



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO. 36 OF 2017**

**KITONYI MASULU TUKE.....PLAINTIFF**

**-VERSUS-**

**MBENYIA MBOLU ..... 1<sup>ST</sup> DEFENDANT**

**MULI MBENYIA ..... 2<sup>ND</sup> DEFENDANT**

**MWOLOLO NZOKA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By his Notice of Motion application expressed to be brought under Order 51 Rule 1, Order 40 Rule 1(a) & (b) of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) and all enabling provisions of the law, the plaintiff/applicant prays for the following orders:-

*2) The court be pleased to grant an order of injunction restraining the Defendants/Respondents whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, scooping sand, burning charcoal, grazing livestock, farming/cultivating on, alienating or otherwise interfering with the suit property being title Number MAKUENI/KAKO/238 pending hearing and determination of this application.*

*3) The court be pleased to grant an order of injunction restraining the Defendants/Respondents whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, scooping sand, burning charcoal, grazing livestock, farming/cultivating on, alienating or otherwise interfering with the suit property being Title Number MAKUENI/KAKO/238 pending hearing and determination of this suit or till further orders by this Honourable Court.*

*4) The costs of this application be provided for.*

*5) The Honourable court be pleased to make such further orders as it may deem just and expedient in the circumstances of this case.*

2. The application is dated the 23<sup>rd</sup> March, 2015 and was filed in court on the 17<sup>th</sup> March, 2017. It is predicated on the grounds on its facts and is supported by the affidavit of the applicant sworn on the 23<sup>rd</sup> March, 2017. It is opposed by the replying affidavit of Mbenyia Mbolu, the first defendant/respondent, sworn on the 31<sup>st</sup> August, 2017 and filed in court on 01<sup>st</sup> September, 2017.

3. On the 13<sup>th</sup> July, 2017, the court directed that the application be disposed off by way of written

submissions. Only the respondents had filed their submissions by the time of writing this ruling.

4. The respondent's counsel submitted that in order for the orders sought to be granted, the applicant must fulfill the principles set out in the case of **Giella vs Cassman Brown**. These principles are:-

*a. A prima facie case with probability of success.*

*b. An injunction will not normally be granted unless he applicant might suffer irreparable damage if injunction is not granted.*

*c. If the court is in doubt, it will decide the application on a balance of convenience.*

5. On the first principle, the respondent's counsel submitted that without the surveyor's report showing the actual delianations on the ground, the applicant fails terribly since the court will not be convinced as to the real situation on the ground as to whether the respondents have indeed trespassed/encroached into the applicant's land. Regarding the alleged construction by the respondents, the counsel opined that the same has not been demonstrated and the allegation is bare, hollow and unsupported.

6. The counsel further submitted that the applicant seeks equity with unclean hands and is also guilty of material non-disclosure. The counsel added that in paragraph 5 of his supporting affidavit, the applicant has deponed that the buyers have settled and put up homes on the suit property. He submitted that in their replying affidavit, the respondents have deponed that they have already constructed homes and have resided thereon since time immemorial and that the applicant did not disclose to the court that he has never lived on the suit property.

7. On the issue of irreparable loss, the counsel submitted that the applicant has not demonstrated the loss that he would incur should the orders sought are not granted.

8. Regarding the principle of balance of convenience, the respondents' counsel submitted that the respondents have demonstrated that they have been in occupation and use of the suit property and as such, the balance of convenience tilts in their favour. The counsel added that issuance of the orders sought would amount to an order of eviction of the respondents from their property and would be against the principle of the court that mandatory orders cannot be issued at interlocutory stage unless under very special circumstances which the applicant has not demonstrated.

9. Having read the submissions filed as well as the application and the affidavit evidence, it is clear that on the issue of whether or not the applicant has a prima facie case with probability of success, there is no doubt that land parcel number Makueni/Kako/238 belongs to the estate of the Late Masulu Tuke. The applicant and the respondents are in agreement that the late Masulu Tuke sold parcels of land and transfer of proprietorship is yet to be concluded. The applicant has not indicated who the buyers of the land were but I do note that the respondents claim to reside on the portion allegedly sold to one Nzoka Muangi who in turn sold it to other buyers. These are issues which cannot be determined at the interlocutory stage and as such, it is my finding that the applicant has not established a prima facie case with probability of success.

10. On the issue of whether or not the applicant will suffer irreparable loss if the order of injunction is not granted, I hold that he has not demonstrated the irreparable loss that he will suffer and which loss cannot be compensated by way of damages.

11. On the issue of balance of convenience, it has not been disputed that the respondents have been in occupation of the suit land for quite some time based on the aforementioned sale. As earlier on observed, the purchasers of the land in question will be established during trial and as such my finding is that the balance of convenience tilts in favour of the respondents.

12. Arising from the foregoing, it is my finding that the application lacks merit and **same is dismissed with costs to the respondents.**

**Signed, Dated and Delivered on this 29<sup>th</sup> Day of January, 2018.**

**MBOGO C.G.,**

**JUDGE.**

**In the presence of;**

Mr. Hassan holding brief for Mr. Mulei for the Defendant/Respondent

Mr. Munyasia for the Plaintiff/Applicants – absent

Mr. Kwemboi – Court Assistant

**MBOGO C.G.,**

**JUDGE.**