



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1253 OF 2003

LUCAS N. NYANGWESO.....PLAINTIFF/APPLICANT

VERSUS

JACKSON NTELELE SURUM.....1ST DEFENDANT/RESPONDENT

MORIOSO OLE KINDI.....2ND DEFENDANT/RESPONDENT

RULING

This application was made under Order XXXIX Rules 1, 2, 2A and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya), and brought by Chamber Summons dated 2nd December, 2003 and filed on the same day.

The Applicant prays that the Court do issue an interim injunction restraining the Defendants themselves, their agents, servants and/or employees from trespassing, entering, using, cultivating, planting and/or dealing in any manner whatsoever with all that parcel of land known as Cis Mara/Nairekiange/8, measuring 140 acres situate at Naloklok Keekonyokie, within Narok District, pending the hearing and determination of the suit. The Applicant also prays for the costs of this application.

Grounds to support the application are set out as follows:

- (i) The first Respondent is in the process of breaching a lease agreement;
- (ii) The Respondents have jointly and severally entered the suit premises, illegally, and commenced cultivation thereat in disregard of the Applicant's contractual rights as lessee;
- (iii) The Applicant is fully paid up as lessee for the suit premises which payment confers exclusive usufructuary rights over a period of one full year;
- (iv) The Applicant stands to suffer substantial loss, by being deprived of the use of the suit land.

The Applicant, Lucas N. Nyangweso has sworn an affidavit in support of the application, dated 2nd December, 2003. He states that, on 4th September, 2003 he entered into a lease agreement with the first Defendant, on the following terms:

- (i) the lease was to run for one year;
- (ii) the lease related to 140 acres of land;

(iii) the leased land was to be used for the cultivation of wheat;

(iv) the amount payable by the Plaintiff was Kshs.378,000/-.

He states that prior to the lease agreement, the two Defendants/Respondents had each cultivated one-half of the suit land, and that this had been the case during the years 2002 and 2003.

Under the agreement of 4th September, 2003 the Applicant's wheat cultivation on the suit land was to commence in January, 2004. The Applicant duly paid the agreed sum of money for one year's farming.

He states that, on 28th November, 2003 the two Defendants acting in collusion trespassorily entered the suit land and started conducting their own cultivation. On 30th November, 2003 the Applicant lodged a complaint with the Naire Kingare Police Station and the Police Officers attempted unsuccessfully to locate the Defendants. On the same day the Applicant also reported the matter to the office of the District Officer at Mau Narok, and this led to the Police stopping agents of the second Defendant from further cultivation at the suit land, by which time the second Defendant had already cultivated half of the land. The Appellant states that the leasing of land in the area in which the suit land is located, is subject to the practice of involving officials of the local administration; and that the lease agreement in question had been signed in the presence of Government officials. It is stated that the first Respondent is in the process of breaching the lease agreement, as he has allowed the second Defendant to make exclusive use of the suit land, in violation of the Applicant's rights as lessee. The Appellant states that he stands to suffer substantial loss, as he has already paid Kshs.378,000/- to the first Defendant; he is likely to lose earnings estimated at 15 bags for every acre, selling at a price of Kshs.1,700 per bag.

The application was heard for the first time ex parte by the Honourable Mr. Justice Nyamu, on 2nd December, 2003 and he issued interim Orders of injunction against the Defendants. When the matter came up for hearing on 16th December, 2003 counsel for the Applicant was ready to proceed, while Mr. Muchira who was holding brief for Mr. Kilele, for the Defendants/Respondents, pleaded that Mr. Kilele was indisposed and requested adjournment. Adjournment was granted, with a hearing date fixed in Court, in the presence of the parties, for 21st January 2004.

Counsel for the Defendants was not in Court when hearing was due, and no explanation of their absence was available to the Court or to counsel for the Applicant. In the circumstances, the case for the first Defendant can only be made out from his affidavit of 11th December, 2003 filed on 15th December, 2003. He states that he did indeed enter into a lease agreement with the Applicant, in respect of 140 acres of land, and that the amount payable was Kshs.347,000/- (not 378,000/- as stated by the Applicant), and that this money has not yet been paid. The first Defendant also states that the suit land, L.R. No. Cis Mara/Nairekiange/8 is larger than 140 acres and that he, the first Defendant, has no registrable interest over the suit land. The rest of the first Defendant/Respondent's assertions are essentially argumentative and having to do with legal inferences he states were brought to him by his Advocate and that he verily believes the same.

To the Replying Affidavit, the Applicant had sworn a Further Affidavit, dated 13th January, 2004 and filed the next day. The Applicant states that the first Respondent is a member of Enturi Group Ranch, and is in that capacity allocated 140 acres, so that the denial of ownership in the first Defendant's sworn statement is not truthful. The Applicant produces a letter from the District Officer of the locality in which the suit land lies, confirming the first Defendant's membership of the Group Ranch. The Applicant produces documentation to show that, on 15th September, 2003 the first Respondent purported to lease the suit plot to the second Respondent, and this indicates a link between the operations at the suit land of both the first and the second Respondent. The Applicant states that in the period 2002 – 2003, the first Respondent had leased part of the suit land to him (the Applicant) and part to the second Respondent, which confirms the first Respondent's ownership. The Applicant asserts that his full payment in cash of the contractual sum of Kshs.378,000/= was the basis of the signing of the lease agreement, in the presence of Government officials.

Counsel for the Applicant made a formal presentation of the application, with the affidavits in support and

the annexures. He submitted that there was a prima facie case against the Respondents, and that the Applicant's case had a clear likelihood of success. He argued that compensation in damages would not sufficiently compensate the Applicant for the losses he would suffer if denied the fruits of the contract of lease. He submitted that the Court was empowered, by Order XXXIX Rule 2 to prevent threatened breaches of contract, by awarding injunctions, and he prayed for the same.

I have benefited from the detailed documentation in support of his case that the Applicant has presented. This has been methodically presented by counsel, Mr. Oyugi, who has left very little in the shape of a doubt that the Plaintiff/Applicant has a good case with a likelihood of success. With regard to the Respondents, on the contrary, not much of a case has been made; and the documentation filed in Court does little credit to the seriousness of the response or likely defence.

The weight of the evidence from the affidavits shows that a lease had been made between the Plaintiff/Applicant and the first Defendant/Respondent, under which the Applicant had rights of cultivation for one year, beginning from January, 2004 on 140 acres of land being the suit land. The Applicant duly paid up as was required under the contract; but later the Defendants colluded to deprive the Plaintiff/Applicant of his cultivation rights as set out in the lease. This is wrongful and must be rectified at this stage by the machinery of justice.

Accordingly, I find in favour of the Applicant and make Orders as follows:

1. An injunction is issued restraining the Defendants by themselves, their agents, servants and/or employees from trespassing, entering, using, cultivating, planting and/or dealing in any manner whatsoever with all that parcel of land known as Cis/Mara/Nairekiange/8 measuring 140 acres situate at Naloklok Keekonyokie within Narok District pending the hearing and determination of this suit.
2. The Plaintiff/Applicant shall secure the commencement of suit within the next 28 days subject to the convenience of the Court.
3. The Plaintiff/Applicant's costs in this application shall be borne by the Defendants/Respondents.

DATED and DELIVERED at Nairobi this 20th day of February, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Oyugi, instructed by M/s Oyugi & Co. Advocates

For the Defendants/Respondents, Mr. Kilele, instructed by M/s Lel & Associates Advocates.