



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE 64 OF 2009

1. MUTUKU KIVUTHI
2. WASUA MATHEKAPLAINTIFFS

VERSUS

UMOA BUS SERVICES.....DEFENDANT

RULING

The plaintiffs instituted this suit against the defendant on 17th March, 2009. The Plaintiffs sought a permanent injunction to restrain the defendant from evicting them from “*the unregistered land situated at Winumba Aathi Division, Mutomo District*”. They based their claim on the fact that the defendant took possession of a parcel of land measuring about 1,707 acres situate in Winumba within Mutomo District with the intention of sharing it out to its members. The 1st and 2nd plaintiffs settled on the said parcel of land in 1990 and 1998 or thereabouts respectively. However on or about 6th March, 2009 the defendant unlawfully issued them with a notice to vacate despite the fact that they were in possession and had developed the land with permanent structures and crops. The defendant though was not the registered proprietor of the land, hence the suit.

Contemporaneously with the filing of the suit, the plaintiffs took out, under a certificate of urgency, a chamber summons application seeking an interlocutory injunction to restrain the defendant from evicting them from the unregistered parcel of land pending the hearing and final determination of this suit. On the basis of the foregoing, they claimed to have established a *prima facie* case with a high probability of success, the defendant being the unregistered proprietor of the land lacked authority to effect their eviction and finally, that having been in possession thereof since 1990 and 1998, if evicted they stood to suffer irreparable loss. The affidavit in support of the application was sworn by the 1st plaintiff. He merely reiterated the averment in the plaint already reproduced above.

On being served, the defendant reacted by filing a notice of preliminary objection on the grounds that:-

- The suit was bad in law as there is no interest which can be ascertained.
- The court lacked jurisdiction as the land was unregistered
- The plaintiffs have no *locus standi* to mount the suit

- The suit does not disclose any cause of action known in law.

When the application came for *inter partes* hearing before **Lenaola, J** on 21st July, 2007, he directed that the preliminary objection be heard on 6th October, 2009. Come that day and the good judge issued further directions that parties file and exchange written submissions. Thereafter, the judge left the station on transfer. On 18th May, 2012 the application came before me for directions. **Mr. Mutia** holding brief for **Muoki** for the Plaintiffs and **Mr. Munyasia** for the defendant agreed that I should proceed with matter from where **Lenaola, J** had left. They subsequently filed and exchanged written submissions which I have carefully read and considered.

My take is that both the suit and the application are non-starters. The suit as instituted is bad in law. The orders and prayers sought in the application and suit respectively are incapable of enforcement. There is no ascertainable interest capable of being enforced by court. For instance, which is the land that the court is being asked to issue orders and prayers against or in favour of? The title of the land has not been stated and if the court was to allow the application and indeed the suit, it may end up issuing orders incapable of enforcement. Thus the court will have acted in vain. Ordinarily courts do not act in vain. The orders as sought are vague, ambiguous and cannot be enforced as the land in question is incapable of being identified.

By their own admission in the plaint, the defendant took possession of land measuring 1,707 acres with intention of sharing it to its members. The land therefore belongs to the defendant. The plaintiffs cannot then be heard to say that the defendant is not the registered proprietor of the suit. Since they made the allegation, they were required to prove, which endeavour they have miserably failed. Since the land acquired is 1,707 acres, if the orders sought were to issue, would it mean that they would apply to the entire parcel of land? If not, what will be the extent of their efficacy? Armed with such orders, nothing will stop the plaintiffs from moving from one end of the land to the other in their attempt to enforce compliance of the order. That could not have been their initial intention. It would result in absurdity in any event.

The plaintiffs acknowledge that they are not the registered owners of the land. Then on what basis are they suing? They contend that they have been in occupation of the land since 1990 and 1998 respectively and had developed the portion in their occupation with permanent structures and crops. However, this averment is bare. There is nothing in the affidavit in support of their application solidifying this assertion. Nor are the plaintiffs claiming ownership on account of adverse possession.

In conclusion, I am satisfied that the preliminary objection was well taken. The suit and injunctive orders sought therein are incapable of enforcement. The suit and the application are accordingly dismissed with costs to the defendant.

RULING DATED, SIGNED and DELIVERED at MACHAKOS this 6TH day JULY, 2012.

ASIKE -MAKHANDIA
JUDGE