



IN THE HIGH COURT OF KENYA AT KAKAMEGA

ENVIRONMENT AND LAND CASE NO. 404 OF 2014

ROBERT MWASHI INYANJE

(Suing as an ATTORNEY for

SOLOMON ISOLIO ALIGULAHPLAINTIFF

VERSUS

JOHN JUMA MUSAMBAGA DEFENDANT

R U L I N G

This is a Notice of Motion Application dated 5/8/2014 brought under **Order 40 rule 1** and **51 rule 1** of the **Civil Procedure Rules 2010**, and **Sections 1A, 1B, 3, 3A and 63 (c) and (e)** of the **Civil Procedure Act, Cap 21** Laws of Kenya, by **Robert Mwashu Inyanje** suing as an Attorney for **Solomon Isolio Aligulah** (the Applicant) against **JOHN JUMA MUSAMBAGA** (the Respondent). The applicant seeks:

“A temporary injunction restraining the defendant/respondent by himself, his agents, servant and or employees or otherwise from trespassing, encroaching, alienating and/or in any other way whatsoever dealing with or interfering with the plaintiff/applicant’s land parcel Number TIRIKI/CHEPTULU/1366 pending the hearing and determination of this suit.”

The application is supported by the affidavit of **ROBERT MWASHI INYANJE** sworn on the 5/8/2014 and also by grounds appearing on the face of the Motion. It has been deposed in the supporting affidavit that by an agreement for sale dated 16/2/2011, Solomon Isolio Aligulah purchased a parcel of land from the defendant and his brother, **DANIEL ALUVANZE**, at a consideration of Kenya shillings 500,000/= which money was to be paid by instalments. The portion measuring 0.3 Ha. sold to the Plaintiff/Applicant, was to be excised from Parcel No. **KAKAMEGA/TIRIKI/CHEPTULU/50**. The land was eventually subdivided and parcel No. **TIRIKI/CHEPTULU/1366** transferred to the Plaintiff/Applicant, thus concluding the transaction.

The applicant contends that after the land was transferred into his name, the Defendant/Respondent has trespassed thereon and is now cultivating on it thus interfering with the applicant’s right to quiet enjoyment of his land. The applicant, therefore, seeks orders to restrain the Defendant/Respondent from committing acts of trespass.

The Defendant/Respondent opposed the application and filed a replying affidavit sworn on 12/8/2014. He has denied that he has trespassed on the parcel of land in dispute. He has deposed in his replying affidavit, that his father, **CHARLES MASAMBAKA JUMA**, the proprietor of Parcel No. **KAKAMEGA/TIRIKI/ CHEPTULU/50**, died intestate on 4/5/2005 and left behind dependants who

included the Defendant/Respondent among others. He stated that the Plaintiff/Applicant used false pretence to acquire a portion of the deceased's land and that members of the family have resolved to refund money paid as purchase price to the Plaintiff/Applicant. He therefore denies that he is the trespasser and attributes any acts of trespass to his siblings.

Mr. Wasuna, counsel for the applicant, submitted that the Respondent, having sold the parcel of land to the Plaintiff/Applicant, has no right to interfere with the applicant's right to quiet enjoyment of his property. He argued that the Respondent's actions are illegal and should be restrained. He maintained that any actions of the Respondent's siblings are actions of the Respondent's agents and therefore, the Respondent should be held liable for such actions. He contended that the Respondent having admitted in his replying affidavit, that the land was sold to the Applicant, and as long as the Plaintiff/Applicant remains the Proprietor of the land, his rights must be protected.

Mr. Aburili, who appeared for the Defendant/Respondent, submitted that the Defendant/Respondent has not trespassed onto the disputed Parcel of land, and that actions of trespass, if any, are committed by independent actors other than the Respondent. He referred to paragraph 12 of the Replying affidavit, where the Respondent has denied trespassing onto the parcel of land owned by the Plaintiff/Applicant. He submitted, on behalf of the Respondent, that actions of third parties should not be attributed to the Respondent. He therefore urged the court to dismiss the application with costs.

I have perused the documents filed herein both in support of and against this application. I have also considered respective arguments by both counsel in this matter. This being an application for an injunction, it is the Applicant's duty to satisfy the court that he has met the conditions for granting an injunction as stated in ***GIELLA –vs- CASSMAN BROWN & CO. LTD. [1973] EA 358***. For an applicant to succeed in such an application, he must show that;

1. He has a prima facie case with a probability of success,
2. That he will suffer irreparable loss if an order of injunction is not granted, and
3. That where in doubt, the court should consider the application on a balance of convenience.

The Applicant has brought this application seeking to restrain the Respondent from trespassing onto his parcel of land. The Respondent has deponed it is one of his siblings, namely EVERLYNE LUVANDA who has planted crops on the suit land and that her structures have been destroyed by agents of the Plaintiff/Applicant. If this deposition, which is not controverted, is true, then it is evident that it is not the Respondent who is trespassing onto the Applicant's parcel of land but independent and known actors.

Mr. Wasuna, in urging the application on behalf of the applicant, has argued that it is the duty of the Respondent to enjoin any trespassers as interested parties herein. I do not agree. The applicant has to establish, prima facie, that the Respondent is responsible for the actions complained of for the court to grant an order of injunction against such a party. The Applicant has not succeeded in doing so, and the court cannot issue an order against persons who are not parties to a suit.

Furthermore, in the agreement for sale between the Plaintiff/Applicant and the Defendant/Respondent and his brother, Daniel Aluvanze, the applicant was purchasing a portion measuring 0.3 Ha. to be excised from KAKAMEGA/TIRIKI/CHEPTULU/50 which measured 0.6 Ha. The Title Deed, a copy of which is annexed to the Applicant's affidavit, shows that the parcel transferred to the Applicant measures approximately 0.4 Ha. which would appear to be more than what was sold to him. No explanation has been given for this discrepancy. At the time of entering into the sale agreement, the Defendant/Respondent had not taken out Letters of Administration of the estate of CHARLES MASAMBAKA JUMA, the registered Proprietor of KAKAMEGA/TIRIKI/CHEPTULU/50 who was then deceased, thus raising the question of whether the Defendant/Respondent and his brother, had capacity to dispose of the property of a deceased person. It has also not been explained whether the other beneficiaries of the estate of CHARLES MUSAMBAKA JUMA were consulted or gave consent to this transaction.

In the circumstances, I find that the Plaintiff/Applicant has not made out a Prima facie case with a

probability of success to warrant the grant of an injunction. The application dated 5/8/2014 is declined and it is hereby dismissed with costs to the Respondent.

Dated and delivered at Kakamega this 30th day of September, 2014

E. C. MWITA

J U D G E