REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

Civil Suit 204 of 2006

PETER SARAI WEKHOMBA.....PLAINTIFF

V E R S U S

1. **VICTOR NABWERA**
2. **EVANS MULONGO**
3. **ROBERT MAKANYANGA.....DEFENDANTS**

R U L I N G

This is a case between a father and three of his sons.

It is the plaintiff's case that he was an allottee and a Licencee of ***KONGONI SETTLEMENT SCHEME*** plots Nos. 161 and 162 which he says were allotted to him by the Settlement Fund Trustees in 1966.

By virtue of the said allotment, the plaintiff asserts that he is the owner of the two plots.

That notwithstanding, he accuses the defendants, who are his adult sons, of ganging – up against him, to deprive him the use of the plots. He says that the defendants had used tractors and people to plough the said plots, to his exclusion.

According to the plaintiff, the defendants lodged a complaint with the Chief of Kongoni Location, that the Plaintiff had denied them the right to plough or to put up shelter on the disputed plots. The Chief then wrote to the plaintiff on 20th February, 2006, asking him to attend at the Chief's office, to enable the Chief attend to the complaint, that the plaintiff had leased out all the plots, without the consent of his family.

The plaintiff did not attend before the Chief on 27th February 2006, as he had been asked to do the explanation, on oath, is that he did not have any dispute with the defendants.

His explanation is that he has five wives and a large family. Therefore, he feels that if the injunction sought herein was not granted, the rest of the big family would suffer.

In support of the application, the plaintiff annexed minutes of a clan meeting held on 18th March 2006. According to him, the meeting resolved that he was the owner of the two plots in issue.

However, the defendants vehemently denied the existence of the alleged meting. Instead, they accused the plaintiff of always failing to attend any family meetings which were intended to sort out disputes about the land in question.

The defendants also said that whenever the plaintiff attended any family meetings, he caused the same to be disbanded.

I have perused a copy of the said minutes, and noted that a total of 25 persons were invited to the meeting. The said invitees included the plaintiff, the defendants, eighteen sons of the plaintiff, and the plaintiff's three wives. However, it is not clear how many of those who were invited actually attended the meeting.

A scrutiny of the contents of the minutes suggests that the 1st defendant, Victor Nabwera was at the meeting, and so also his mother Loise Muyoka Masai. It would also appear that David Mwangale Wekhomba was present.

However, the 1st defendant has sworn an affidavit expressly denying ever attending the alleged meeting.

After giving due consideration to the minutes, I have formed a prima facie impression that the defendants version of events appears more likely than the version given by the plaintiff. In other words, it appears more likely than not that the alleged meeting did not take place.

I say so because although the plaintiff asserted that the meeting was chaired by the Chairman of the Kololi clan, Mr. Johnstone Khisa, the said chairman did not sign the minutes.

Also, it is noteworthy that parts of the said minutes are recorded in the first person singular, as if they were words being stated by the plaintiff. That portion of the minutes suggests that the same were recorded by the plaintiff, and that they were reflective of her views, as opposed to being a record of a meeting which had other particulars.

Meanwhile, the plaintiff has deponed that he did not attend at the Chief's office on 27th February 2006, because he did not have any dispute with the defendants.

In the circumstances, it is thus very strange that by 18th March 2006, the chairman of the clan had convened a meeting to discuss; at length, issues pertaining to the ownership of plots 808, 161, 162 and 167.

And whilst the minutes indicate that Victor Nabwera and his mother, Mrs. Loise Muyoka Masai made some concessions, neither of them signed the minutes. One would have expected that the said two persons should have signed the minutes, as a sign of their acknowledgement of the concessions which they had allegedly made.

Another strange aspect of the minutes is that whilst a portion thereof reads as if it was recorded by the plaintiff, the resolutions suggest that it was otherwise I say so because the first joint resolution was in the following terms;

> "***1. Our father owns the land."***

Now, supposing that the plaintiff was a participant at the meeting, that resolution would be meaningless, as he and his sons do not share the same father.

Furthermore, if the plaintiff's three wives or any of them attended the meeting, they would not be in a position to talk about one father, who they also shared with their sons and their husband.

For those reasons, I find that the minutes are suspect, and I therefore reject them.

But, in the same vein, the question still remains whether or not the plaintiff had established a prima facie case with a probability of success against the defendants.

In order to be able to consider that issue, the court must first take note of the prayers in the plaint. The same are as follows:

"(a) ***That the Defendants/ their families/agents/servants/workers and or anybody working under their instructions be evicted from the suit premises***.

(b) ***That the Defendants/their families/agents/workers and or anybody working under their instructions he injuncted from trespassing/ploughing/planting and or in any other way from dealing at the said plots."***

The plots cited in the plaint were numbered 161, 162 and 167, altogether which are said to measure approximately 92 acres. The application is however limited to plots Nos.161 and 162, after the applicant deleted therefrom plot No. 167, although that has no bearing on this application.

My concern is that there is an order in ***LOIS MUYOKA WEKHOMBA - V- PETER KITUI S. WEKHOMBA, KITALE H.C.C.C NO.101 OF 2006***, restraining the plaintiff herein from interfering with the plot on which stands the house occupied by the defendants' mother, as well as any other land which the defendants' mother has been utilizing for her livelihood.

The defendants claim to be in occupation of the land by virtue of the fact that they reside with their mother on the plots in issue.

As their said mother appears to be in occupation by virtue of an order of this court, I hold the view that it would be erroneous for me to find, as suggested by the plaintiff, that the defendants were trespassers onto the plots.

Of course, none of the defendants has laid any proprietary interests in the plots. That implies that they are not challenging the plaintiff's title to the said plots. But, insofar as the defendant's mother had obtained an order to restrain the plaintiff, it would be wrong to enable the plaintiff to utilize this case in order to go around the court order which is still in force in ***H.C.C.C.NO. 101 OF 2006.***

In arriving at this decision, I do concur with the views of the ***Hon. MUSINGA J***., in ***JOHN NDUNGU MURIITHI –VS- GIDEON KAREGWA NDUNGU & 5 OTHERS, NAKURU H.C.C.C NO.94 OF 2004,*** whereat the learned Judge said;

"***I believe the defendants displayed unmitigated greed and utter selfishness by either harassing their father in an attempt to force him to distribute amongst them his property during his life time or by openly showing him that they wished him dead so that they could inherit his property and divide it amongst themselves. This court cannot condone such conduct. I agree with the plaintiff that he is entitled to the declaration that he has sought from this court.In my view, the plaintiff is free to deal with his Property in whatever manner he chooses during his Lifetime and cannot be compelled by law or by the Defendants or otherwise to give any part thereof to anybody."***

That verdict was arrived at after a full trial between the plaintiff and the 6th defendant, who was the only defendant to have filed a defence.

Had the defendants herein made demands on the plaintiff, to sub-divide the land to them, I would have told them exactly what my learned brother said hereinabove. But the defendants have no such demands. It is their mother who lodged a claim, and has managed to obtain an order of injunction against the plaintiff herein. To that extent, this case is distinguishable from that in ***NKU H.C.C.C NO.94 OF 2004***.

Another issue for consideration is that whereas the Plaintiff has sought an injunction to restrain the defendants from ploughing and planting on the two plots, the plaintiff does not appear to be sure what the status on the ground was.

At paragraph 21 of his affidavit in support of the application, he says that the respondents have since ploughed the entire suit land.

Yet, at paragraph 22 of the same affidavit, the plaintiff says that the respondent had started ploughing, planting, and had threatened his workers.

As it is possible that the whole land had already been ploughed and a crop planted thereon, this court is unwilling to grant an order which might be in vain.

It is also evident, from the two prayers in the plaint, that the defendants were in occupation of the suit property, hence prayer that they be evicted therefrom. That being the position, I find that the balance of convenience tilts in favour of the defendants, because otherwise if they were to be restrained from utilizing the land which they appear to be in possession of, and from trespassing thereon, the court would have granted a mandatory injunction, in the guise of a prohibitive injunction. That would be irregular, in my view, as mandatory injunctions ought to be granted, in interlocutory applications, only in exceptional circumstances. I have found no such exceptional circumstances herein.

But would not a denial of the application occasion irreparable loss to the Plaintiff?

As already held herein, the defendants' mother did obtain an injunction to restrain the plaintiff. Although the scope of that injunction is the subject of further litigation, it forms the basis of the defendants' occupation of the suit land. In effect, any such loss as the plaintiff might suffer would be attributable to an order of this court, as opposed to the defendants' direct actions. Therefore, any such losses as the plaintiff might suffer can only be addressed through efforts to reverse the orders now in place, instead of through an application in a separate suit.

In the final analysis, but without purporting to so order, I think that the best way to resolve the issues herein may be through having them addressed simultaneously with the issues in ***H.C.C.C NO. 101 OF 2006 (O.S.).***

For all those reasons, I find no merit in the application dated 8th March, 2007. It is therefore dismissed with costs.

Dated and Delivered at KITALE this 8th day of May, 2007.

FRED A. OCHIENG

JUDGE