



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Case 31 of 2007**

**BENJAMIN ABURUKI.....PLAINTIFF**

**VERSUS**

**SAMWEL KILINGO.....DEFENDANT**

**RULING**

The applicant herein brought a suit against the respondent on 4<sup>th</sup> April, 2007 seeking eviction and an order of injunction to restrain the respondent by himself, servants, and/or agents from entering, remaining or otherwise interfering with the applicant's land Ref.No.3425, Ankamia.

The applicant is also seeking damages and *mesne* profit, costs and interest. As is now the practice, with the plaint the applicant simultaneously brought Chamber Summons in which he seeks temporary injunction to restrain the respondent in term of the prayers in the plaint. That application is the subject of this ruling.

The applicant has sworn an affidavit in support of the Chamber Summons in which he has averred that he is the legal owner of parcel of land Ref.No.3425, Ankamia (suit property). That in the month of July, 2006 the respondent trespassed upon the suit property and began to dig a pit latrine. The applicant reported the matter to the local area Assistant Chief, the police at Mikinduri and the Land Adjudication Officer.

The respondent was not deterred and proceeded with his trespass and damage to the suit property, prompting the applicant to seek the consent of the Land Adjudication Officer in order to bring this suit.

The respondent has replied to this application arguing that he has lived on the portion of land in dispute all his life without knowing that it was annexed to the applicant's land. He further states that he has permanent houses on the disputed portion of land. That he was simply repairing an old latrine on the portion when the applicant began to protest. He adds that he complained to the Demarcation Officer who summoned the parties to appear before him but the applicant failed to attend. That the police visited the disputed land and confirmed that the respondent has settled on it. The respondent concludes that the dispute is pending before the Demarcation Officer and the Committee. Those are the rival arguments which I must now consider before deciding whether or not to issue restraining orders.

The applicant and respondent are neighbours. It is the applicant's case that the respondent has encroached on his land (the suit property) and is constructing a latrine. The respondent on the other hand maintains that he has been in occupation of the disputed portion of the suit property all his life, and that

he was simply repairing an old latrine.

Looking at the map, annexed by the applicant it is clear that the boundary between the suit property and the respondents land – No.2496 is a straight line. There is, however, a suggestion by the respondent that the portion in dispute, measuring 0.22 acres, protrudes into the suit property. Indeed in the map annexed to his replying affidavit the respondent has marked the rectangular area which extends into the suit property. For an injunction to issue, it is now settled, on the authority of Giella V Cassman Brown & Co.Ltd(1973) E.A 358 the applicant must establish a *prima facie* case with a probability of success, but in case of doubt, the balance of convenience must be sought. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

The correct approach in dealing with an application for injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. In this application I have not been called upon to decide the parties rights. A *prima facie* case is established in a civil case where the applicant demonstrates the existence of a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

See Mrao Ltd V First American Bank of Kenya

2 Others(2003) KLR 125. Has the applicant shown a right which the respondent appears to have infringed?

The land in dispute is located in Ankamia Adjudication Section. What is the position of adjudication in the area? According to the respondent the adjudication register has not been closed. But the applicant maintains that the process is complete and only the issuance of title deeds is remaining.

From the annexures both to the application and the replying affidavit it is clear to me that the respondent has built on the portion of the suit land in dispute. It is also clear that before this suit was instituted there were attempts at settling the dispute by the Demarcation Officer and the Land Adjudication Officer. According to a letter written by the Land Adjudication Officer to the OCS Mikinduri Police Station, the former has clearly indicated that the section was at the time of writing that letter on 5<sup>th</sup> March, 2007 under demarcation stage.

That being so, Part III of the Land Adjudication Act (Cap 284) is applicable. Ankamia area is an adjudication section. The applicant's claim to the portion in dispute was rightly referred to the Land Adjudication Officer under Section 13 of the Land Adjudication Act to resolve the ownership of that portion.

I find that the institution of this suit, although with the consent of the Land Adjudication Officer, was premature. It is not clear to me why the Land Adjudication Officer changed his mind after commencing arbitration.

Secondly, I have found that the respondent occupies the portion in dispute and has a house and latrine on it. The orders sought, if granted would have the effect of evicting him and his family before the main suit is heard and determined on merit. It is settled law that such an order, mandatory in nature, can only issue at interlocutory stage in very clear and special circumstances.

This is not one of those clear cases. There are no special circumstances. In the result I come to the conclusion that the applicant has not demonstrated a *prima facie* case with a probability of success.

Secondly the balance of convenience tilts in favour of the respondent who is in occupation. Finally the applicant stands to suffer no injury if orders he has sought are not granted as the disputed portion has been in possession of the respondent.

For all these reasons, the applicant's Chamber Summons dated 2<sup>nd</sup> April, 2007 is dismissed with costs.

Interim orders issued on 19<sup>th</sup> April, 2007 are also discharged.

DATED AND DELIVERED AT MERU THIS 24<sup>TH</sup> DAY OF MAY 2007.

W. OUKO

JUDGE