



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

ELC CASE NO.90 OF 2014

JOSHUA MUTISO MAITHA.....PLAINTIFF/APPLICANT

VERSUS

MOSES MUTUA KWINGA..... DEFENDANT/RESPONDENT

RULING

1. By a Plaint dated 18.9.2014 and filed on 23.9.2014 the Plaintiff/Applicant seeks Declaratory and injunctive reliefs against the Defendant/Respondent over Plot No.2230 Mbanya Adjudication Section. Contemporaneously the applicant filed motion dated 18.9.2014 on 23.9.2014 seeking temporary injunction against the Respondent over the same suit land. The motion is under Orders 40, 51, Rule 1 and Sections 3A and 63 Cap 21. The application is based on grounds on the face of the motion and supported by the Affidavit of Joshua Mutiso Maitha sworn on 18.9.2014. The Respondent opposes the same motion and has filed a replying affidavit sworn on 22.10.2014. The Applicant also filed further affidavit to respond to the Respondent's Replying affidavit sworn on 3.11.2014.

2. The summary of Application is that he bought a portion of land now Plot No.2230 at Mbanya Adjudication Section from the Defendant/Respondent herein after referred to as the suit land. Thereafter disputes arose between him and the Defendant/ Respondent vide;

- Mbanya Adjudication Section Committee case No.MBA/87/92 on 1.3.1991.
- Arbitration Board Complaint No.MBA/46/96 on 15.4.96
- And objection case No.MBA/DTB/8/1998 on 1412/1999

3. In all the above matters the applicant was held as the rightful owner as Respondent sold him the suit land. However, despite the above decisions in Plaintiff's favour, the Defendant has constantly issued threats of forceful eviction culminating with the notice of eviction dated 26.8.2014. Further the Respondent in conjunction with elders from Atagwa clan had physically assaulted him and he had to check medical attention

4. The Respondent case is that he sold a portion of land to the Plaintiff/Applicant at Ndoo area, of Mbanya Adjudication Section at Kshs.12,500/- and the Plaintiff took possession of the same. However, the Plaintiff started to encroach on parcel No.1047 located at Kyuu area Mbanya Adjudication Section belonging to the Defendant. The Plaintiff claimed to have bought the same prompting the Plaintiff to lodge committee case No.MBA/87/92 against the Respondent and same was heard on 1.3.93.

5. The Applicant admitted that he bought land at Ndoo area and that his main concern was the measurement of the portion of land he had bought from him as he claimed the one at Ndoo area was

small. The Respondent gave Plaintiff entire parcel of land at Ndoo area as ordered by the then District Officer and Atagwa clan in their decision. However, the Plaintiff misled surveyor to excise a portion of land Parcel No.1047 at Kyuu Adjudication Section and created Plot No.2230 which was registered in Applicant's name illegally.

6. This culminated with committee being misguided by the Plaintiff's sketch map indicating the plot bought was No.2230 at Kyuu area prompting the Defendant to file an appeal **No.MBA/ARB/46/93**. However, as the parties are step brothers, the Respondent withdrew appeal and matter went to the clan where it was resolved that the Applicant to vacate Plot at Kyuu area and go back to Ndoo area. The parties were in agreement and they signed the minutes. However the Plaintiff has disobeyed clan decision and has refused to vacate as decreed by the clan precipitating the issuance of notice to vacate by the Respondent.

7. After going through materials before me, I find the issue for determination is: whether the Plaintiff/Applicant has met the threshold of issuance of temporary orders?

The Applicant submits that he has met the conditions in **GIELLA –VS- CASSMAN BROWN & CO. LTD. (1973) EA 318**. This is because he is a bona fide purchaser for value. The Respondent admits selling the suit land and all the proceedings between the parties alluded to confirm Applicant as the rightful owner of the suit land. He is in occupation and the land's officers confirm that he is the holder of the suit land 2230. Thus a prima facie case has been established. He relies further on the following authorities **AGNES KITONDO NAMBU –VS- RUTH VINYA (20013) eKRL**.

MRAO –VS- FIRST AMERICAN BANK (K) LTD & 2 OTHERS (2003) KLR 125.

HABIB BANK VS. EUGENE M. YAKUB Civil Appeal No.439 of 1982.

8. On the Limb of irreparable harm, the Applicant submits that he is in possession together with his family and he is likely to be evicted if orders are not granted. This would render him and his family destitute and lose livelihood and the farm where they cultivate in the same land. He relies on authorities below to support his argument:

- **NIAZ JON MOHAMED –VS- THE COMMISSIONER OF LANDS (1996) eKLR.**
- **NELSON OMOLO OCHOLA –VS- GEORGE OMONDI AJWALA (2013) eKLR.**
- **JANE WANGECHI KIGOTHO –VS- SAMUEL O. WAKIHU AND ANOTHER (2013) eKLR**

and submit that relying on the above cases and facts irreparable harm would be occasioned to the Applicant if orders sought are not granted as prayed. He also submits that on balance of convenience, balance tilts in his favour as he is in occupation and he is the registered owner and eviction will inconvenience him and his family. He concludes by relying on authority of **HC. No.1128/01 FRANCIS JUMBA ENZIANO –VS- BISHOP PHILIP OKAYO & OTHERS**: where court held;

“The golden rule in, an application for injunctions is to maintain the status quo”.

He thus seeks for orders:

9. The Respondent in rejoinder submits that the Applicant has not satisfied any of the conditions set for granting temporary injunctions and relies on cases:-

- **ALBERT MANCIO CORDETRO –VS- CYPHER ENTERPRISES LTD & OTHERS HCC 234 OF 96.**

He submits that the Applicant claim has no chances of success as he illegally caused suit land 2230 situated at Kyuu area to be excised from Plot No.1047 belonging to the Defendant.

10. On balances of convenience he submits that same tilts in Defendant's favour as he gave Plaintiff Plot at Ndoos area where he took possession but still encroached No.1047 dispossessing the Defendant off his land. He thus seeks the Applicant's application to be dismissed. After perusing the material before court and the submissions by the parties, I make the following findings:-

It is not in dispute that the Defendant sold to Plaintiff a piece of land and full consideration paid. The Plaintiff is now the registered as owner of Plot No.2230 Mbanya Adjudication Section where he occupies and lives with his family.

The Respondent contends that the sold land was at Ndoos area but not Kyuu area and thus 2230 is illegally held and occupied by the Plaintiff.

The matter has been Adjudicated by Mbanya Adjudication Committee Case No.MBA/87/92 on 1.3.1991.

Arbitration Board case No.MBA/46/1996 on 15.4.1996. AND

Objection Case No. MB/DJB/8.1998 on 14.12.1999.

All the above decision were in Plaintiff's favour.

11. However, the Respondent argues that his final appeal was withdrawn and matter remitted to the clan who ruled in his favour and the parties signed the minutes in agreement and the Applicant was to vacate the suit land and keep Plot at Ndoos area where he was sold the land. However, the Applicant disobeyed the clan's directive, thus attracting the notice to vacate or face eviction.

12. The court finds that taking to account that the Applicant is the registered owner of the suit land and that he is in occupation and also being aware that in the stated 3 previous disputes by Committee, Arbitration Board and in objection case, he was the victor, he has established a *prima facie* case with probability of success in terms of the conditions set by the **GIELLA CASE supra**.

13. The intended eviction if carried out, he will suffer irreparably as he is in occupation with his family and depends on the farming on the land to eke out a living. **AND**

In any case the balance of convenience tilts in his favour in the circumstances of the case. In terms of **MRAO CASE supra**, the Plaintiff has established a genuine case.

14. In line with **HABIB BANK Case supra**, the court is not to adjudge case at this stage since proof is only required at the hearing stage. The court is only gauging the strength of the Applicant's case. Also relying on **FRANCIS JUMBA ENZIANO case supra**; the Court borrows on **Ringera J.** words that:

"The golden rule in applications for injunctions is to maintain the status quo".

15. The court thus finds merit in the application dated 18.9.2014 and makes the following orders:-

1. Prayers 3, 4, 6 and 7 are granted as prayed.
2. Prayer No.5 to be revisited in the course of the trial.
3. Costs in the cause.
4. The Parties to comply with order 11 within 30 days to expedite trial.

Dated and Delivered at Machakos this 27th day of February, 2015.

CHARLES KARIUKI

JUDGE