



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT 91 OF 2005

ANDREW KETER KIRUI ..... PLAINTIFF

VERSUS

ALI HASSAN KETER ..... DEFENDANT

RULING

The Plaintiff, Andrew Keter Kirui filed suit against the defendant Ali Hassan Keter seeking orders of eviction against the defendant. At the time of filing suit, the Plaintiff also made an application for injunction seeking to restrain the defendant his agents or any other person acting under his authority from trespassing into, erecting any structures or cultivating any crops or occupying all that parcel of land known as KERICHO/KIPCHIMCHIM/2366 (hereinafter referred to as the suit land) pending the hearing and determination of the suit. The grounds in support of the application are that the plaintiff claims that he is the absolute registered owner of the suit land. He further claims that the defendant without any colour of right had forcefully entered into the suit land and has continued to occupy the same and thus prevented the plaintiff from taking possession and enjoying the use of the same. The plaintiff prays for the orders of this court of injunction so that the tension that has been existing between him and the defendant may be dissipated. The application is opposed. The defendant has filed a replying affidavit opposing the application. In the said affidavit he has stated that the plaintiff who is his half brother had disinherited him and further had wanted to take the suit land which the defendant had been in occupation since his birth. He avers that the plaintiff obtained title in respect of the suit land fraudulently. He therefore urged this court to dismiss the application.

At the hearing of the application, I heard the submission made by Mr. Matwere learned counsel for the plaintiff and Mr. Nyawencha learned counsel for the defendant. Mr. Matwere submitted that the plaintiff was the registered owner of the suit land having inherited the same from his grandmother before her demise. The plaintiff submitted that the suit land was never at any time the property of their father and therefore did not form part of his estate when he died. He submitted that although the defendant was in occupation of the suit land, he had no right whatsoever over the same. He urged this court to allow the application as prayed as the plaintiff had demonstrated that he is entitled to the said suit land. He submitted that the defendant had threatened to take over the ownership of the suit land and thus had caused tension within the family. The defendant has caused the plaintiff distress. He urged the court to allow the application as prayed.

Mr. Nyawencha learned counsel for the defendant submitted in opposition to the application that the suit land was fraudulently transferred to the plaintiff. He submitted that the suit land was family property which the plaintiff had cleverly omitted from the succession proceedings in respect of their deceased father's estate. The defendant submitted that he had been residing in the suit land with his younger siblings. To allow the application in his view would result in the defendant being disinherited from what is lawfully due to him as inheritance from his father. Mr. Nyawencha submitted that the supplementary affidavit filed by the plaintiff was incompetent because the affidavit and the annexures thereto were sworn by different persons. He further submitted that the balance of convenience tilted in favour of the defendant because he was currently residing on the suit land. He urged the court to dismiss the application with costs.

I have carefully considered the arguments made by the parties to this application. The issue for determination by this court is whether the plaintiff has established a case to enable this court grant him the orders of injunction sought. The suit land is registered in the names of the plaintiff. That fact has not been disputed by the defendant. The defendant however, avers that the suit land was fraudulently transferred to the plaintiff. The defendant further submits that the suit land was family land which ought to have been listed as being among the properties of their deceased father in *Kericho HC Succ. Cause No. 21 of 2002*. The defendant states that he resides on the suit land. This fact has not been disputed by the plaintiff. Indeed the thrust of the plaintiff's application is to secure orders of this court for the purposes of removing the defendant from the suit land.

Having considered the facts of this case, it is clear that what the plaintiff is actually seeking from this court is a mandatory injunction and not an interlocutory injunction. The plaintiff has conceded in his pleadings that the defendant is in occupation of the suit land. From the submissions made, it is evident that the defendant has been in occupation of the suit land since before the death of their father. Although the plaintiff claims that the suit land used not to belong to their father but rather to their grandmother who transferred the same to him during the lifetime of their father, what is clear is that there is dispute as to the circumstances under which the said transfer was made.

That dispute can only be resolved by this court hearing the parties in a full trial. The status quo on the ground is that the defendant is in occupation of the suit land. The plaintiff admits this fact. This court cannot therefore grant injunction to enable the plaintiff get possession which he did not have at the time of filing the suit. Although the plaintiff is a registered owner of the suit land, the circumstances under which he got registered is an issue which will be determined by the court during the hearing of the main suit in a full trial.

In the circumstances of this case I do hold that the plaintiff has failed to establish a prima facie case so as to entitle this court to grant him the orders of the injunction sought. The plaintiff had filed a suit for eviction. He recognizes the fact that he does not have possession of the suit land. The orders sought in this application should be ventilated in the main suit. From my evaluation of the affidavit evidence herein, it is clear that the issues of the registration of the plaintiff as the owner of the suit land are intertwined with the issues of succession of the plaintiff's and the defendant's father's estate.

The defendant is in occupation of the suit land. This court cannot grant an interlocutory injunction to upset the *status quo*. Orders of interim injunction are only granted to maintain the *status quo* on the ground pending the hearing and determination of the main suit. In the premises therefore the application for injunction fails and the same is dismissed with costs.

**DATED AT KERICHO THIS 10<sup>th</sup> DAY OF February, 2006.**

**L. KIMARU**

**JUDGE**