



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 53 OF 2015**

**WILLIAM OMAKADA ..... PLAINTIFF/APPLICANT**

**VERSUS**

**THE BOARD OF GOVERNORS**

**MUKUYUNI PRIMARY SCHOOL..... DEFENDANT/RESPONDENT**

**RULING**

1. The applicant William Omakada filed a notice of motion dated 10/4/2015 seeking an injunction restraining the respondent from interfering with **Plot No. 138 at Maridadi Settlement Scheme** (suit land). The applicant contends that he bought the suit land on 20/1/2001 from one **Cheptarus Chemoiwa** who was the allottee of the suit land. He paid the agreed amount to the seller but remained with a balance of 3000/= which was to be cleared upon the suit land being transferred to his name
2. He has been pursuing the seller for the transfer in vain. He even sent completion documents to the vendor who has not executed them. In the meantime he took possession and has been cultivating maize on the suit land. On 8/4/2015 the applicant's wife and his workers were preparing the suit land for planting when pupils led by teachers of the respondent went to the suit land and demanded that they stop any activity on the land as the school was the owner of the same.
3. The pupils and teachers threatened the applicant's wife and his workers of dire consequences should they continue to claim the suit land. As the applicant did not want to engage the students and pupils in any confrontation, he decided to move to court for redress hence this application.
4. The applicant's application was opposed by the respondent through a replying affidavit sworn by the head teacher of the respondent on 4/5/2015. The respondent contends that it bought the suit land from Cheptarus Chemoiwa on **9/3/2015** and was given immediate possession. The respondent denies that it is a trespasser to the suit land. The respondent further contends that if there was any agreement for sale between the applicant and Cheptarus Chemoiwa, the same is unenforceable.
5. The applicant in his supplementary affidavit sworn on 10/8/2015 deponed that on or about 9/3/2015, the deponent of the replying affidavit **M/s Monica Khavele Nyongesa** and other officials of the school approached him with a view of purchasing the suit land. The officials inspected the land and the documents in his possession. The officials were satisfied with the suit land. He agreed to sell the suit land to the school at **Kshs.2,000,000/=**. An agreement was executed in which it was agreed that a deposit of **Kshs.1,000,000/=** was to be made and the balance to be paid before December, 2015. The respondent's officials however reneged on the agreement and went and entered into a fresh one with the person who had sold him the suit land.

6. The applicant further states that the respondents have since gone to the suit land where they have accumulated building materials ready to start construction work. He reported the respondent's action to police who did not help him.
7. The respondent in a further affidavit contends that the respondent is in possession of the suit land and has put up a building on it. The respondent therefore argues that the applicant's application has been overtaken by events.
8. I have gone through the applicant's application as well as the opposition to the same by the respondent. There is no contention that the suit land was sold to both the applicant and the respondent at different times. From the statement of Cheptarus Chemoiwa attached to the respondent's further affidavit, the vendor appears to suggest that the transaction between him and the plaintiff was not completed as there was no consent of the land control board given.
9. The applicant has come to court for an injunction. This is an equitable remedy and whoever comes to court has to come with clean hands. The applicant has deposed in his supporting affidavit that the suit land is **3.5 acres**. This is supported by the agreement between him and Cheptarus Chemoiwa annexed to the supporting affidavit.
10. In a further affidavit sworn by the applicant on 10/8/2015, the defendant offered to sell the suit land to the respondent at **Kshs.2,500,000/=**. The acreage of the suit land was shown to be **4.5 acres**. The applicant has acknowledged receiving Kshs.1,000,000/= through **Kwanza CDF**. The balance of Kshs.1,250,000/= was to be paid on or before 15/1/2015. This agreement was made on 17/11/2014.
11. The applicant has decided to deliberately lie on oath regarding these facts. He has chosen to hide the purchase price which he claims was Kshs.2,000,000/= but the agreement shows the contrary. He has even decided to lie that he intended to sell the suit land to the respondents officials on 9/3/2015. He even claims that it is Monicah Khavere Nyongesa who came for the negotiation when the truth is that he dealt with different officials of the respondent on 17/11/2014. Monicah Khavere Nyongesa was not the head teacher of the respondent as at 17/11/2014. She was transferred to the respondent school with effect from 15/1/2015 as per the letter from the Teachers Service Commission.
12. The purpose of a temporary injunction is to preserve the property from waste. It is never intended to remove the respondent from the property in contention unless it is a mandatory injunction. In the instant case, there is evidence that the respondent has taken possession of the suit land and has put up a building which is nearing completion. The delay in arguing this application was attributed to a preliminary objection which was raised by the respondent in respect of the application and the entire suit. This preliminary objection has since been dismissed with costs to the plaintiff.
13. It is apparent that the applicant had wanted to purchase the suit land from Cheptarus Chemoiwa in 2001. This agreement seems not to have gone through. The applicant has conceded that he did not clear the balance of the purchase price. The vendor who sold the suit land to the applicant is the same one who sold the same land to the respondent. It is therefore not clear whether any interest in the suit land had passed to the applicant. It cannot therefore be said that the applicant has demonstrated that he has a prima facie case with probability of success.
14. The applicant has also not demonstrated that he will suffer loss which will not be compensated in the damages. The applicant had already wanted to sell the suit land to the respondent. He has already received Kshs.1,000,000/= from Kwanza CDF as per the agreement of 17/11/2014 whereby he acknowledged receiving the amount on execution of the agreement. The applicant seems to have been intent on benefiting from public funds by lying that the land was 4.5 acres which was not the case. He added an acre on top which acre was non-existent. He even inflated the price. The same land was sold to the same party later on at a lower price of Kshs.2,000,000/=. The advocate involved in the earlier transaction and the present one is the same. There is clearly an element of collusion to steal from the public if at all CDF paid Kshs.1,000,000/= as per the agreement of 17/11/2014. If the land is found to belong to the applicant this is a case where he can

be compensated because he had already manifested his intention to sell the suit land.

15. Even the balance of convenience tilts against grant of the injunction. The respondent has already put up a permanent building on the property. I therefore find that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this **28th** day of **October, 2015**.

**E. OBAGA**

**JUDGE**

**In the presence of Mr. Nyamu for Defendant/Respondent and M/s Mufutu for Mr. Bundi for Plaintiff/Applicant.**

**Court Assistant – Omulindi.**

**E. OBAGA**

**JUDGE**

**28/10/15**