



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

Civil Case 158 of 2001

DAVID KINJA PLAINTIFF

VERSUS

JOSEPH KAIBI 1ST DEFENDANT

GEOFFREY M'ITABU 2ND DEFENDANT

RULING

This is an application for injunction and inhibition under Order 39 rules 1, 2 and 3 of the Civil Procedure Rules and Section 128 of the Registered Land Act. It is based on the grounds that this suit in which the applicants have been sued by the respondent is pending arbitration.

The suit seeks to restrain the applicants by an order of permanent injunction from any dealing with Ithima/Anutambui/3476. The applicants have averred that while that arbitration is pending the applicants have receive information from what they term reliable source that the respondent is planning/threatening to dispose of suit land.

That the applicants and their families reside on the suit land and will be rendered homeless should the respondent proceed with the sale.

The respondent in his replying affidavit has insisted that since the application seems to question the arbitrator's failure to perform his duties, it ought to have been served upon the arbitrator.

He maintains that he has not encroached on the applicants' land (that is, the suit land). He is relying on a map drawn by the District Surveyor and the District Land Registrar, Meru North District.

These grounds were canvassed before me on 24th May, 2007. I have considered the arguments advanced by each party. It is apparent to me from the record that, although the dispute was referred to arbitration by consent of the parties, it did not infact go for arbitration due to what counsel for the parties referred to errors in the consent order. But clearly there is a boundary dispute between the applicants and the respondent.

It is the applicants' contention that the respondent is planning to dispose of the suit property during the pendency of this suit. The respondent has, on the other hand denied these allegations.

I must consider these contentions and the submissions in light of the usual principles for the grant of an interlocutory injunction as enunciated in Giella V Cassman Brown & Co.(1973 EA 358. Briefly stated these principles are, first the applicant must demonstrate a *prima facie* case with a probability of success

at the trial. In determining this question I must steer clear of making definite findings either of facts or of law at this stage as doing so would amount to determining the suit at interlocutory stage.

But I must be satisfied that there is a *prima facie* case as defined in Mrao Ltd V First American Bank of Kenya

2003) KLR 125.

Secondly, an injunction will normally not be granted where an award of damages would be sufficient compensation. It does not follow that invariably in all applications for injunction the relief will not be granted if damages would be adequate remedy. There are instances where an injunction will nonetheless issue even if it can be shown that an award of damages would be sufficient. See Lucy Njoki Waithaka V ICDC HCCC No.321 of 2001 cited with approval in Muigai V Housing Finance Co.of Kenya Ltd & Another. (2002) 2 KLR 332 at page 336.

The final consideration which really is an alternative to the first two conditions, is that where the court is in doubt, the application ought to be considered on a balance of convenience.

Turning to the application before me and applying these principles, have the applicants shown that they have a *prima facie* case?

What they intend to stop is the dealing with the suit land by the respondent. They are apprehensive that the latter will sell the property to their detriment. Their apprehensions is based on "...information from a reliable source"

Two issues emerge from this. What was the source? And secondly what steps has the respondent taken towards the disposal of the suit property? It is a mandatory requirement of Order 18 rule 3 of the Civil Procedure rules that affidavits must be confined to such facts as the deponent is able to prove of his own knowledge, although in interlocutory applications, like this one, the deponent can aver to matters of information either with leave of the court or by disclosing the source and ground of the information. It was therefore not enough for the applicants simply to rely on undisclosed source. Of course they did not have leave.

The applicants have also failed to demonstrate clear steps taken by the respondent, for example, the details of any would-be purchaser, towards disposal of the suit land.

For these reasons I come to the conclusion that the applicant's have not satisfied me that they have a *prima facie* case.

The dispute relates to land, an emotive asset in Kenya today. It is also appreciated that no two parcels of land are the same. Damages may not be sufficient remedy but since the applicants have no *prima facie* case the application must fail.

For the same reasons as explained in the foregoing paragraphs an order of inhibition cannot issue.

In the result this application is dismissed with costs to the respondent.

DATED AND DELIVERED AT MERU THIS 13TH DAY OF JULY, 2007

W. OUKO

JUDGE