REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
Civil Case 16 of 2006

YUSUF M. KAKUKO .....PLAINTIFF.

VERSUS

WILLIAM PIRO KAKUKO

JONATHAN KAKUKO .....DEFENDANT.

R U L I N G.

The applicant Yusuf M. Kakuko filed this application THROUGH Kiarie & Co. Advocates seeking the following orders.

(a) That the defendants by themselves, their agents or servants be restrained from entering, trespassing, ploughing, cultivating, planting or in any other way interfering with the plaintiff's use of the plaintiffs/applicants land comprised in title No. WEST POKOT/KERINGET A/2538 while pending the hearing and determination of this application and the main suit."

(b) That the OCS Kapenguria to enforce the orders made herein.

(c) That costs be provided.

The application is premised on the 6 grounds on the face of the application and supported by the affidavit sworn by the applicant on 10/3/2006. He has also annexed the title Deed for the Land in question and a consent order dated 21/6/2000. This consent order was recorded in Kitale succession cause No. 13 of 1998. The 1st respondent William Piro Kakuko was a signatory to the said consent. This consent distributed the land belonging to the father of the parties herein. The court is informed that they are step-brothers. According to the consent, Title No. WEST POKOT/KERINGET 'A'/106 was to be sub-divided into 6 equal portions for the 6 houses of the deceased. The portion that went to the applicant's mother's house was registered in his name and it is the subject of this ruling. According to the applicant, the 2 respondents who had been working on that portion refused to give him vacant possession and they have been utilizing approximately 9 acres of his portion since 2003. He has filed this suit for costs of user for his said plot since year 2003, but pending the hearing and final disposal of the main suit, he filed this application.

On their part, the respondents have opposed the application. The 1st Respondent in paragraph 5 of his replying affidavit has admitted being in occupation of the plot in question. He claims that he has already planted and so he cannot be restrained from ploughing or planting on the portion as prayed by the applicant. He claims that his homestead is on the said plot. He says that the granting of the injunction will not be in the interests of justice since they are all family members.

The applicant has however denied that any of the respondents stays on the plot in question. He says

that their homesteads are elsewhere and that they just cultivate the said portion. This according to his counsel explains why they have not applied for orders of eviction against the respondents.

He claims that they have not even ploughed the plot for this year. According to Mr. Kiarie for the applicant, if the injunction is not granted, the applicant is likely to suffer irreparable loss, which cannot be compensated by way of damages Ms. Munialo for the respondents however submitted that the fact that the plaintiff/applicants claim itself is for compensation shows that the loss he is likely to suffer in the event the injunction is not allowed can be compensated by way of damages.

Both counsel cited several cases on this subject of injunctions.

I have been informed accordingly by these decisions.

As a starting point, I wish to observe that the Respondents do not deny that the plot in question rightly belongs to the applicant herein. What they say is that he obtained the title deed without the consent of the other family members. I have looked at the statement of defence filed by the defendants/respondent on 17/3/2006. They have not prayed for a cancellation of the said Title Deed. Nor have they counterclaimed for the portion in question. This is why I say they have conceded that the plot belongs to the applicant. According to Mr. Kiarie, the respondent has not annexed any photographs to show that his homestead is in the plot in question. Nor has he shown that he has cultivated the same.

I have carefully considered this application along with the grounds and affidavits for and against it. I have also considered the oral address by counsel along with the authorities cited. As indicated earlier, the applicant has established that he is the registered owner of the plot in question. He has annexed a copy of a Title Deed, which the respondents have not challenged.

The only reason or excuse the respondents have for not wanting to move from the applicants plot is that in respondent's homestead is there and that he has ploughed for this season. This has been denied by the applicant. The court is at a loss as to who to believe. My view however is that even assuming the 1st respondents homestead fell within the applicant's plot after the sub-division following the consent order, he has had sufficient time to shift his homestead to his plot. Why has he not done so? Yet he has not lodged a claim on that portion? This makes me inclined to believe that his homestead is not in that portion. Indeed, if it was, what would have been easier then the plaintiff/applicant applying for eviction orders against the Respondents? On this point the balance tilts in favour of the applicant. The court should not assist the respondents to perpetuate an illegality just because he has been doing it for the last several years. My finding therefore is that the plaintiff/applicant has through his annexures proved that he owns the plot in question. This on itself shows that he has established a prima facie case with a probability of success as required under the principles enunciated in the well celebrated case of Giela vs Cassman Brown. I agree with Ms. Munialo that the plaintiff's claim is one for compensation and he can be compensated by way of damages. If the court were to deny him this injunction on the basis that he can claim for further damages against the defendants, this in my view would be perpetrating an injustice against him since the defendants know very well that they are utilizing the plaintiff's land while they have no right to do so at all.

The fact that damages can be paid for loss of user is not in my view on adequate remedy in these circumstances.

In this case, my finding is that the plaintiff/applicant had established a prima facie case with a probability of success. The balance of convenience also tilts in his favour. Accordingly, I find his application merited. I allow the same and grant the orders sought with costs. Orders accordingly.

W. KARANJA.

JUDGE.

Delivered, signed and dated at Kitale this …… day of April, 2006 in presence of:-