



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

CIVIL SUIT NO. 37 OF 2006

ALEXANDER NGABU MUTHEE PLAINTIFF

VERSUS

**ESTHER MUTHONI
DEFENDANT**

RULING

Alexander Ngabu Muthee who claims to be registered proprietor of Uasin Gishu/Kimumu/297 (“the subject property”), has filed this suit against Esther Muthoni in which he prays for a declaration that he is the sole registered proprietor of the subject property and in which case, Muthoni is not entitled to trespass into, enter, cultivate and or carry out any other activity on therein. Apart from costs and interest, he also seeks a permanent injunction to restrain her from trespassing, occupying, cultivating, construction thereon or otherwise interfering with the said property.

He bases his suit on the fact that being the sole registered proprietor, and for that matter being the first registered owner of the subject property, he is entitled to enjoy quiet possession and use of the land, and all the rights and privileges belonging or appurtenant thereto to the exclusion and without interference from anybody else. He claims that Muthoni has interfered with his quiet enjoyment of the subject property, which act led to the filing of this suit.

He has simultaneously filed this application which is now before me, in which he seeks an order to restrain Muthoni from interfering in any manner, with the subject property pending the hearing and determination of the suit.

Though Mr. Mbugua, learned counsel for the respondent had filed his notice of Preliminary Objection, he had not served it upon the applicant’s counsel, and he could therefore oppose the application on pure grounds of law.

The guiding principle in an application of this nature was well laid down in the case of Geilla vs. Cassman Brown & Co. Ltd [1973] EALR 358, which are:

- Ø *that the applicant must show that he has a prima facie case with a probability of success;*
- Ø *that he stands to suffer irreparably should the order which he seeks not be granted; and*
- Ø *that damages would not be an adequate remedy.*

When the Court is in doubt it should decide the application on the balance of convenience.

Mr. Mbugua has taken issue with the jurisdiction of this court and he relied on section 159 of the Registered Land Act which stipulates that “*Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate’s Court, or, where the dispute comes within the provisions of Section 3 (1) of the Land Disputes Tribunal Act in accordance with that Act.*”

In my view, the issue of jurisdiction would have been easily determined had he provided evidence of the value of the subject property. In view of the fact that he did not produce such figures I am inclined to agree with Mr. Gicheru, that the property, which is situated within the Eldoret Municipality is worth more than that envisaged in the aforementioned section, and I hold that this court has the jurisdiction to hear and determine this matter.

After taking the submissions of both counsel into account, I find that it is not in dispute that the applicant has been the registered owner of the subject property since 21/12/1989. The respondent who admits that proprietorship in her defence however avers that she claims ownership of the same on the basis of the fact that her late husband placed her on the subject property and that she has had exclusive possession of the same since 1992.

In my humble opinion, the issues which Muthoni raises are matters of evidence, which will be dealt with and determined during the trial.

In the meantime, he who has demonstrated that he has title to the property, which appears to be an indefeasible title by virtue of the fact that he claims to be the first registered owner, a fact which has not been challenged, should have exclusive possession of the subject land until the contrary is proved. Indeed his rights are well catered for under section 27 (a) of Registered Land Act Cap 300 of the Laws of Kenya, which stipulates that “*subject to this Act-*

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

Muthee has demonstrated and I am convinced that he has a prima facie case with a probability of success against Muthoni who has not in any event demonstrated that she has the locus standi to appear in this matter on behalf of her late husband, under whom she claims a right to the property. In any event, the fact that he has shown that the save for the trespass, the parcel is otherwise vacant, would tend to tilt the balance of convenience in his favour.

I do find that this application is meritorious and I do grant the applicant an order in line with his prayer (c).

Costs shall however be in the cause.

Dated and delivered at Eldoret this 12th April 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Mitei holding brief for Mr. Gicheru for the applicant

No appearance for the respondent