



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

Civil Suit 8 of 2006

HASHAM LALJI PROPERTIES LTD:.....PLAINTIFF

VERSUS

KIPCHOGE KEINO:.....DEFENDANT

RULING

In this application under the provisions of Order 39, Rules 2,7, and 9 of the Civil Procedure Rules, the plaintiff seeks inter alia the following Orders that:-

“ a)

b) This Honourable court do grant leave to the plaintiff/Applicant to forthwith enter upon and take possession of the suit premises known as Eldoret Municipality, Block 13/72 pending the hearing and determination of this application inter parties and pending the hearing and determination of this suit.

c) The defendant, his agents, servants and or anybody acting under him be restrained by an injunction from trespassing, wasting and or dealing in any way with the suit premises known as Eldoret Municipality/Block 13/72 pending the hearing and determination of this application inter parties and pending the hearing and determination of this suit.

d) If prayers (b) and (c) are granted, the Officer Commanding Eldoret police station do enforce the said orders.”

The plaintiff is the registered owner of the Land Parcel Number, Eldoret Municipality Block 13/72. It alleges that it has all along had exclusive possession of the suit property. The plaintiff claims that on or about 17th November,2005, the Defendant together with his agents and/or servants wrongfully entered and took possession of the plaintiff’s aforesaid property and have wrongfully and without any colour of right remained in possession thereof and have trespassed and continue to trespass thereon.

The application is opposed by the Defendant who has filed a Defence and counterclaim. The Defendant claims that sometime in 1973 he purchased the suit property from the plaintiff for a sum of Kshs.75,000/=. The Defendant says that he took exclusive possession and use of the suit property in 1973 and has had exclusive possession thereto to date. He adds that in March 2003 the plaintiff their agents and/or servants violently wrongfully unlawfully and without any colour of right entered the suit property and thereby forced the Defendant to share possession of the property with the plaintiff until 7th November,2005 when the plaintiffs, their agents and/or servants moved out.

In the counterclaim, the Defendant seeks in essence specific performance of a sale agreement by way of a declaration that he is the lawful and rightful owner of the property and an order compelling the plaintiffs to execute transfer of lease documents over the property in favor of the Defendant. The Defendant in its Replying affidavit has annexed an executed indenture but undated to show that he had purchased the property. The year it was made was 1974. However, the plaintiff in its Defence to the counterclaim denies that it ever sold the property to the Defendant and if any sale agreement was entered into then the same was entered with unauthorized persons and no consideration whatsoever has ever passed to the plaintiff.

Upon consideration of the pleadings, rival statements and submissions, it is clear that there is a serious dispute in this property. While the property is registered in the name of the plaintiff, yet there is an incomplete conveyance document purporting to show that the plaintiff sold the property to the Defendant in 1974 and had executed the transfer document but which has never been registered. From the plaintiffs own pleadings and affidavit, it is stated that the Defendant has been in possession of the suit property at least from 17th November, 2005 – albeit, wrongfully according to the plaintiff. The plaintiff filed this suit on 26th January, 2006, over two months later.

The question of possession of the property before 17th November, 2005 is contentious and I find that it is a matter that will have to be determined at the trial. It is not possible to determine the said question on the basis of the affidavits filed. What is certain is that at the very least the Defendant is currently in possession of the suit premises and was in such possession when the suit was filed. How he entered the premises and whether the same was wrongful or unlawful will have to be determined at the trial.

The Defendant was already in possession at the time the suit was commenced. As stated above, the date of entry and taking of possession by the Defendant is a heavily contested issue that will have to be determined in a fully – fledged trial. What the plaintiff seeks substantially is a mandatory injunction removing or evicting the Defendant from the suit premises and allowing it to enter upon and take possession of the same. In the case of **NDERU –V- KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY & ANOTHER (2003) KLR 160**, the Court of Appeal restated the principles upon which a mandatory injunction would be issued. The court referred to the decision in **LOCANBALL INTERNATIONAL FINANCE LTD –V- AGRO EXPORT & OTHERS (1986). 1 A11 E,R, 901** which stated as follows:-

“ A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstance, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction.”

As stated earlier the situation here regarding the circumstances of the possession is not clear. The Defendant has also set up a counterclaim and produced documents that suggest the possible existence of a sale agreement between the parties. The plaintiff’s claim at this stage cannot be said to be **“clear and incontrovertible”** in the case of **MALINDI AIR SERVICES –VS- HALIMA ABDINOOR HASSAN**, The court of Appeal in Civil Application No. NAI. 202 of 2002 stated:-

“A mandatory injunction at an interlocutory stage is rarely granted, only when the plaintiff’s case is clear and incontrovertible.”

In the circumstances, this is clearly not an appropriate case in which mandatory injunction would be granted. I do not feel a high assurance that at the trial it would appear that such an injunction had rightly been granted. The case could go either way and it is best that all these issues are decided at the trial.

As a result, I do hereby decline to grant the orders sought and dismiss the application dated 25th January, 2006 with costs to the Defendant.

DATED AND DELIVERED AT ELDORET ON THIS 18TH DAY MAY OF 2006.

M.K. IBRAHIM

JUDGE.