



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 36 OF 2016

EVANSON MBURU GICHIMU..... PLAINTIFF

VERSUS

JOSEPH MATU NDIAGADEFENDANT

R U L I N G

1. The Applicant **Evanson Mburu Gichimu** filed an Originating Summons against the Respondent **Joseph Matu Ndiaga** seeking orders that he has acquired a portion measuring

50 x 100 ft out of **LR No. Trans Nzoia/Mito Mbili Settlement Scheme/79. LR No Trans-Nzoia /Mito Mbili Settlement Scheme** is registered in the name of the Respondent. The Applicant contemporaneously filed a Notice of Motion dated 10/2/2016 in which he seeks an injunction to restrain the Respondent from interfering with the portion measuring **50 x 100 ft** (suitland).

2. The Applicant contends that he entered into a sale agreement with the Respondent in 1996 whereby the Respondent agreed to sell to him the suit land. That he paid the entire purchase price and took immediate possession of the same and has been in possession and has carried out developments on it.

3. The Applicant further contends that the Respondent has threatened to evict him from the suitland. He contends that he has been in continuous and peaceful occupation of the suitland for over 20 years and as such the Respondent's rights in the suitland have been extinguished in his favour. It is on this basis that the Applicant seeks an injunction to restrain the Respondent from carrying on his threats to evict him.

4. The Applicant's application has been opposed by the Respondent through replying affidavit sworn on 1/ 3/ 2016. The Respondent concedes that he indeed had intended to sell a portion measuring **50 x 100 ft** to the Applicant. That instead of the Applicant occupying a particular area where the Respondent had earmarked for him, he went and occupied a different portion where he now intends to put up a permanent house. That the portion where the Applicant intends to put up a permanent house is where his homestead is.

5. The Respondent further states that the Applicant has concealed material facts. This includes the fact that he filed a claim before Cherengany Land Disputes Tribunal whose award was adopted as judgement of the court vide Kitale **SPMCC Land case No. 87 of 2003**. That the Applicant even filed an application for judicial review seeking to quash the decision as well as the judgement of the court adopting it. This application was dismissed on 29/7/2013. He has since filed Notice of Appeal to the court of Appeal.

6. The Respondent goes on to state that the filing of this suit is res judicata as the dispute herein had been

settled vide Kitale **SPMCC Land case No 87 of 2003** and that the filing of the present one is an abuse of the process of the court. The Respondent contends that the Applicant's occupation of the suitland has not been peaceful and as such, he cannot be granted an injunction.

7. In response to the Respondent's replying affidavit, the Applicant filed a further affidavit sworn on 4/3/2016 in which he denies that he ever filed any claim before Cherengany Land Disputes Tribunal. He contends that if there was any such claim filed, then it was filed by the Respondent who intended to use it to deprive him of the suitland.

8. I have considered the Applicant's application as well as the opposition thereto by the Respondent. This being an application for injunction which is an equitable remedy, an Applicant approaching the court has to do so with clean hands. The Applicant has also to demonstrate that he has a prima facie case with probability of success. An injunction will not normally be granted if damages will be an adequate remedy. If the court is in doubt, it will decide the application on a balance of convenience.

9. In the instant case, there is no contention that there was an agreement for sale between the Applicant and the Respondent. This was in 1996. It would appear that a dispute arose as to the exact place where the Applicant was to have his portion of 50 x 100 ft. The Applicant moved to the Cherangany Land Disputes Tribunal where he filed a claim. The Tribunal ruled that he had occupied an area where he was not supposed to be. The Tribunal verdict was adopted as judgement of the court vide Kitale **SPMCC Land case No. 87 of 2003**.

10. The Applicant was aggrieved by this decision. He filed a Judicial Review application in the High Court seeking to quash the decision. This application was later dismissed in a ruling delivered on 29/7/2013. The Applicant who was aggrieved filed a Notice of Appeal expressing his intention to appeal against the decision of the Superior court. The Applicant is trying to deny that he ever filed a claim at the Tribunal. The Applicant is not being serious. The Applicant is still trying to fight the verdict of the Tribunal. He did not want to disclose this fact. An equitable remedy cannot be granted to a person who has deliberately avoided to disclose material facts.

11. Even if the applicant is guilty of material non disclosure I will nevertheless consider whether he has disclosed that he has a prima facie case with probability of success. Evidence emerging is that the Applicant's occupation of the portion he seeks to have by way of adverse possession has not been peaceful. He was supposed to occupy a particular portion but he chose to go to a place of his own liking. When a dispute arose over this, he filed a claim in the Tribunal which decided the matter. His application to quash the decision has since been dismissed. Though he has appealed to the Court of Appeal, the fate of that appeal is not known. I therefore do not find that in the circumstances the Applicant has disclosed a prima facie case to entitle him to grant of an injunction.

12. On the issue as to whether the Applicant will suffer loss which will not be compensated in damages, the facts emerging show that it is the Applicant who is trying to put up a permanent structure where he is not supposed to put it. The issue of where he is supposed to occupy has already been settled. The Applicant has semi permanent structures on the suit property. He has not yet put up permanent structures. There is no loss which he is likely to suffer which will not be compensated in damages. If he goes ahead to construct permanent structures, he will be doing so at his own risk.

13. I do not have to consider the balance of convenience as there is no doubt in my mind as to the matter before me. I therefore find that the Applicant's application has no merits. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 27th day of April 2016.

E. OBAGA

JUDGE

In the presence of Mr Analo for Plaintiff/Applicant and

M/s Khaoya for Defendant/Respondent

Court Assistant – Isabellah

E. OBAGA

JUDGE

27/4/16