



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 286 OF 2014**

**JOHN MUTITU NGACHA.....PLAINTIFF/APPLICANT**

**VERSUS**

**NTIYO OLE NTHEIYA.....DEFENDANT/RESPONDENT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 12<sup>th</sup> March 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction against the Respondent restraining him from building, disposing off or in any other manner dealing with the parcel of land known as Kajiado/Loodariak/531 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, John Mutitu Ngacha, sworn on 12<sup>th</sup> March 2014 in which he averred that he is the registered proprietor of the suit property. He annexed a copy of his title document together with a copy of the Certificate of Official Search dated 1<sup>st</sup> February 2013. He further averred that the Respondent encroached upon the suit property by interfering with the perimeter fence and erecting a structure thereon. He averred that he learnt of the encroachment on 2<sup>nd</sup> March 2014. He stated further that the Respondent’s acts are unlawful and detrimental to his interests as proprietor of the suit property.

The Application is contested. The Respondent filed his Grounds of Opposition dated 21<sup>st</sup> March 2014 to the following effect:

1. That he is the legitimate owner of the suit property which is his family land on which he has lived with his family of two wives and several children and grandchildren since 1985.
2. That he is a member of the Loodariak Group Ranch which since adjudication is the lawful owner of the suit property.
3. That from the records it is not known how the Plaintiff became the owner of the suit property.
4. That the Plaintiff has not given an undertaking as to damages.
5. That the Plaintiff has not shown that he has a prima facie case.
6. That he has no alternative land and that he and his family would suffer great prejudice if the Plaintiff is granted the prayers he seeks.
7. That the Plaintiff has not proved that he has at any one time been in possession of the suit

property.

8. That the Plaintiff has withheld important material information with regard to the ownership and possession of the suit property and this court should not exercise its discretion in his favour.

The Respondent also filed his Replying Affidavit sworn on 14<sup>th</sup> April 2014 in which he made similar averments as are contained in his Grounds of Opposition. He also averred that the suit property was being claimed by an outsider known as George Kimani Charles Kiarie and not the Plaintiff and that the said George Kimani Charles Kiarie who was not a resident and was unknown in that area was directed by the adjudication committee to surrender the suit property to him. He further stated that it is unknown how and when the Plaintiff started claiming to be the owner of the suit property.

In response to that, the Plaintiff filed his Supplementary Affidavit sworn on 21<sup>st</sup> May 2014 in which he averred that the Respondent has not annexed any document of title to have him recognized as the registered proprietor of the suit property. He conceded that the Respondent is indeed a registered member of the Loodariak Group Ranch and that in the Land Adjudication Report of 1984, the Respondent was allocated land parcel Kajiado/Loodariak/627 where he has lived all along until the year 2014 when he trespassed on the suit property. He further averred that the suit property was allocated to one George Kimani Chalres Kiarie by the Land Adjudication Committee of 1984 who in turn sold the parcel to him. He annexed a copy of the Sale Agreement dated 16<sup>th</sup> May 2012. He averred that the suit property was never allocated to the Respondent as he alleges.

Both the Plaintiff and the Respondent filed their written submissions which I have considered.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

**“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

Looking at the facts of this case, the Plaintiff has based its claim of ownership over the suit property on a Title Deed dated 15<sup>th</sup> February 2013, as well as a Certificate of Official search copies of which he produced. He also produced a copy of a Sale Agreement dated 16<sup>th</sup> May 2012 to demonstrate that he purchased the suit property from one George Kimani Charles Kiarie. The Respondent also claims ownership of the suit property, claiming that the same was allocated to him as a member of the Loodariak Group Ranch. He however did not produce any documentary evidence to support his claim. In the circumstances, his claim remains unsubstantiated. The law prescribes how a court may approach such a scenario. Section 26 (1) of the Land Registration Act states as follows:

**“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to**

**challenge except –**

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

There is no doubt that the Plaintiff/Applicant has produced his title deed. The above legal provision binds this court to take that as prima facie evidence of ownership unless it can be challenged on the grounds of fraud or misrepresentation or where the title deed has been acquired illegally, unprocedurally or through a corrupt scheme. From what I can see, the Respondent has not been able to demonstrate to this court, albeit at this interlocutory stage, that the title deed produced by the Plaintiff can be challenged on any of those grounds. That being my finding, I further find that the Plaintiff/Applicant has succeeded to establish a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR .**

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from all of the above reasons, I find that the Plaintiff has reached the threshold for grant of an interlocutory injunction. I therefore allow this Application with costs to the Plaintiff/Applicant.

It is so ordered.

**SIGNED AND DELIVERED IN NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2014.**

**MARY M. GITUMBI**

**JUDGE**