

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 73 OF 2012

JOHN KIPNGETICH
KIRUL.....PLAINTIFF

VERSUS

DAVID KIBET
MISEK.....DEFENDANT

RULING

By a Notice of Motion dated 20th February 2012 and filed on 9th March 2012, the Plaintiff/Applicant (the Applicant) sought the following prayers -
that this application be certified as of extreme urgency and that service hereof be dispensed with in the first instance,

that pending the hearing and determination of this application inter-partes this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendant by himself, his agents, his servants from entering, cutting trees, erecting structures, selling, transferring, alienating, disposing, tilling, cultivating, leasing or in any way from interfering with the subject parcel of land known as Nakuru/Lengenet/659 and a copy hereof be served upon the OCS Rongai Police Station for effective compliance,

that pending the hearing and determination of this application inter-parties this Honourable Court be pleased to issue an order of mandatory injunction directing the Defendant by himself, his agents, his servants to vacate from the subject parcel of land known as Nakuru/Lengenet/659 and a copy hereof be served upon the OCS Rongai Police Station for effective compliance,

that pending the hearing and determination of this suit this Honourable Court be pleased to issue orders of temporary injunction restraining the Defendant by himself, his agents, his servants from entering, cutting trees, erecting structures, selling, transferring, alienating, disposing, tilling, cultivating, leasing or in any way from interfering with the subject parcel of land known as Nakuru/Lengenet/659,

the costs of this Application be provided for.

The Motion was supported by the Affidavit of the Applicant, John Kipngetich Kirui and the grounds thereon. It was however opposed by the Defendant/Applicant, David Kibet Misek sworn and filed on 28th May, 2012.

In order for an Applicant to qualify for a grant of a temporary injunction, he must-establish a prima facie case with a probability of success,

show that unless the injunction is granted, he will suffer such loss as may not be compensated in damages by the Defendant/Respondent,

where there is doubt the matter will be decided on balance of convenience.

Those principles are found in the case of *GIELLA VS. CASSMAN BROWN & CO.* [1973] E.A. 358.

In this case, the Applicant contends that he is the registered proprietor of all that parcel of land known as NAKURU/LENGENET/659, and has attached to his application copies of the Title and Official Search (done on 18th February 2010 showing the Applicant as the registered owner of the parcel of land).

The Applicant therefore claims not only that the Respondent is a trespasser, but also that he should be removed from the land by an order of mandatory injunction, and not merely the temporary restraining order granted on 21st May, 2012.

By its nature a mandatory injunction is in the nature of a final order commanding and requiring the defendant to put to an end what the plaintiff or applicant sees is wrong, an order compelling a defendant to restore things to the condition in which they were at the time when the plaintiff's complaint's was made. It is akin to an order for specific performance and an order of mandamus.

In this case, the Applicant obtained his title on 12th April 2002. The Defendant has no title but avers that he was shown the parcel of land by the Settlement Fund Trustees some twenty-five (25) years ago, and even if he has no title, his counsel has threatened to bring proceedings for adverse possession against the plaintiff.

In addition, from the documents from the District Land Adjudication and Settlement Officer, (letter dated 10th May 2012, DKM4") the Applicant is reputed to be owner of plot No. 65, designated in the name of a Mr. Kenneth Wanderi, who is said by the same officer, to have paid 10% land deposit but has not made any further S.F.T. Loan repayments. This plot 65 comprises 11 acres, and has thereon various trees including a lemon tree reputed to have been planted by a Mr. Kirui – Is this the same person as John Kipngetch Kirui? His counsel was served with the Respondent's Replying Affidavit well before hearing of the application on 6th June 2012. He has not refuted the Respondent's averments.

In light of the confusion on the ground as to who owns and resides on which plot, it would be very unsafe to grant any of the prayers sought whether a temporary or mandatory injunction.

I therefore decline to grant either of the orders of temporary or mandatory injunction. I however direct that pending the hearing and determination of the suit herein, the plaintiff/applicant may keep his documents of title in safe custody, but he will not interfere with the Respondent's occupation and use of the suit land.

I therefore dismiss the Notice of Motion dated 20th February 2012, and filed on 9th March 2012, and I direct that costs will abide the outcome of the suit herein.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 6th day of July, 2012

J. ANYARA EMUKULE

JUDGE