

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Suit 34 of 2004

FREDRICK WEKESA MWANJA.....PLAINTIFF

VS

PHILIP MUCHAI MWASAME.....DEFENDANT

R U L I N G

Fredrick Wekesa Mwanja the plaintiff, filed an action against Philip Muchai Mwasame by way of a plaint in which his main prayer is for the eviction of the defendant. The plaint is dated 12th March 2004. At the same time the plaintiff also filed a chamber summons pursuant to the provisions of sections 3, 3A & 63 (c) of the Civil Procedure Act and Order XXXIX rules 1, 2(1) & (2), 3 and 9 of the Civil Procedure Rules. In the summons the plaintiff sought for an order of injunction to restrain the defendant from trespassing into parcel no KAKAMEGA/LUANDETI/1291 pending the hearing and determination of the suit. The plaintiff filed two affidavits in support of the summons. This application was opposed by the defendant who filed a replying affidavit and grounds of opposition.

The plaintiff avers that the defendant in the year 2003, forcefully and illegally trespassed into his parcel land without any colour of right. He exhibited a copy of the title to show that he is the registered proprietor. He complains that the defendant commenced putting up temporary structures and threatens to forcefully cultivate the suit premises. He now wants this court to issue an order of injunction to bar the defendant otherwise he would suffer irreparable loss.

The defendant challenged the plaintiff's assertion saying that the title was obtained by fraud. He averred that he has been in occupation of the suit land for the last forty years. The Respondent further raised an issue which I think should be considered first before taking into account other arguments, that is to say that to grant the orders of injunction would determine this suit at an interlocutory stage.

I have already stated that the main prayer in the plaint is for an order of eviction. If an order of a temporary injunction is granted it means the Respondent will be barred from the suit premises hence he will have been effectively evicted. There will be nothing that will remain for this court to go for trial.

Even if I am found to be wrong over this issue, I am not satisfied that the applicant has met the conditions necessary for the grant of the orders of injunction. He has not shown that he would likely suffer an irreparable loss or he would most be inconvenienced. In the circumstances I am inclined to dismiss the summons with costs to the respondent, those are the orders of the court.

DATED THIS 21st DAY OF January 2005

J.K. SERGON

JUDGE

