



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
LAND & ENVIRONMENT CASE NO. 306 OF 2013

OLIVER SHADRACK MBALANYA PLAINTIFF

VERSUS

JOHN ATINGO AMAYI DEFENDANT

RULING

This is a Notice of Motion dated 23/10/13 filed by the plaintiff through Ngala Owino & Company advocates. The application was brought under **Order 40 (a)** and **rule 4 (1)** of the **Civil Procedure Rules 2010**.

The prayers are as follows -

“(a) That pending the hearing and determination of this suit, the defendant/respondent, their servants and/or agents or otherwise however be restrained from being, remaining or trespassing/entering upon all that piece of property situated in West Bunyore/Ebusikhale/2028 – the suit property.

(b) That pending the hearing and determination of this suit, the defendant/respondent, their agents and/or servants or otherwise however be restrained from interfering howsoever with the plaintiff/applicant’s quiet enjoyment, possession and occupation of the suit property.

(c) In the alternative, pending the hearing and determination of this suit, the defendant/respondent, their servants and/or agents or otherwise however be restrained from misusing, damaging, wasting, destroying, polluting or in any other manner howsoever.

(d) That the cost of this application be borne by the defendant.”

There are four grounds listed on the face of the application. The grounds are that the defendant has trespassed, taken possession and wrongfully remained in possession of the land. That the defendant has misused, damaged, wasted, destroyed, polluted and degraded the suit property which is in use for rental purposes. That the defendant has refused and neglected or failed to vacate the suit property.

The application was filed with an affidavit sworn by the plaintiff on 23/10/13. It is deponed in the said affidavit *inter-alia* that the defendant without any justifiable cause has trespassed on the subject land. That he has denied the plaintiff access and enjoyment of the said land which has caused the plaintiff to suffer damage and loss. That therefore the plaintiff is seeking the injunctive orders herein prayed for.

The application is opposed. The defendant filed a replying affidavit sworn by himself on 21/1/14. It is deponed that the defendant has bought a portion of land measuring 50 x 100 metres from the late grandfather of the plaintiff called Mbalanya Omwakwe in 1961. That the said Mbalanya Omwakwe died in 1984 and his sons, including the father of the plaintiff, died in or about the year 2000. That there has been no quarrel between the original seller or his sons and the defendant. That the present suit, filed in October 2013 is statute barred.

At the hearing of the application Mr. Abok appeared for the plaintiff while Mr. Munyendo appeared for the defendant. Both counsel made oral submissions in court, which I have considered.

This is an application for injunctive orders. It was filed subsequent to filing a suit by way of plaint. The prayers in the plaint are as follows -

(a) A permanent injunction (be issued) restraining the defendant by himself/herself, servants, agents, employees and those claiming through him from trespassing or continuing to interfere with the plaintiffs land known as L.R. NO. West Bunyore/Ebusikhale/2028.

(b) General damages for trespass.

(c) Costs of the suit.

The parameters to be taken into account by the court in an application for interlocutory injunctive orders were clearly stated in the case of **Giella -vs- Cassman Brown Ltd. [1973] EA 358**. An applicant has to show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss not capable of being compensated in damages. Thirdly, if the court is in doubt, it will decide the matter or application on a balance of convenience.

The facts as disclosed by the parties are not in dispute. The defendant has actually been in occupation and use of the land for a long period of time. He claims to have bought the land from the grandfather of the plaintiff in 1961. The plaintiff admits that the defendant has been using the land and is still in occupation and use thereof.

Does the plaintiff have a prima facie case? A prima facie case is one which may or may not succeed. It is an arguable case. Depending on the evidence that will be tendered in court at the trial herein regarding the reasons and the time when the defendant entered, occupied and started using the land, the case might be decided either way. It is an arguable case either way. In my view, the plaintiff has a prima facie case, the determination of which will depend on the evidence to be tendered at the trial, and the application of the law to that evidence.

What about suffering irreparable loss that cannot be adequately compensated in the form of damages? From the facts before me, I am of the view that the plaintiff does not stand to suffer irreparable loss if the interlocutory injunctive orders sought herein are not granted. His loss, if any, can be compensated adequately in the form of damages. In my view, what the plaintiff is attempting to do now through this application, is to evict the defendant from the land at an interlocutory stage before the pending substantive case is heard and determined. The orders sought in the application, if granted will have the effect of determining the entire suit. At such preliminary stage, courts are not entitled to grant orders that will determine the substantive case. The plaintiff's main prayer in the plaint is for a permanent injunction and eviction. The present application seeks that prayer by merely using different words. Granting the prayers sought in this application will determine the substantive case which the court is not entitled to do at this preliminary stage. The injunctive orders sought in the application cannot be granted as the plaintiff has not satisfied one of the two primary requirements for the grant of interlocutory injunctive orders. He will not suffer irreparable loss if the orders sought are not granted.

The balance of convenience is also not in favour of the plaintiff. It is in favour of the defendant.

This is because the defendant has been in occupation and use of the subject land for a long time. He is still in occupation and using the land. Restraining him and possibly his dependants from using the subject land now is definitely an inconvenience, while not granting the orders sought herein means retaining the status quo until the substantive case herein is heard and determined.

To conclude, I find no merits in the application. I dismiss the same. The plaintiff will pay the defendant the costs of the application.

Dated and delivered at Kakamega this 8th day of May, 2014

George Dulu

JUDGE