



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Environmental & Land Case 6'C' of 2013**

**MARK MATHENGE GIKONYO ::::::::::::::::::::::::::::::::::::::: PLAINTIFF.**

**VERSUS**

**RAPHAEL GITHINJI ::::::::::::::::::::::::::::::::::::::: DEFENDANT.**

**RULING.**

This is a ruling in respect of an application dated 4th February, 2013. the applicant seeks an injunction to restrain the respondent from entering, trespassing, reploughing, planting, occupying, using or in any other way interfering with the user of the plaintiff/applicants land comprised in Title No. Sinyerere/Sitatunga Block 1/Mukuyu/204. The applicant also prays that the OCS Kachibora police station be directed to ensure that orders made by the court are obeyed. He also seeks costs of the application.

The applicant is the registered owner of plot No. Sinyerere/Sitatunga Block 1/Mukuyu/204. The applicant used to have an arrangement with the respondent in which the respondent would lease his land in return for agreed payment. On 11th January, 2013 the applicant wrote to the respondent through his lawyers M/s. Kiarie and Company Advocates intimating to him that he was not going to lease the land to him for the year 2013. This letter was sent to the respondent through registered post. In the letter, the applicant also pointed to the respondent that the respondent had erected a fence without consulting the applicant and that he had gone ahead to put up a permanent house on the land without his knowledge. This letter notwithstanding, the respondent forcefully moved into the property on 30th and 31st January, 2013 and ploughed it ready for planting for the 2013 season. It is on this basis that the applicant has moved to court seeking injunctive orders restraining the respondent from reploughing the land and interfering with it in any manner.

The respondent filed a replying affidavit in which he contends that he had paid the applicant for lease of the land for the year 2013 and that he had put up a permanent house for the applicant at his request on the understanding that the applicant was to give him land equivalent to the value of the house put up for him. The respondent contends that he had paid Ksh. 344,000/= between 19/3/2012 and 20/12/2012 and that he

is therefore entitled to keep utilising the land for the next 4 years. He annexed to his affidavit a tabulation of the alleged payments which he marked as exhibit RG1. Accompanying "RG1" were 5 copies which were neither signed nor commissioned as required. Mr. Kiarie for the applicant took issue with the exhibit marked RG1 in the replying affidavit and the accompanying 5 copies of documents which were not commissioned. He urged the court to expunge them from the record. In support of his argument he cited the case of **Weetabix Ltd. vs. Healthy U. Two Thousand Ltd. Civil Case No. 283 of 2006** in which Mr. Azangalala – J as he then was expunged certain documents from an affidavit on the ground that the same had not been commissioned and sealed as required by Rule 9 of the Oaths and Statutory Declarations Rules. I entirely agree with the submission of Mr. Kiarie and the findings of Azangalala – J as he then was. The requirement for sealing and signing of affidavits is a very important one and failure to do so cannot be taken to be a procedural technicality which may be overlooked. Papers which are not sealed cannot be said to be properly on record. I therefore expunge annexure accompanying RG1. Annexure RG1 is also expunged from the record as it is of no evidential value. It was not signed by any party and it cannot purport to be supporting any case herein. The law is clear that no suit shall be brought upon a contract for the disposition of an interest in land unless -

(a) the contract upon which the suit is founded -

- i. is in writing;
- ii. is signed by all the parties thereto; and
- iii. the signature of each party signing, has been attested by a witness who is present when the contract was signed by such party.

Annexure RGI purports to be a summary of payments allegedly made to the applicant. The document is neither signed nor attested to by a witness. It cannot therefore be of any evidential value. The same is also expunged from the record. This being the case the paragraphs in whose support the annexures were meant remains bare and unsupported.

There is the issue of a permanent house which is built on the applicant's land. The respondent claims that he constructed the same for the applicant at his request. In the respondent's replying affidavit, he depones that the agreement was that the applicant was to give him land equivalent to the value of the house. The respondent has counterclaimed for the value of the house. This is a matter which will be addressed later at the hearing.

The principles upon which a court should grant a temporary injunction were well set out in the case of **Giella vs. Casman Brown & Co. Ltd. 1973 EA 359**. The same principles were reiterated in the Kenyan Case between **Teresa Shitakha vs. Mary Mwamodo and Four others (1982-1988) 1 KAR** page 965 at 966 where it was held that those principles are first an applicant must show a prima facie case with a probability of success.

Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

In the present case the applicant has shown that he gave notice to the respondent that he was not going to lease out his land to him. He did this vide letter dated 11th January, 2013. the respondent does not deny that he never received the letter. The respondent has not paid for the year 2013 and in any case he would not have paid as he had already been notified that he was not going to have the land. Despite having been expressly notified that the applicant was not ready to lease the land to him, he came and forcefully ploughed the land. This is a case where the applicant has shown that he has a prima facie case with probability of success.

The defendant/respondent contends that the applicant has not disclosed material facts to this court and that an injunction should not issue. In support of this he cited the case of **Alloys Kaveen Chepkwony**

**vs. Alice Hottensiah Githu Machakos High Court Civil suit No. 27 of 2012.** In this case the applicant had been granted interim injunctive orders but during inter-partes hearing, it was found that the interim orders were obtained based on wrong information. The interim orders were vacated. In the present case the application was heard interpartes. The respondent has not shown that the applicant has concealed material facts. The respondent contends that the house which was constructed on the applicant's land was done so at his request. This is denied by the applicant. The truth of the matter about the house will be known during the main hearing. The mere denial by the applicant that the house was built without his knowledge is not prove of any concealment of material facts.

There are some photographs annexed to the respondent's affidavit where it is argued that the applicant was photographed with his son outside the house. The applicant is said to be a blind man. The mere fact that he has been photographed outside the house does not mean that it was constructed for his benefit. It is not even known who took the photograph and for what purpose. All these will come out during the hearing. The house is vacant. Neither the applicant nor the respondent is occupying it. I find that this is a proper case where an injunction ought to issue. The respondent is hereby enjoined from entering, trespassing, reploughing, planting, occupying, using or in any other way interfering with the user of the plaintiff's land comprised in Title Sinyerere/Sitatunga Block 1/Mukuyu/204 until the hearing and final determination of this case. The applicant shall have costs of this application.

It is so ordered.

**[Dated, signed and delivered in open court at Kitale on this 20th day of March, 2013.]**

**E. OBAGA.**

**JUDGE.**

In the presence of Mr. Kiarie for the applicant present.

M/s. Arunga for the defendant/respondent present.

CC – Joan.

**E. OBAGA.**

**JUDGE.**

**20/3/2013.**