REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
Civil Case 115 of 2004

KIVUI MAWEU ……..…….. PLAINTIFF

VERSUS

H. YOUNG & CO. E.A. LTD ……..…….. DEFENDANT

R U L I N G

Before me is the Chamber Summons dated 8/10/04 in which the applicant Kivui Maweu seeks an order of injunction restraining the defendants/Respondents H. Young E.A Ltd. their servants or agents from trespassing, entering, constructing any structures on plot No.1845 Muthingiini Settlement Scheme and for costs of the application.

The application is expressed to be brought pursuant to order 39 Rules 1 (a), 3 (1) (2), 5, and 9 of the Civil Procedure Rules and Section 3 A Civil Procedure Act.

The application is based on grounds found in the body of the application, an affidavit in support, a supplementary affidavit and a further affidavit. The application was opposed and a replying affidavit and further replying affidavit were filed by the Respondent.

For the court to grant an order of injunction, the applicant will have to establish the following: that he has a prima facie case with good chances of success; that he will suffer irreparable harm if the order is not made and if the court is in any doubt, then the application will be decided on a balance of convenience. The court bears in mind that this is a discretional remedy and the court applies the above principles in its exercise of said discretion.

The applicant contends that he is the owner and proprietor of plot No.1845 Muthingiini Settlement Scheme which is in an adjudication area and title deeds are not yet issued. The plot was allocated to him in 1994 and the District Land adjudication officer confirmed that allocation vide his letter of 20/9/04 and following this dispute the adjudication officer of the area gave the plaintiff consent to file this suit in accordance with Section 30 of the Land Adjudication Act. The applicant depones that the defendant has entered the said land without his consent and has cut down trees, dug up trenches, pit latrines and is building permanent structures and has defied any warning to stop the same. In response to the allegations by the Respondent that the applicant gave up the land as a public utility, he denies that he did so and Mr Nyakweba counsel for the applicant argued that the annextures of the application do not evident that the applicant ever gave away any land to be used as a public utility and even if it had been, there is no compulsory acquisition of the land as due process as per the constitution and Land Acquisition Act have not been complied with. On the other hand, the Respondents argue that the land does not belong to the applicant because he donated it and he annexed documents and minutes of the local development committee to show that the land had been donated to the public, there are now government buildings on the land and Respondent is rightly on the land.

I have considered the application, affidavits, annextures filed and the submissions of counsels. I would like to first take up the argument by Mr Nyakweba that parts of the replying affidavit sworn by the Respondent should be struck off as it offends Order 18 Rule 3 (1) Civil Procedure Rules. I totally agree that the Respondent could not ably depone on how the public came to be the owners of the land or otherwise. He could not know the facts he depones to in paragraph 4, 5 and 6 of his replying affidavit unless he was informed and even if he was informed, he did not disclose the source of the information. These three paragraphs do offend the provisions of

Order 18 Rule 3 of the same order and the three paragraphs are hereby expunged from the affidavit and they cannot be cured by Rule 7 of Order 18.

The applicant has tabled evidence to the effect that the land was allocated to him. Even if there is no title deed the adjudication officer does confirm that he is the owner and the land will be registered in his name when the registration is done.

Though the defendant annexed several annextures, there is none that evidences the surrendering of the land by the applicant to the local people. Even the purported agreement in which the land was given to the community with an annexed list of the signatories, the name of the applicant does not appear. There are purported minutes annexed. They are incomplete and not signed. The court cannot even look at them. The chief of the area goes ahead to talk of the applicant having given 3 acres of land to the community whereas the District Officer talked of one acre. The question is even if at all the applicant surrendered land, how much was it, an acre or 3 and is what the Respondents occupying what was surrendered. This is a triable issue. From my assessment of the evidence before me, I do find that the applicant has established that the land is his. The Respondent has failed to show that the applicant has given it up to the community. A prima facie case has been made out by the applicant. If indeed a borehole is being dug and buildings coming up the user of the land is being changed completely and it may be put out of reach of the applicant and of his use and he would suffer irreparable loss.

The Respondent urged the court to consider the issue of security for costs in the event that the Respondent succeeds in the end. It is time that the Respondent is likely to suffer monetarily from the delay that will be occasioned by this order. It is only proper that the applicant do give security for costs.

This court is satisfied that the plaintiff/applicant is entitled to an order of injunction restraining the Respondents, their servants, agents from interfering, constructing or trespassing on land parcel 1845 Muthingiini Settlement Scheme on condition that the applicant does deposit Kshs.50,000/= with the court within 21 days of today's date as security for costs.

In default orders of injunction to vacate and application to stand dismissed. Costs to be in the cause.

Dated at Machakos this 27th day of January 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE