



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 14 of 2005

JEREMIAH MUSYIMI

NZUKIPLAINTIFF

VERSUS

MICHAEL MULE

MUTUKUDEFENDANT

R U L I N G

The plaintiff has by Chamber Summons dated 1st November, 2004 brought under Order XXXIX Rule 1 of the Civil Procedure Code applied for orders:

“That the defendant, his agents/or servants be restrained from using or interfering with land parcel No. Makueni/Mubau/658 in any manner whatsoever pending determination of the main suit.”

The application is based on the grounds that the defendant was committing acts of damage and waste on the suit land and that he had admitted being in occupation and use of the suit land without the permission of the plaintiff. It is also based on the grounds that the plaintiff/applicant has been denied enjoyment and use of the suit land by the defendant and that the plaintiff/applicant title to the land was unchallenged and the applicant stood to suffer great loss occasioned by these acts of the defendant.

The application is also supported by an affidavit sworn by the plaintiff/applicant and dated 1st November, 2005. In the affidavit, the applicant has annexed copies of title deed to the land in dispute Exhibit NK1, in the applicant’s name. The title was registered and issued to the applicant on 1st July 2004. It also annexes a certificate of official search from the land registry Exh. NK2 confirming the same.

The applicant depones that the land was registered in his name and that the defendant/Respondent has not, in his statement of defence challenged the said registration. That the Respondent had admitted accompanying the land without his consent or permission and that since mid October 2005, the defendant started cutting down trees and clearing bushes on the land despite the applicant’s protests and grazing animals therein. That due to these actions, the applicant had been denied use and enjoyment of the suit land and stood to suffer great loss.

In the Respondent’s replying affidavit dated 15th November, 2005 he opposes the application. The

Respondent has deponed that he has been in occupation of the suit land since 1964 and was therefore not a trespasser. The Respondent continued to depone that he was a bone fide purchaser for value of the suit land since 15th June 1964. That he bought the portion from the applicant's elder brother in whose name the original title Makueni/Mubau/215 was registered in trust for the family. That on 1st December, 1998 the applicant sued his elder brother to have the land sub-divided which order the clan elders awarded. That pursuant to that order, the land was subdivided into two portions out of which, one portion was given the land title No. 658 which is the subject matter of the suit. That the applicant fraudulently caused that title together with the second one (659) to be registered in his name thereby disinheriting his elder brother. The respondent therefore deponed that the entire proceedings were an abuse of the due process and ought to be disallowed.

Mr Kitonga, argued the application on behalf of the applicant while Mr Abomba represented the Respondent. Each advocate repeated the same arguments/dispositions raised in their clients' affidavits as I have summarized above.

I have carefully considered the application, the affidavits deponed herein and the submissions by both the counsels. The application sought herein is provided for under Order XXXIX Rule 1 of the Civil Procedure Rules as cited on the face of the Chamber Summons. The order provides that a temporary injunction may be granted where any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit.

The applicant has particularized the waste and damage complained of in his affidavit at paragraphs 6 and 7. Under paragraph 6 the applicant depones that the Respondent cut down trees and cleared bushes while in paragraph 7, he depones that the applicant grazes his animals on the land. The applicant deponed that these acts of waste and damage started in mid – October 2005. The application was filed on 1st November, 2005.

I see from the pleadings filed herein and from the submissions by the advocates to the parties herein that indeed there is a dispute as to the ownership of the suit land. Even though the applicant herein deponed that his title to the land had not been challenged, that is not the correct position. The Respondent has clearly averred that the suit land was part of a larger piece of land previously registered in the applicant's elder brother's name in trust for the family. From that averment the issue of trust arises and which issue touches on the ownership of the land. That is an issue that needs to be ventilated during the hearing of the main suit. In the Respondent's affidavit, he avers to another issue which also touches on ownership of the land and which also can only be ventilated fully during the hearing of the main suit. That is the issue of fraud. Despite the fact that the title to the suit land was registered in the applicant's name, the two issues raised by the Respondent is a challenge to the applicant's right to title to the suit land. These are not matters which can be determined within this application and further, at the end of it the suit may be decided in favour of either party herein.

The other matter I wished to comment on is the issue of the Respondent's occupation of the land. The applicant asserts that the wasting complained of begun in October, 2005 and yet he admits that the respondent is in actual occupation of the land. If the applicant was registered as the owner of the land in July, 2004 he ought in his application herein to have disclosed when the respondent's occupation begun if he knew. The applicant did not disclose this.

The respondent admits being in occupation of the suit land and he avers that the occupation spans over a period of 41 years. Despite seeing that averment in the respondent's replying affidavit, the applicant gave no response whether in denial or admission. Given the other averments which claim that infact the suit land was family property from as far back as before 1964, it must be true that at least the respondent's occupation was before 2005 the period complained of. I noted that even though registration of the land was in 2004, the applicant did not complain of the damage or waste to the land until 2005. That lapse of time does also suggest that there is an absence of urgency in the matter that would justify an injunction ordered in the terms prayed for. As the respondent submits through his advocate, granting the orders will in effect cause the eviction of the respondent from the land and that would determine the suit in the sense that the substantive prayers sought are to do with the respondent's eviction. The order for

injunction cannot be issued in the circumstances. I also noted that the particulars of the waste and damages complained of are cutting of trees, clearing of bushes and grazing. I do not believe that clearing of bushes and grazing the land would be qualify to be interpreted as waste or damage. Especially where the applicant has not been candid to say whether those acts are part of what the respondent has done on the suit land prior to 2005. The cutting of trees however does qualify.

I will not grant the order of injunction in terms prayed for in this application. However in order to preserve the suit land during the pendency of this suit I will make the following conservatory orders against both the applicant and the respondent and their servants and agents and or assignees:

One that none of them should deal with the suit land adversely as to cause waste or damage of a permanent nature and none of them should carry out activities such as cutting trees therein, or construct any structures therein whether temporary or permanent thereon that would affect the stratum and or value of the land until the suit is heard and determined or pending further orders of this court.

Two, the respondent is not prevented from grazing and cultivating the land. So long as this two activities will be limited to the area he has been occupying prior to the filing of this suit.

Costs of the application be costs in the cause.

Dated 17th May, 2006 at Machakos.

J. LESIIT

JUDGE