

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 241 OF 1996

KANYASYA MUTIEPLAINTIFF

VERSUS

KILIMBU NGUNGI.....DEFENDANT

RULING

The defendant/Applicants pray for an order of injunction to injunct, the first plaintiff one Kanyasya Mutie whether by himself, his servants or agents from carrying on any excavation, construction or putting up any structure or building on the 2nd defendants plot no. 427, Mukuyuni adjudication section pending hearing of the suit and he also prays for costs.

The reasons for the said application are that the 1st plaintiff has started constructing a building on the plot owned by 2nd defendant and which is in dispute, that if the said construction continues the defendant will suffer irreparable harm and that the plaintiffs have not bothered to prosecute their suit. The second defendant filed an affidavit in support of the application in which he depones that the present suit is pending between the parties regarding the said property and yet the 1st plaintiff started constructing a building on the said plot in January, 2002.

The application was opposed and grounds of objection filed as well as replying affidavit by the respondent Kanyasya Mutie. The application is opposed on grounds that the applicant does not have a good case with good chances of success nor has he shown that he will suffer irreparable harm that cannot be compensated by way of damages. In his affidavit the Respondent depones that he was born on the land in 1930 and has been in occupation since and he is seeking cancellation of the orders of land adjudication officer and the process of adjudication is not complete and hence the applicant cannot claim to be owner of the plot in question. He denies having started any construction work on the said land.

From the pleadings before court, plot no. 427 is just but one of the plots in dispute between the plaintiffs and defendants and this dispute has been subsisting for a long time. It is the plaintiffs contention that the land adjudication officer wrongly allocated the land to 2nd defendant and that is why they have filed this suit asking court to cancel the allocation of this plot among others to the defendants and they want original boundaries restored. The defendant has counter claimed in his defence asking the 1st plaintiff to vacate the said plot no. 427 and for a permanent injunction from trespassing or interfering with the said plot.

The first plaintiff claims to be in occupation of the land since his parents resided thereon and he has structures on it and denies putting up any recent structure. We have the word of plaintiff as against that of second defendant. A photograph of the site under construction would have been of assistance to the court.

As of today it is agreed and not in dispute that the land is provisionally allocated to the second defendant. The land adjudication officers order still subsists until and unless the court orders otherwise after hearing and determination of this case. That being the case the second defendant does have a right to the land which has to be protected and I therefore find that the applicant has shown that he has a prima facie case with good chances of success.

If indeed, which is not confirmed, the 1st plaintiff is constructing a building on the said plot at this stage, It may prejudice the 2nd defendants position in the event that the court upholds the decision of the land adjudication officer and he would suffer irreparable loss. Since the plaintiffs claims to be in occupation of

the plot which has not been disputed by 2nd defendant and cannot be evicted before hearing of this matter, I do agree with the sentiments of Mr. Makau for the plaintiff that it is best that status quo be maintained so that he can cultivate and live on the land but it is ordered that he should not construct permanent buildings or structures or deal with the land in any way that may be prejudicial to the other party – second defendant till this case is heard and determined. Orders accordingly.

Dated, read and delivered at Machakos this 5th day of February, 2004.

R. WENDOH

JUDGE