REPULBIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1180 OF 2004

ROBINSON KIBON……..…………………..…… PLAINTIFF/APPLICANT

VERUS

JENIFFER JEMUTAI KOSITANY……….DEFENDANT/RESPONDENT

RULING

The Plaintiff's application by Chamber Summons dated and filed on 5th November, 2004 was brought under Order XXXIX rules 1, 2, 3, 7 and 9 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). There is one substantive prayer outstanding:

> **"THAT the Defendant, her servants, agents be restrained by an order of temporary injunction from threatening, evicting and/or in any other manner whatsoever interfering with the Plaintiff's quiet and peaceful enjoyment of the suit premises situate at Kipsingori, Moi's Bridge otherwise known as Koibei Farm, or performing any contractual obligations therein until further orders of the Court."**

Grounds stated are as follows:

(a) that, on 31st December, 2003 at Ngata Farm in Nakuru District, the Plaintiff and the Defendant had entered into an oral agreement for jointly preparing, cultivating the land and planting maize, thereafter selling the harvest and sharing the proceeds on a 50:50 basis; and the Plaintiff has already performed his part of the bargain;

(b) that, at this opportune time of harvesting and sharing the product, the Defendant has threatened to evict the Plaintiff from the suit property, with the consequence that the Plaintiff will not partake in the proceeds of the maize harvest;

(c) that, the Plaintiff has already implemented the threat, on 3rd November, 2004 by causing the Police from the Kipsingori Police Post to harass the Plaintiff and his agents and to get them to leave the suit land;

(d) that, in the terms of the agreement, this was a joint venture, and both parties should have equal access to the suit property for the purpose of performance of the contractual obligations entered into;

(e) that, the Plaintiff/Applicant stands to suffer irreparable loss and damage if the Defendant is not stopped from evicting and/or interfering with the Plaintiff's rights over the suit premises.

There are several affidavits, providing the evidence in support of the application. These are by ***Robinson***

Kibon (the Plaintiff) dated 5th November, 2004; ***Joakim Mundui***, dated 5th November, 2004; ***Nicholas K. Toniok,*** dated 5th November 2004; and ***Moses Kiprono***, dated 5th November, 2004. The tenor and effect of these affidavits may be set out as follows:

> (i) that, on or about 31st December, 2003 at Ngata Farm in Nakuru District, and in the presence of one J***oakim Mundui;*** one ***Nicholas K. Toniok*** ; one ***William Kipyegon Seurei***; one ***Meshack Kpkemboi Chumo ;*** and one ***Moses Kiprono ,*** the Plaintiff entered into an oral agreement with the Defendant wherein it was agreed that the two contractants would jointly prepare, cultivate and plant maize in a farm at the Koibei Farm;
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> (ii) that, sometime in June, 2004 the Plaintiff, while in the company of
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> ***Moses Kiprono***, paid Kshs.50,000/= to the Defendant at her house in new Muthaiga, on Thigiri Grove, Nairobi and this was his contribution besides other obligations assumed by him in respect of the agreed shared farming; and the Plaintiff thereby secured access to the suit land and performed his obligations in accordance with the contract; and as a result the maize grown under the contractual arrangements is now ready for harvesting;
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> (iii) that, the Defendant has now, without good cause, threatened to evict the Plaintiff so that he does not partake in the harvest;
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> (iv) that on the 3rd November, 2004 the Defendant prosecuted his threats by means of the Police personnel from Kapsingori Police Post which is located within the farm.

The Defendant responded by filing grounds of opposition, dated 24th November, 2004 and filed on 25th November, 2004. It is claimed that the suit which founds the application is frivolous. The application is impugned for incompetence because it was entirely oral. It is contended that the claim cannot be granted because the Plaintiff has not himself deponed to the terms of the agreement in his affidavit – and that the terms have only come through in the affidavits of those who are not parties. It is contended also that the anticipated loss is capable of compensation by damages.

This matter was heard before me on 25th November, 2004 when ***Ms. Kimende*** appeared for the Plaintiff/Applicant, while ***Mr. Kiptanui*** appeared for the Defendant/Respondent.

Ms. Kimende, on the basis of the facts in the depositions, submitted that the Plaintiff stood to suffer irreparable loss unless injunctive relief was granted pending the hearing of the substantive suit. There was, however, no detailed demonstration of the irreparable nature of the harm that would be suffered by the Plaintiff, if all the facts as deponed were true.

Mr. Kiptanui contended that the suit was frivolous, because the suit property was not properly described by title number – and so it was difficult to identify the suit properly. This would make an order incapable of enforcement. No doubt, this is a cogent argument. But does it suggest that a party to some cultivation arrangement in respect of a block of land which witnesses can clearly identify, can resile from any undertaking, just by pleading that the Lands Office number for the land in question was not mentioned? Suppose that two parties agreed that the one of them who is a sculptor, should design and erect the bust of Kenya’s first President on a hill quite well known by name and which witnesses can identify, and the sculptor proceeds to craft the greatest work of art; can his claim in contract be defeated just because he does not specify the Land Reference Number of the swathe of land bearing the hill where the sculpture has been done? I don’t think so; otherwise the technicalities of the law would be a vehicle of fraud, or at any rate these formalities would squarely defeat the principles of equity.

Therefore I cannot accept the objection of the Defendant which rests on the land reference number not being provided.

Counsel for the Defendant also contends that the share-cropping arrangement ought to have been reduced into writing. But he did not cite the provision of the law which imposed such a requirement.

Mr. Kiptanui also claimed incompetence in the Plaintiff's application founded on the fact that it is the affidavits other than that of the Plaintiff, which set out the *terms of the oral agreement* for share-cropping made between the parties. While it appears right that the Plaintiff's affidavit would carry such details, what is improper or irregular in those details being in the depositions of the several witnesses? I do not, with respect, think that a valid point of law has been raised in this regard. I also doubt whether the several depositions in support of the application can be dismissed as emanating from busybodies. There is clear, uncontraverted evidence that the deponents were witnesses actually present, as the events unfolded which have led to litigation.

Mr. Kiptanui insists that the agreement alleged ought to have been reduced into writing. In his words: "*Where issues are elaborate, an or al agreement is no good. This is an agreement about land."*

I do not, with respect, think the point here being made is a legal proposition. No doubt, contracts made in writing are more professionally set, and this will be very helpful in the process of litigation. But the law does not stipulate that all contracts shall be in writing. What would have been here being contracted for? Not title to land. Not a lease. Not a mortgage. It is only an understanding to plant some crops on the land, and the duration involved might well be only up to harvest-time (which cannot always be predicted with the greatest certainty; and I must take judicial notice of unpredictable weather conditions). Such is an agreement the parties could very well have thought it right to make orally. And it is the Court's responsibility to give effect to the contractual intent of the parties, though this issue must await the main trial.

I consider as the most cogent element in learned counsel, Mr. Kiptanui's submission the argument that the Plaintiff's anticipated loss can be computed in *damage*s ; and therefore this is not necessarily a suitable case for the equitable remedy of injunction. The product of the alleged agreement is harvest of maize. It is capable of quantification. And I would add, one is dealing with purely commercial commodities. To the maize that will be harvested, it is not possible that there is a special kind of attachment which might justify equity's role.

I must uphold this argument, applying the well known principles in ***Giella v. Cassman Brown & Co. Ltd*** . [1973] E.A. 358, and hold that the Plaintiff's proper remedies lie in damages , and therefore must be proved in the main trial, rather than in the instant interlocutory application.

I will therefore order as follows:

1. The Plaintiff/Applicant's prayer for injunctive relief against the Defendant is refused.

2. The Plaintiff shall bear the costs of this application in any event

DATED and DELIVERED at Nairobi this 4th day of February, 2005.

J.B. JWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Plaintiff/Applicant: Ms. Kimende, instructed by M/s. Arusei & Co.Advocates

For the Defendant/Respondent: Mr. Kiptanui, instructed by M/s. Kimaiyo & Munya Advocates