



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO.45 OF 2015

RAMADAHAN MAKAL LALANGOLE PLAINTIFF

VERSUS

LOPUSIKOU KORI LOKAMAR..... DEFENDANT

R U L I N G

1. The applicant filed a notice of motion dated 1st April 2015 in which he sought a mandatory injunction ordering the removal of the respondent from plot No.274 in Kanyarkwat Settlement Scheme pending the hearing and determination of the suit herein. The applicant had filed a suit against the defendant in which he sought the following reliefs:-
 - a) A declaration that he is the owner of plot No.274 at Kanyarkwat Settlement Scheme and further that the respondent is a trespasser in the said plot and that he or anybody claiming under him should be ordered to vacate the land or be evicted.
 - b) A mandatory injunction
 - c) General and exemplary damages for trespass
 - d) Costs
 - e) Interest
2. The respondent who was duly served with the summons to enter appearance as well as the application never entered appearance or reply to the application. The applicant contends that plot No.274 at Kanyarkwat Settlement Scheme was allotted to his late brother Loitalima Lalangole who had no family; that he has since obtained a grant of letters of administration which has been confirmed and that the land is supposed to be registered in his name. The respondent filed a suit against the applicant. The suit was ELC Case No.67 of 2014. This suit was dismissed on 10.2.2015 for want of prosecution. After the dismissal of the respondent's suit, the respondent went to the land and chased away the applicant's son and occupied the house which the applicant had put up in the property. The applicant has since tried to have the respondent move out of the land in vain.
3. The applicant annexed a copy of grant of letters of administration and copy of confirmed grant. It is clear that the applicant is the administrator of the estate of his brother. There is also a letter from the District Land Adjudication and Settlement Officer – Trans-Nzoia confirming that plot No.274 of Kanyarkwat settlement scheme was allotted to the applicant's deceased brother.
4. The only issue for determination in this matter is whether a mandatory injunction should be granted at interlocutory stage. The principles for grant of mandatory injunction were well set out

in the case of Locabail International Finance Ltd vs Agro Export & Another (1986), ALLR 901 where it was stated as follows:

“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction. “

5. The above case has been quoted with approval in several court of Appeal decisions such as Nairobi Court of Appeal Civil Appeal No.121 of 2005 between Shariff Abdi Hssan and Nadhif Adan (unreported). In this appeal the respondent who was the plaintiff in the High Court had sued the appellant who had trespassed into his property and erected temporary structures on the same. The respondent filed an application in which he among other prayers sought for a mandatory injunction ordering the appellant to remove the structures from his property. The application for a mandatory injunction was granted. The appellant being dissatisfied moved to the Court of Appeal. The Court of Appeal dismissed his appeal with costs. The judges referred to the case of Kamau Mucuha vs The Ripples Ltd Civil Application no.Nai 186 of 1992 (unreported) where Cocker J A stated after referring to Locabail case as follows:-

“ A party as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act and without in any way attempting to pre-decide the intended appeal or to influence a decision thereon, I am of the view that the order of the learned judge, granting the prohibitory and mandatory injunction ought not to be disturbed at this stage.”

6. In the case of Super Power Cash and Carry Ltd vs Nairobi City council and 2 others (unreported), the court of Appeal stated as follows:-

“ This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

7. Applying the above principles, I find that a mandatory injunction can be granted at interlocutory stage in the circumstances. The respondent has taken the law into his own hands and chased away the applicant's son and occupied a house put up by the applicant. He did this after his case against the applicant was dismissed for want of prosecution. He is prima facie a trespasser who should not be allowed to retain a position of advantage which he has gained through unlawful means. I therefore allow the applicant's notice of motion dated 1.4.2015 in this entirety.

It is so ordered.

Dated, Signed and Delivered at Kitale on this 18th day of May 2015.

E. OBAGA

JUDGE

In the presence of Mr Kiarie for Applicant – Court Clerk - Isabellah.