



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL CASE NO. 63 OF 2012**

**JOSEPH ANTONY MBURU.....PLAINTIFF/RAPPLICANT**

**VERSUS**

**KAHINDI CLINTON MBAYA.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. The Application before me is dated 18<sup>th</sup> December, 2012. The same was filed by the Plaintiff and it seeks for the following orders:
  - a. **THAT a temporary injunction do issue restraining the Defendant/Respondent by himself, his agents, representatives, or any other person claiming under him from trespassing into, continuing to occupy, carrying out farming activities, developing, erecting temporary or permanent structures and/or from adversely dealing with the Plaintiff' land known as LAME/WITU/681 situated at Kasaka Kairu Area in Witu pending the hearing, determination and final disposal of the suit herein.**
  - b. **THAT the Officer Commanding Station (O.C.S) Witu Police Station do assist in the service of the order.**

**The Applicant's case**

2. The Plaintiff's Application is supported by the affidavit of the Plaintiff who has deponed that he is the registered owner of all that parcel of land known as LAMU/WITU/681, the suit property, measuring approximately 6.4 Hacters.
3. The Applicant has deponed that the Defendant has illegally been occupying the suit property by cultivating and carrying out farming activities and has now put up three temporary residential structures and that he is now using violence to obstruct and hinder the Plaintiff/Applicant from accessing and utilizing his parcel of land.
4. The Applicant finally deponed that the Defendant is a trespasser and is violating his constitutional rights to own property as enshrined in the Constitution and that the Defendant's continued occupation of his property and the illegal utilization of the same is subjecting him to unnecessary loss and damage.

## **The Respondent's case**

5. The Respondent filed his Replying Affidavit on 19<sup>th</sup> February, 2013 and deponed that the Applicant has admitted in his Affidavit that he a resident of Murang'a; that the lands officials issued the title deed to the Applicant and yet he is the one who has been staying on the suit property since 1993 and that the transfer of the suit property to the Applicant by the Settlement Fund Trustees was signed by one Benjamin N. Mwangi, a relative of the Applicant.
6. The Respondent finally swore that the entire exercise of the allocation of the suit property was illegal and was aimed at uprooting and forcefully evicting him from the plot so as to stop him from quite enjoyment of the property that he has developed for many years.
7. The Applicant's advocate filed his written submissions on 18th March 2013 while the respondent's advocate filed his submissions on 8th April 2013. I have considered the submissions.
8. The Plaintiff is relying on a title deed that was issued to him on 28th August 2006 to claim the land which is being occupied by the respondent. According to the Applicant's Supporting Affidavit and Further Affidavit, he was allocated the suit property on 26th March 2001 through a letter of offer and paid the requisite 10% deposit. The land was offered to him by the government through the Settlement Fund Trustees.
9. However, it is the Defendants case that he has been in occupation together with other families, in the suit property. This act has not been denied by the Applicant. Indeed, the Applicant has admitted that the Respondent has and is still in occupation of the suit property and wants this court to evict him.
10. It is true that the Applicant's constitutional rights to own property should be protected by this court. However, it is also true that under the same constitution the Respondent has the right to access land.
11. A title deed is an end product of a process and it will be incumbent on the Applicant at the trial to show how the said title deed was issued to him by the Settlement Fund Trustee to the exclusion of the people who were already occupying the suit property at the time he was allocated the land. The right of the Applicant will be weighed against the right of the Respondent to access land as provided for under Article 60(1) (a) of the Constitution at the trial to enable the court make a determination as to the rightful owner of the suit property.
12. In the circumstances, this court cannot at this stage state whether the Applicant has a "superior" right to the suit property than the Respondent. I am therefore unable to state at this stage if the Plaintiff has established a prima facie case with chances of success or not.
13. As I have stated above, the Applicant was aware or should have been aware that the Respondent was residing on the suit property as at the time of the allocation. The Plaintiff is not staying on the suit property and considering that he has not shown that the Respondent is a trespasser, he will not suffer any irreparable damage if the injunctive orders are not granted. To the contrary, it is the Respondent who is likely to suffer immensely if he is evicted from the suit property at an interlocutory stage.
14. The fact that the Respondents have been in occupation of the suit property before the Applicant was allocated the same land tilts the balance of convenience in favor of the Respondent.
15. In the circumstances, and for the reasons I have given, I dismiss the Applicant's Notice of Motion dated 18th December 2012 with costs.

Dated and Delivered in Malindi this **20th** Day of **June, 2013**

**O. A. ANGOTE**

**JUDGE**