



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 276 OF 2012

KALYA SOI FARMERS COOPERATIVE SOCIETY..PLAINTIFF

-VERSUS-

PAUL KIRUI.....1ST DEFENDANT

THE KENYA FOREST SERVICE.....2ND DEFENDANT

RULING

By a Notice of Motion brought under Order 40 Rules 1, 2 (1), 3 (1) & 9, Order 51 Rule (1) of the Civil Procedure Rules, Section 3A & 63 (e) of the Civil Procedure Act the Plaintiff/ Applicant herein seeks the following orders among others; THAT pending the hearing and determination of this application the Court be pleased to issue an order of temporary injunction restraining the Defendants/ Respondents by themselves, agents, servants, employees or otherwise who have without the Plaintiff's consent entered onto the Plaintiff's land and destroyed the properties thereon by burning houses and crops and have continued with their acts of destruction

The Application is supported by the affidavit of Mathew Kipkoech Rugut sworn on 3rd September, 2012 and is premised on the grounds on the face of the application.

The applicant's case is that it is has been the registered owner of the suit land measuring about 287.333 Ha since 1976: That sometime in August 2012, the Respondents entered into the suit land, destroyed properties including houses and crops and have continued with these acts of destruction to date. In the process they also evicted the Plaintiff's members from the said land, thus denying them the use and occupation of the land.

In their Grounds of Opposition dated 21st September, 2012 the respondents opposed the application on the grounds that the same was bad in law, inept, incompetent, frivolous, vexatious, the application has been overtaken by events, the remedies sought are not available in law, the application is at variance with the suit and there is no solid evidence of the size and ownership of the land in the absence of an official search.

The conditions for granting a temporary injunction are provided for in the landmark case of **Giella vs. Cassman Brown & Co. Ltd** [1973] E.A 285-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.” also See ***EA Industries v Trufoods*** [1972] EA 420.

The Applicant submits that it has established a *prima facie* case with overwhelming chances of success by demonstrating that it is the registered owner of the suit land since the year 1976. However, it is worth noting that the title exhibited was registered on 21st February, 2002. In addition, the Applicant states that it would be prejudiced if the orders sought are not granted as it will be evicted from the suit land before the conclusion of the matter thus rendering the suit nugatory.

The applicant relied on the case of **Amir Suleiman vs. Amboseli Resort Limited H.C.C.C No. 1078 of 2003 (UR)** where the court held that in considering an application for an interim injunction, the court should always opt for the lower rather than the higher risk of injustice.

The Respondent submitted that Order 40 Rule 1 is clear that a temporary injunction is granted where the property in dispute is in danger of being wasted, damaged or alienated. In this instance there was no such danger as the plaintiff had already been evicted and this case was filed about 6 months from the date of the last evictions. Therefore the Plaintiff was not in occupation of the suit land and that the prayers sought were incapable of execution since evictions had already occurred and there was no current danger of any property being wasted, damaged or alienated. They relied on the holding in **Sonalux Limited & Another vs. Barclays Bank of Kenya Limited & 2 Others [20088] eKLR**

In this case, the legality of the Applicant's title has been challenged by the Respondents. A letter by the District Land Registrar, Narok District has been exhibited. The letter states that the title to the suit land has been suspended pending the conclusion of talks between the interested parties. This land is one of the parcels said to have encroached into the Mau Forest.

The Respondents further contend that the Plaintiff has come before court with unclean hands and therefore undeserving of the orders sought. They failed to disclose that their title to the suit land had been suspended by the Government because it had encroached on Mau Forest. In addition, they were fully aware that the occupants of the said land had been evicted. For this proposition, reliance was placed on the case of **Tende Drive Villas Limited vs. David Kamau & Others [2005] eKLR** where the court refused to grant an interlocutory injunction for the reasons, inter alia, the Applicant was guilty of material non-disclosure.

Thirdly, the Respondents argued that the Plaintiff did not have *locus standi* to file the application since its claim as the registered proprietor of the suit land had been disputed.

An injunction is an equitable remedy to which the principles of equity apply. The Court of Appeal at Nairobi in **Eric V.J. Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No.20 of 1994 (12/94 UR)** addressed itself to the issue of grant of an injunction where the action sought to be restrained has already taken place and the application of the equitable principle that equity does not act in vain as follows-

“An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it.”

The purpose of an injunction is to maintain the status quo pending the hearing and determination of the matter before it. It therefore cannot restrain what has already taken place. For an injunction to be issued, the Applicant must demonstrate that it stands to suffer irreparable damage that cannot be compensated by an award of damages. This is because a temporary injunction is intended to protect the suit property pending the final determination of the rights and interests of the parties in the suit. Thus it is issued where the property is in danger of being wasted, damaged or alienated to the prejudice of the party seeking the orders. In the case of **Assanand v Pettitt [1989] KLR 241** Hancox J cited with approval the holding in Cotton, L J in **Preston v Luck (1884) 27 Ch D** at p 505

“to keep things in status quo, so that, if at the hearing the plaintiffs obtain a judgment in their favour, the defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.”

In the present case, the evidence before the court is that the Applicant's members had already been evicted by the Respondents at the time of filing this suit. Indeed the plaintiff was quite vague on the actions sought to be restrained in the orders it was seeking. Thus the court cannot issue a prohibitory injunction restraining an eviction that has already taken place.

I agree with the holding in the authority cited by counsel for the respondent. see **Tende Drive Villas Limited vs. David Kamau & Others** (*supra*) that an injunction should not be granted where there is material non disclosure. I find the applicant guilty of material non disclosure and therefore does not deserve the orders sought.

I therefore dismiss the application dated 3rd September, 2012 with costs.

Dated, signed and delivered on this 4th day of October 2013.

L N WAITHAKA

JUDGE.

PRESENT

Mrs Gatei holding brie for Mr Orina for the plaintiff

Ms Said for the respondent

Stephen Mwangi: Court Clerk

L N WAITHAKA

JUDGE