



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
ENVIRONMENT AND LAND CASE NO. 48 OF 2014

PETER MWANGI THUMBI PLAINTIFF/APPLICANT

VERSUS

GEORGE SITATI..... 1ST DEFENDANT/RESPONDENT

PAUL SITUMA.....2ND DEFENDANT/RESPONDENT

RULING

1. The notice of motion dated 3rd March 2014 brought under order 40 rule 1 and 4 of the Civil Procedure Rules and section 1A, 1B and 3, 3A and 63 (e) of the Civil Procedure Act seeks the following orders;
 3. That the status quo be maintained.
 4. That the Respondents be ordered to remove the illegal structures erected by them illegally and repair the perimeter wall forthwith.
 5. That a temporary injunction do issue restraining the Respondents, their agents, servants, workers or any person claiming under them, from selling, disposing, charging, wasting, tilling, erecting structures and/or interfering in whatsoever manner with land parcel No.NDIVISI/MUCHI/3465 measuring zero decimal three nine (0.39ha) hectares pending the hearing and determination of the suit.
 6. Any other order this honourable court may deem just and expedient to grant.
 7. That the costs of this application be provided for.
2. The application is opposed. Both Respondents have sworn replying affidavits challenging the facts as put by the Applicant. The 1st Respondent deposes he sold the Applicant the suitland which according to him is 0.05 ha and not 0.39 ha as alleged. Secondly the Applicant's land shares no common boundary with the 2nd Respondent's title.
3. The 2nd Respondent deposes that the application is spurious, misconceived and incompetent. He contends that the Applicant wants to expand his land from 0.05 ha to 0.39 ha. Further that his land NDIVISI/MUCHI/3213 has no affinity to the suitland as they were hived off different parcels of land. He asked the court to dismiss the application with costs to him.

4. Both advocates for the parties submitted orally for and against the application. I have considered those submissions and need not reproduce them here. In the Applicant's affidavit, he annexed copies of a written sale agreement, title deed and green card and mutation forms. The sale agreement does not disclose the size of land sold. The title deed and copy of the register (green card) gives the size of the suit land NDIVISI/MUCHI/3465 is 0.05 ha in size. From the copy of the register, it was opened on 16th July 1992. Page 3 of the mutation form also shows the suit land as measuring 0.05 ha.

5. The Applicant avers that on the ground, the size of the suitland is 0.39 ha and the Respondents demolished property that is on portion of land owned by him as per the annexed photographs. He asked the court to issue orders restraining the respondents from interfering with his land measuring 0.39 ha. From his own documents annexed, he has nothing to show his land is 0.39 ha. He did not disclose whether the Respondents interfered with the portion measuring 0.05 ha or the difference (i.e 0.39 – 0.05). Until this suit is determined it is difficult at this stage with the documents available to establish whether the applicant is entitled to land measuring or 0.39 ha.

6. I do find the Applicant has therefore failed to show that he has a prima facie case with probability of success or that damages he will suffer if the orders are not granted cannot be compensated by way of damages. The upshot is that he has not convinced the court that his application meets the threshold laid in the renowned case of **Giella vs. Cassman Brown**. I proceed to dismiss this application with costs to the Respondents.

DATED, SIGNED and DELIVERED this 22nd day of MAY 2014

A. OMOLLO

JUDGE.