction to remove the defendant from the land.

After giving due consideration to the application, the court dismissed the same. One of the reasons cited by the learned Judge for the dismissal of the plaintiff's application was that the applicant only wanted to;

“hound the respondent out of the land which he has been occupying for the last 11 years, with his consent. He should wait until the main suit is heard and determined.”

It is after that ruling that the defendant brought the present application.

Perhaps the defendant gained the courage to bring the application from the fact that the court had dismissed the plaintiff's application. I say so because the mutation form annexed to the applicant's affidavit is dated 23rd October, 2003. In other words, it predated the institution of these proceedings.

But I do also note that on 12th September, 2006, the District Officer, Likuyani Division, wrote to the plaintiff requiring him to sign the requisite transfer forms, in favour of the defendant, before the Land Control Board meeting scheduled for 28th September, 2006.

Even though the plaintiff is said to have failed to sign the transfer forms or to attend the Land Control Board meeting, I do not think that that alone is sufficient reason to have the court sign the transfer forms.

In my considered view, just like the plaintiff was told to await the determination of the main suit, the defendant must also await the said determination.

If the court were to sign the transfer forms before the substantive suit is heard and determined, that would imply that it had already come to the conclusion that the counterclaim was successful. It would also imply that the plaintiff's claim was not successful.

I am afraid that the defendant must face up to the fact that until the competing legal claims by the two parties herein are determined, successfully in his favour, it would be premature for this court to execute the transfer forms, so that the suit property can be transferred to his name.

Accordingly, there is no merit in the application dated 9th November, 2006. It is thus dismissed, with costs in the cause.

The reason why the plaintiff has not been awarded the costs of the application is that he neither filed any papers in answer thereto, nor did he attend court to oppose it.

Dated and delivered at Kitale this 21st day of March, 2007.

FRED A. OCHIENG.

JUDGE.