

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 35 of 2005

JOHN DAVID NGAO

PETER WAMBUA SEVU PLAINTIFFS

VERSUS

JOSHUA MBONOKA MUNYAO DEFENDANT

R U L I N G

The application before the court is dated 6/4/2005. It seeks a temporary injunction pending the hearing and final determination of the main suit. The application was served upon the defendant but the latter did not file any response in defence. But the defendant attended court during the hearing of this application.

According to the material deponed, the applicant is shown to be the registered owner of the plot number Nzau/Nziu/112, the subject property, that is in dispute. However, the defendants have been in occupation of the land since March 2000, a period of about five years. They entered the land with the permission of the person who formerly owned the land before the land was transferred to the applicants. The defendant constructed residential houses on the land, which houses he presently occupies. The defendant also is said to have planted trees and is presently in the process of constructing permanent buildings. It is the applicant's submission that unless the Respondent is restrained he will end up putting up permanent buildings on the land to the detriment of the applicant if the latter finally wins the case, thus causing irreparable damage. The plaintiffs also argue that they have demonstrated a prima facie case with chances of success.

Despite the fact that the defendant had not filed any replying affidavit, or grounds of opposition, the court noting that he was unrepresented peasant, it allowed him to orally respond to the arguments above. He stated that he was living on the land since 1995, September and that he had been tilling it. He also said that he lives on the land with all his family and that the land belongs to him.

I have carefully considered the facts and circumstances of this case. As admitted by both parties the defendant resides on the land and has been residing on it for more than five years. He was allowed to put up residential houses which are the ones he lives in. The defendant appeared to believe that the land belongs to him. He up to now failed to file his defence against the plaintiffs' claim. Indeed an interlocutory judgement was entered on 19/5/05 against the defendant. It is not clear whether the defendant is aware of this fact or whether he understands the meaning of filing defence or properly defending this application.

It is the view of this court, despite all the above, that the circumstances of this case do not attract an injunction in the nature the same is sought in this application. There is no doubt that the defendant, despite his apparent ignorance, should not be allowed to continue constructing a permanent or any other

buildings on the land until this case is fully decided. And yet to stop him from entering the land where he lives does not make sense until the case is finally settled in favour of the plaintiffs so that the defendant will be evicted in execution of the decree that will result from the determination of the case if it so happens. Furthermore, the issue of restraining the defendant from entering the land where he already is does not appear practical. Accordingly, the court makes the following order which appear to be the ones appropriate.

Orders:

That an injunction do issue against the defendant or his agents and servants restraining him from constructing or continuing to construct any new houses or buildings on the suit premises until this suit is heard and finally decided.

Costs in the main suit.

Dated and delivered at Machakos this 20th day of December, 2005.

D.A. ONYANCHA

JUDGE