



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 110 of 2005

DAVID MOSE GEKARE:.....PLAINTIFF

VERSUS

HEZRON NYACHAE:.....DEFENDANT

RULING

This is an application by the plaintiff dated 8th November,2005 by way of summons in chambers. It is made under the provisions of Order 39, Rules 1 and 2 of the Civil Procedure Rules and seeks a temporary injunction against the Defendant, his agents and any other person acting on the plaintiff's portion on parcel No. LR. No. 9478 pending the hearing of this suit.

The plaintiff has sworn an affidavit on 8th November,2005 in support of the application in which he says:-

- That he is the equitable owner of a portion of land situated at Kuinet, Uasin Gishu District being 10 acres of L.R. No.9478/B.
- That the Defendant since 2004 has committed acts of waste on the aforesaid portion of land.
- That a purported sale agreement made between himself and the Defendant is null and void.
- That he intends to carry out agricultural activities on the suit land and he cannot do so unless the orders sought herein are granted.

The prayers sought in plaint dated 8th November,2005 are as follows:-

A declaration that the contract between the plaintiff and defendant is null and void.

- (i) An order of permanent injunction against the defendant, his agents and any other person acting on his behalf restraining them from entering, occupying, ploughing, alienating or in any other way dealing with the plaintiff's portion on parcel No. Kuinet (B) /A.F.T/9478.
- (ii) An order of eviction from parcel No. Kuinet (B)/S.F.T./9478.
- (iii) General damages for breach of contract.
- (iv) Mense profits of Shs.60,000/=.

(v) costs and interest.

(vi) Any other or further relief this Honourable Court deems fit to grant.

The application is opposed by the Defendant who has sworn Replying Affidavit on 6th December, 2005. He claims that he purchased the portion of land in dispute from the plaintiff and that he has been in possession of the property before the sale Agreement dated 25th January, 2005.

I have considered the application, the affidavits and counsel's submissions. It is certain as pleaded by the plaintiff that by an agreement dated 25th January, 2005, he agreed to sell and the Defendant agreed to purchase between 5 – 6 acres of the plaintiff's land at Kuinet (B) 9478, Uasin Gishu District. One of the orders sought is the nullification of the said sale agreement. This can only be done after the suit is heard and judgment is delivered in favour of the plaintiff. This is a matter for the trial.

From the Evidence, I am satisfied that the Defendant is and was in possession and/or occupation of the suit property at the time the suit was filed on 23rd November, 2005. In paragraph 8 of the plaint, the plaintiff states:-

“ In further breach, the defendant ploughed, planted and harvested maize on the plaintiff's whole portion of land for two consecutive years 2004 and 2005 without the consent of the plaintiff and continues to do so and the plaintiff has suffered loss of maser profits of Shs3,000/= per acre a year amounting to Kshs.60,000/=” (emphasis mine).

By his own pleadings, the plaintiff has shown that the Defendant is in possession of the disputed land. It is for this reason that he seeks inter alia, an order of eviction against the Defendant.

During his submissions, counsel for the plaintiff started that they do not seek an eviction order at this stage. He conceded that a mandatory injunction cannot be brought under Order 39, Civil Procedure Act. Counsel submitted that what they sought was a temporary injunction to restrain the Defendant from “wasting, alienating or ploughing the land. What are these acts?

Waste:- This is permanent harm to real property committed by a tenant or occupier to the prejudice of the reversioner (see Black's law Dictionary). The plaintiff did not give any particulars of such waste or evidence thereof.

Alienation: This is to transfer or convey property to another. The plaintiff did not give any evidence that the Defendant intended to transfer or convey the property to a third party. No proof of intention to part with possession e.g. by “leasing”, was shown. In any case, alienation by the Defendant is not possible since the property is still registered in the name of the Settlement Fund Trustees. There was also no evidence that the Defendant has the legal capacity to sell or dispose of the proprietary interest in the disputed portion to a third party.

Ploughing. The Defendant is in possession of the land. He has allegedly been cultivating the land for two years. The plaintiff has yet to prove his case and his claim must await trial. There is a written sale agreement which he seeks to be declared null and void. From the rival affidavits, I am unable to determine whether the plaintiff has a prima facie case with a probability of success.

In any case, the plaintiff has claimed general damages and mesne profits. The mesne profits are determinable since he has given the amount of Shs.60,000/= for the 2 years. In other words, the plaintiff's loss can be compensated in damages. I see no basis to restrain the Defendant from ploughing the portion of land which is the subject of the Sale Agreement.

As a result, the plaintiff's application has no merits and it is hereby dismissed with costs to the Defendant.

DATED AND DELIVERED AT ELDORET ON 7TH JULY, 2006

M.K. IBRHIM

JUDGE

7/07/2006

Coram

Ibrahim K

C/C - Chelang'a

Mr. Momanyi for the Defendant

Mr. Kuloba for the plaintiff

Ruling read in their presence.

M. K. IBRAHIM

JUDGE.