



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO.4 OF 2004

GEOFFREY BOGONKO NYARIENGA & 3 OTHERS PLAINTIFF

-VERSUS

JOSEPH NYAGAKA & 2 OTHERS DEFENDANT

RULING

This is an application under Order 39 Rule 1 and 9 of the Civil Procedure Rules. It seeks a temporary injunction to issue to restrain the defendants from subdividing, selling, taking possession, transferring or evicting the plaintiffs or dealing in whatever manner with the plaintiff's portion of land reference KPTOI/59 pending the hearing and determination of the suit. The grounds of the application were that the plaintiffs are proprietors in common of the said parcel of land, that the defendants are using an illegal order obtained from the Land Disputes Tribunal (which was adopted by the court), and that they have threatened to evict the plaintiffs to sell the land to repay a loan allegedly obtained from one Catherine Nyamato. The application is supported by the affidavit of the first plaintiff Geoffrey Bogonko Nyarienga sworn on 14th January, 2004, which I note is a photocopy and not an original copy.

Mr. Momanyi for the applicants submitted that the plaintiffs were owners of 8 acres of land at Kiptoi within Trans-Nzoia District. He submitted that they obtained an illegal order from the Land Disputes Tribunal and they were trying to execute. He asserted that the Land Disputes Tribunal did not have power to order sale of land for a loan and that the Tribunal was not properly constituted. He also submitted that the plaintiffs were not summoned to appear before the Tribunal and no written complaint was served on the plaintiffs. The application proceeded ex parte as an affidavit of service was sworn by Patrick Wayodi Muna on 2nd February, 2004 and filed in court on 3rd February 2004 that defendants were served with the application as well as plaint and summons to enter appearance.

I have perused the documents in the file and I have not seen a copy of any document of proceedings that have been filed by the plaintiffs against the defendants. I have seen though, copies of summons to enter appearance on account of Eldoret High Court Civil Suit No.4 of 2004. Perusing through the Land Disputes Tribunal's record in the second page I find it recorded that the first plaintiff and the others were summoned to the Tribunal but did not attend. I also observe that according to the record of the proceedings in the Senior Principal Magistrate's Court Land Case No.53 of 2003 at Kitale, it was recorded at page 3 that the defendant in the case (Geoffrey B. Nyarega) had been served twice but had refused to go to court.

The orders sought from the court i.e. injunction, are discretionary orders and also equitable orders. The applicants do not appear to me to be saying the truth when I look and the record of the proceedings of the

Land Disputes Tribunal and the Lower Court. I am convinced that they were informed of the proceedings and they failed to attend. I do not see any documentary evidence to support te statement that the applicants are the ownersof 8 acres of land in the applicatin.

In seeking the orders for an injunction the applicants should show that they have a prima facie case with probability of success which, in the absence of the documents of the suit filed against the defendants, I am not able to determine in their favour. I find that the applicants have not established a prima facie case with probability of success in this application in the absence of the copy of the plaint, if any, that they have taken against the defendants.

In the result I dismiss this application and decline to grant the injunction sought by the plaintiffs.

Dated and delivered at Eldoret this 10th day of February, 2004.

.....

George Dulu

Judge

Ruling read in the presence of Mr. Kuloba for Mr. Momanyi for the plaintiff. Defendants absent.

.....

George Dulu

Judge