REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 14 of 2006 (OS)

DAVID MUTURI MIGWI ….....…… PLAINTIFF

VERSUS

SALLY JEMELI KORIR …… 1ST DEFENDANT

JUDITH C. KORIR …… 2ND DEFENDANT

R U L I N G

David Muturi Migwi, who is the applicant herein seeks an order to restrain Sally Jemeli Korir and Judith Korir from alienating, transferring, interfering with or in any other way dealing with his four acres of land, known as UASIN GISHU/ILLULA SETTLEMENT SCHEME/567/90 ("subject property") pending the hearing and determination of his suit against the two.

He bases his application on the grounds that he acquired the subject property in 1986 from Yusuf Chepkeitany Korir, who was its original allottee and who is now deceased. It is also his ground that he has been in occupation of the land since the said acquisition, and he therefore avers that though he has a right to the said land by way of adverse possession, both Jemeli and Judith who have now obtained Letters to administer the Estate of the late Yusuf Chepkeitany have encroached into the same land and have threatened to evict him, an act which he claims, will result in irreparable loss and damage.

The application is however opposed by Jemeli and Judith who I shall now refer to as "the respondents". It is their contention that the subject land forms part of the Estate of the late Chepkeitany.

Migwi, who has attached the relevant agreement for sale of the subject land, had initiated this suit by way of an originating summons, taken out under Order XXXVI rule 7 of the Civil Procedure rules.

In an application of this nature, it is for the applicant who calls upon the Judge to exercise his discretionary powers, to establish that he has a prima facie case with a probability of success. It is important to note that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which will not be compensated by way of damages. Where in doubt, the court should decide the application on the balance of convenience. Such was the principal as well laid down in the case of Geilla v. Cassman Brown & Co. Ltd [1973] EA 358.

I have perused the pleadings herein and I do note that the applicant, who as stated earlier, has attached the agreement for the sale (entered into between him and the late Chepkeitany) to his supporting affidavit; I also note that he is in possession of the subject land, which fact has not been controverted by the respondents.

In my opinion, and based on the pleadings on record, I form the opinion the applicant has a prima facie case with a probability of success and in view of the said developments and long occupation, damages may not be an adequate remedy.

But even if I am wrong in the above finding, the balance of convenience tilts in favour of the applicant who has been in occupation of the land which he also claims to have developed considerably.

I do therefore find that this application is meritorious and I do grant him an order in line with his prayer 2.

Costs shall however be in the cause.

Dated and delivered at Eldoret this 7th day of March 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

No appearance for either party.