



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 25 of 2007

KIPLEL ARAP KIPRUGUT PLAINTIFF

VERSUS

ELIJAH MALAKWEN LELMENGIT DEFENDANT

RULING

The Plaintiff filed this suit on 20th February, 2007 seeking the following orders against the Defendant:-

- (a) An order of permanent injunction restraining the Defendant, his agents, servants and dependants from entering, remaining on, ploughing, planting, leasing, digging, sub-dividing, charging, surveying, or erecting structures or in any way dealing with the Plaintiffs parcel NANDI/ITIGO/88.
- (b) In the ALTERNATIVE AND WITHOUT PREJUDICE to prayer (a) above – eviction of the Defendant, his agents, servants, and or dependants, from the Plaintiff’s parcel NANDI/ITIGO/88.
- (c) An order of removal of caution lodged by the Defendant against parcel NANDI/ITIGO/88.
- (d) Cost of this suit with interest.
- (e) Such other or further relief the Honourable Court may deem fit to grant.

The Defendant filed his Defence on 27th March, 2007. In the Defence in paragraph 4, the Defendant claims that he has been in occupation of the land for a period of more than 16 years and has developed it and has therefore acquired the same by operation of law.

The Defendant has now filed this application seeking inter alia, orders to restrain the Plaintiff, his agents and/or servants by way of a temporary injunction from wasting, damaging, alienating, charging, mortgaging, selling, tilling, removing, disposing of or in any way dealing with all that parcel of land known as NANDI/ITIGO/88 pending the hearing and determination of this suit.

The Defendant in his affidavit depones that in the month of April, this year he hired a tractor to plough the land, when the Plaintiff threatened violence and chased away the owner of the tractor. He is now likely to lose this year’s harvest as the planting season is almost over.

The application is opposed by the Plaintiff who denies all the allegations of interference with the suit premises. He however admits that he did tell the tractor driver to stop ploughing the land till the suit is heard and determined.

I have carefully considered the application, the affidavits and the submissions by Counsel. While the Defendant has asserted that he is entitled to be on the suit premises on the ground basis that he has been in occupation for the last 16 years and has acquired ownership by operation of law i.e. by adverse possession, there is no counter-claim for such a relief in this suit. The court has also not been told that there is any other pending suit in this respect.

The application is made under the provisions of Order 39, Rule 2 A (2) of the Civil Procedure Rules. I have carefully considered the provisions of Order 39 of the Civil Procedure Rules. It is clear that the relief of temporary injunction pending the hearing of a suit is only available to a Plaintiff against a Defendant. One must have a suit or claim in respect of a property before any injunctive orders and the provisions of Section 39 can be considered and granted. There is no contemplation that a Defendant who has no counter-claim can invoke the said provisions.

Where a Defendant has a counter-claim in respect of a property e.g. specific performance, adverse possessions etc, then, in respect of such a counter-claim he is a claimant and is in the same position like a Plaintiff. In such a situation, such a Defendant would be entitled to apply for temporary orders of injunction to preserve the suit property etc.

In the present case here is the Defendant has not set up any counter-claim for adverse possession or otherwise. In the premises, I do hereby hold that the orders of a temporary injunction are not available to the Defendant in this case.

Be that as it may, the Plaintiff filed the suit herein seeking the Court's Orders for, inter alia, eviction of the Defendant from the suit. The suit is now pending and has yet to be heard. It would be an abuse of the Court process if the Plaintiff now purports to use this case to interfere with the Defendant's use and occupation of the suit premise before the determination of this suit.

This Court has inherent discretion and jurisdiction to ensure that the dignity of the Court is maintained and that the judicial process is not abused. Having submitted himself to this Court, the Plaintiff must await the outcome of the suit and cannot in any manner interfere with the subject of the suit. As a result in exercise of this Court inherent discretion and original unlimited jurisdiction, I do hereby order that the parties do maintain the status quo existing at the time the suit was filed which includes the fact that the Defendant has the user and occupation of the suit premises. This shall be until the hearing and determination of the suit herein. Costs shall be in the suit.

DATED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF JUNE, 2007.

M. K. IBRAHIM

JUDGE