

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 43 OF 2003

GRACE NTHAMBI MONI.....PLAINTIFF

VERSUS

GABRIEL KYATU MANYALA.....DEFENDANT

RULING

The application for determination is the chamber summons dated 22.7.03 brought pursuant to order 39 rule 1 2 3 and 9 of Civil Procedure Rules and section 3, 3A and 18 Civil Procedure Act. The plaintiff applicant prays that the court do grant an interlocutory injunction against the defendant/respondent restraining him his agents or servants from encroaching upon, alienating or transacting, working or continuing to trespass upon the plaintiff/applicants parcel of land No. UKIA/UTAATI/869 until the suit is heard and determined. The applicant had included a prayer III in the application which is that the court do withdraw the proceedings pending in Makueni District Land Dispute Tribunal case no. 42/02 and try and dispose of the same. However, at the hearing the counsel for applicant abandoned the said prayer. Costs are also asked for. Grounds upon which the application is brought are found on the face of the application and the application is further supported by the affidavit of the applicant Grace Nthambi Moni. It is the applicant's case that she owns land parcel UKIA/UTAATI/869. She annexed a title deed dated 15.1.1992 bearing her names and in respect of the said land and that the defendant/respondent invaded her land in 1993 where he has continued to work and has cut down trees and is in the process of putting up a semi-permanent structure and also invited a prospective purchaser to whom he wants to sell the said land. The respondent has also filed a claim in Makueni Land dispute Tribunal claiming title to the said property and applicant seeks the injunction.

The respondent opposed the application and filed a replying affidavit in opposition in which the respondent depones that he purchased a portion of the suit land from one John Kioko Ndunda for Kshs.44,780/=. He annexed a copy of proceedings before the Land Registrar Makueni. GK I and he placed a restriction on the plot GK2. He has been in occupation of part of the suit land since 1974. He annexed GK3 as acknowledgement of payments but they are not translated to the court's language nor is the original agreement annexed and the court will therefore ignore them.

The respondent claims to have filed a claim in the Land Dispute Tribunal No. 42/02 (GK 4) and that for those reasons an order of injunction cannot be issued as his rights have not been determined. He has constructed permanent houses on the plot cultivates crops and that an order of injunction would harm him. He does not intend to interfere with the land in anyway and that the matter should proceed to full trial instead as he has filed a counter claim in the suit. There is no doubt in my mind that the plaintiff/applicant is the registered owner of the suit land. The respondent has annexed some proceedings before Land registrar in which it was decided that a restriction be put on the said land. None has been put so far. The title is free of any encumbrances.

The respondent claims to have been on the land since 1974. He claims to have purchased the land from one John Kioko Ndunda not a party to this suit. It is only from the annexures to the respondents affidavit that the said person is mentioned as being a brother in law to the applicant. The applicant on the other hand claims that the respondent entered the land in 1993. The question is how come for all those years the respondent did not pursue the registration of the land in his name if indeed he purchased the land. The court has not looked at the documents annexed as evidence of payment because they are not agreements. They seem to be translations. There are no copies of original agreements. Besides they are not translations into English language. There is so far no evidence of sale of the land from the alleged Ndunda Kioko to

the respondent.

However, the respondent has been in possession of the land for some time. The other question to the applicant is why no steps were taken by the application to stop respondent from encroaching on the said land.

If indeed the respondent entered into an agreement with one Ndunda for the said sale of land and no steps were taken towards it being transferred to respondent the question is whether that transaction is valid and if it can be enforced as against the applicant. The court has also considered the annexures to the respondents affidavit GK4 – a claim before the Land Dispute Tribunal. Though that is not an issue before this court, the question is whether that tribunal has jurisdiction to deal with such a claim of ownership to land.

In my considered view the applicant is the owner of the land and the respondent has not shown the contrary. There is no proof of permanent structure on the land. In the letter to District Land Registrar annexed as GK 2 the respondent only indicated he had developed the land into a shamba by terracing it and planting trees. It is the plaintiffs contention that the respondents has shown intentions of constructing a house to the said land and wants to sell the land. As earlier found the plaintiff is the registered owner of the land.

The respondent has not placed sufficient material before the court to prove his interest in the said land. What is however not in issue is that he is in possession of a portion of that land. The court cannot therefore grant an injunction totally barring him from interfering with the land working the land or encroaching on it. The court would be determining the suit without hearing both parties. I have considered the authorities cited by respondents counsel in the cases of FIMA BANK LTD. VERSUS SPARES & INDUSTRIES LTD. CA 51/00 and KENYA COMMERCIAL BANK LTD. VERSUS AFRAHA EDUCATION SOCIETY EALR 2001 38, in which the courts considered the principles that the court taken into consideration before grant of injunction, whether one has established a prima facie case with chances of success, if the applicant will suffer irreparable harm and if in doubt the court to order an injunction on balance of convenience. In the present case, the applicant has shown that she is indeed the owner of the land, it being ancestral land she will suffer irreparable loss if it were to be given to another. However as pointed out earlier there is the question as to how the respondent came to be on land and his exact interest. The court will grant an injunction on a balance of convenience to safeguard the status quo so that none of the parties should interfere with the said land and it should remain in its present condition till this matter is heard and determined at a full hearing. Costs to be in the cause.

Dated, read and delivered as Machakos this 16th day of July, 2004.

R. WENDOH

JUDGE