



CIVIL

Ø Principles of granting an injunction.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVILCASE NO. 119 OF 2010

ZABERIO GITONGA NAAMAN.....PLAINTIFF

VERSUS

M'MWITHIMBU M'MUNYUA.....DEFENDANT

RULING

The plaintiff in his claim seeks for permanent injunction against the defendant, his family members, agents or anyone claiming to him to restrain them from entering into the plaintiff's parcel number *Nyaki/Thura/3916, 3917, 3918 and 3919*. The plaintiff has filed the Chamber Summons dated 28th September 2010 seeking temporary injunction pending the hearing and determination of this suit in the terms claimed in the plaint. In the supporting affidavit, the plaintiff deponed that he purchased through a public auction parcel number *Nyaki/Thura/1866*. This parcel of land was sold by the Industrial and Commercial Development Corporation (I.C.D.C.) in exercise of their statutory power of sale. Following the purchase through the auction, the plaintiff took possession of the same. He subsequently sub-divided the land into 4 parcels of land. He stated that on taking possession, he began to make use of the land but in August 2010 the defendant and his family members started to enter into the land committing acts of trespass. It should be noted that the land before being auctioned belonged to the defendant. However, after the auction, it was transferred to the plaintiff. It was further deponed that the defendant on entering the land began to cut trees which were growing on the land. Further that he erected a temporary shed for selling vegetables. At the time when he swore the affidavit, the plaintiff stated that the defendant was preparing to cultivate the land in readiness for the planting season which began in the month of October. The plaintiff stated that he is suffering immensely from the acts of trespass by the defendant. The defendant was present in court acting in person. When the court inquired from him whether he had filed a replying affidavit, he stated that he was unaware that he needed to file such an affidavit. The court proceeded to hear the matter and allowed the defendant to respond to the application orally. He begun by saying that the land indeed belonged to him but he had been given notice to vacate which he did. In doing so, he demolished his houses that were on the land. He confirmed that he had no claim over the land. He gave the background of his woes by saying that he had guaranteed Samuel Ndumba for a loan facility given to him by I.C.D.C. Ndumba defaulted in paying that loan and as a result his land was sold in an auction. He confirmed that a suit had been filed by him and Ndumba in High Court at Nairobi Milimani Commercial Court Civil Case No. 558 of 2009. In that case, they sought an injunction to stop the first defendant that is ICDC from transferring the suit land to the plaintiff. That application was dismissed on 29th October 2009. Bearing in mind the submissions made by the defendant whereby he clearly stated:-

“I am not claiming that land. I am not at all claiming ownership of that land.”

The court finds that the injunction sought by the plaintiff is merited. The plaintiff has, in my view, satisfied the principles of granting an injunction as enunciated in the case ***Giella Vs. Cassman Brown & Co. Ltd*** [1973] EA. In that case, the principles of granting an injunction were stated as follows:-

“An applicant must show a prima facie case with a probability of success;

An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;

When the court is in doubt, it will decide the application on the balance of convenience.”

The plaintiff has demonstrated a *prima facie* case with probability of success. The demonstration of that probability of success is confirmed by the defendant who stated that he had no claim over the plaintiff's land. The plaintiff has also deposed that he has suffered immensely from the trespass by the defendant and in my view, he thereby satisfies the second principle in that he has shown that if the trespass continues he would suffer irreparable injury. It is for that reason that I grant the following orders:-

1. An order of temporary injunction is hereby issued restraining the defendant, his family members, agents, servants or any one acting through him from entering into, trespassing or in any way interfering with the plaintiff's quiet possession and user of parcels number Nyaki/Thuura/3916, 3917, 3918 and 3919 pending the hearing and the determination of this suit.

2. The plaintiff is awarded costs of the Chamber Summons dated 28th September 2010.

Dated and delivered at Meru this 22nd day of October 2010.

MARY KASANGO

JUDGE