



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC SUIT NO. 15 OF 2013

PHILIP NYAMASYO KAVISI.....PLAINTIFF

VERSUS

SECRETARY OF THE P.T.A ATHI

KAMUNYUNI PRIMARY SCHOOL.....1ST DEFENDANT

CHAIRPERSON OF THE P.T.A ATHI

KAMUNYUNI PRIMARY SCHOOL.....2ND DEFENDANT

RULING

The Plaintiff claims to be the proprietor of the suit property namely Plot No. 1464 Kitengei “A” Settlement Scheme on his behalf and in trust of other beneficiaries. He does not dispute that the suit property was initially part of a bigger parcel of land out of which his father granted land to the Defendants to build a school. He brought as his evidence of title a letter dated 11th May 2012 from the District Land Adjudication and Settlement Officer of Kibwezi District confirming him to be owner of the suit property. He also brought as evidence proceedings of a Land Adjudication and Settlement Department dispute resolution meeting dated 28th November 2011 allowing him to replant the common boundary between the suit property and that occupied by the Defendant’s school.

The Plaintiff claims that he has built his home on the suit property, and that the Defendants have constructed Athi-Kamunyuni Secondary School on the said property and are committing acts of waste thereon by burning and cutting trees which belong to him. He wants this court to grant him orders restraining the Defendants from trespassing and committing any acts of waste upon the said Plot No. 1464 Kitengei “A” Settlement Scheme until this case is heard and determined. These prayers, the facts and supporting evidence are in the Plaintiff’s Notice of Motion dated 24th September 2012, his supporting affidavit sworn on the same date and in a supplementary affidavit he swore on 20th February 2013.

The Defendants have opposed the Plaintiffs application in a replying affidavit sworn by the 1st Defendant on 27th May 2013, and claim that their land was demarcated from Kitengei “A” Settlement Scheme, and parcel number 54 totalling 100 acres curved out for Athi Kamunyuni school. Further, that the said land was donated by the Plaintiff’s father and three other parents in 1975. They have attached as evidence a copy of a letter dated 30th July, 2009 from the District land Adjudication and Settlement Officer for Kibwezi District confirming that parcel number 54 belongs to Athi Kamunyuni Primary School.

The Defendants deny that a meeting was held on 28th November, 2011 concerning a boundary dispute as alleged by the Plaintiff, and that the meeting held was one at the school on 23rd July 2013 attended by local leaders, government officials, the Plaintiff and parents. The Defendants attached the minutes of the meeting held on 23rd July 2013 as evidence. Further, that it was resolved at the said meeting that the disputed 100 acres piece of land belonged to the school, and that the District Lands Officer should revoke a letter purported to have been written on the 11th May, 2012 that Plot No 1464 belonged to the Plaintiff. The Defendants further stated that the said position was further buttressed by a letter from the Minister of Education dated 27th September, 2012 outlining the recommendations from the meeting held on the 23rd July, 2012, which letter they also attached.

The parties filed written submissions in court, which they relied upon during the hearing of the Notice of Motion on 5th June 2013. The Plaintiff's counsel in submissions dated 20th May 2013 reiterated the arguments made in the foregoing. He also submitted that the Plaintiff was the administrator of his deceased's father estate and was issued with a grant of letters of administration on 10th December 2012, which he annexed. Further, that the Plaintiff's deceased father is the one who donated 15 acres out of the suit property measuring 100 acres, and that the remainder of 85 acres was to remain with the Plaintiff in trust for all other beneficiaries.

The Defendant's counsel in submissions dated 5th June 2013 submitted that the Plaintiff has not met the threshold of obtaining an interim injunction as enunciated in **Giella vs Cassman Brown (1973) E.A. 358**. The reasons given by the Defendant for this position were that the Plaintiff had not produced any document or certificate of title to show that they are the rightful owners of the suit property, and that the issuance of the injunction would be inimical to public interest and fundamental rights as it would affect the normalcy of a public school. The Defendant's counsel relied on various judicial decisions in this respect, including **Satros Ayuma & 11 Others vs The Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme & 2 Others (2011) e KLR**.

The Defendant's counsel also argued that the Plaintiff is not properly before the court, as at the time of instituting this suit he did not have locus to do so. It was submitted in this regard that the Plaintiff and Notice of Motion herein were filed on 24th September 2012, and the Plaintiff obtained letters of administration for the estate of Jacob Wambua Kathoka Kaseve (Deceased) on 10th December 2012, 3 months later. It was further submitted that the oxygen principles and Article 159(2) do not rid the court of rules of procedure.

I have carefully considered the pleadings, evidence and submissions made by the parties. I will first address the preliminary issue raised of the Plaintiff's *locus standi*. I note in this regard that the Plaintiff in the Plaintiff and Notice of Motion dated 24th September 2012 and filed on the same date, is suing as the registered owner of the plot No. 1464 situated in Kitengei "A" Settlement Scheme which he claims was given to him by his deceased father to hold in trust for other beneficiaries. He also claims to have been given a certificate of ownership with regard to the said parcel of land. He is therefore not suing in his capacity as administrator or beneficiary of his deceased's father estate, but in his own right as registered proprietor. This court therefore finds that he has standing to sue. It is upto the Plaintiff to prove that he is the registered proprietor in this regard, to be able to succeed in his claim.

As to whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, I agree with the Defendant's submissions that he has not brought evidence of any title document to the suit property, and therefore has not established a *prima facie* case. However, the Defendants have also in this regard not brought any evidence of title to the portion of land they claim namely Plot No. 54 Kitengei "A" Settlement Scheme. The letters produced in evidence in this regard by both the Plaintiff and the Defendants are not recognized documents of title. The actual entitlement by either of the parties to the suit property can therefore only be decided after evidence has been tendered in this regard during full trial.

The Plaintiff's Notice of Motion will therefore be decided on the basis of a balance of convenience. It is

not disputed that the Plaintiff's father gave a portion of his land to the Defendants for purposes of constructing and running a public school. What is in dispute is the acreage of land that was donated, and how much of the land was given to the Plaintiff. It is also not disputed that the Defendants are operating a public school on the suit property and have constructed classrooms thereon. I am of the opinion that the public interest in maintaining the operations of the public school tilts the balance of convenience in favour of the Defendants.

I accordingly hereby order as follows:

1. Pending the hearing and determination of the suit filed herein or until further orders, *the status quo* with respect to the parcels of land known and/or referred to as Plot No. 1464 Kitengei "A" Settlement Scheme and Plot No. 54 Kitengei "A" Settlement Scheme shall be maintained as follows:
 - a. The Plaintiff shall not interfere with the Defendants' use and occupation of existing classrooms and other structures and/or facilities constructed by and being used by the Defendants on the said parcels of land.
 - b. The Defendants shall not interfere with the occupation and use by the Plaintiff of the remaining portion of the said parcels of land on which there are no classrooms, structures and/or facilities constructed and/or in use by the Defendants.
 - c. Neither the Plaintiff nor the Defendants shall sell, transfer, charge or in any other manner alienate or dispose of the said parcels of land.

2. The costs of the Plaintiff's Notice of Motion dated 24th September 2012 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ___16th___ day of ___July___, 2013.

P. NYAMWEYA

JUDGE