



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 190 of 2008

FESTUS MWANGANGI MASILA.....PLAINTIFF/APPLICANT

VERSUS

1. ERIC KYALO MUTINDA

2. PHILLIP MWANZA.....DEFENDANTS/RESPONDENTS

R U L I N G

Before me is an application dated 29<sup>th</sup> October 2008 filed by the plaintiff **Festus Mwangangi Musyoka**. It is a **Chamber Summons** that seeks temporary injunctive orders against the 1<sup>st</sup> defendant **Eric K Mutinda**. The application has grounds on the face of the **Chamber Summons**. I must state that the typed documents (both for the application and affidavit) are not easy to read, as they are very faint. Suffice to state that the matter relates to land in which the plaintiff claims to have an interest as an administrator and beneficiary in succession. It is also appropriate to state that an interim injunction pending the hearing and determination of the application *inter partes*, was granted by the court on the November 2008.

The application is opposed. A replying affidavit sworn by **Eric Kyalo Mutinda** the 1<sup>st</sup> defendant on 22<sup>nd</sup> December 2008 was filed. It was deponed, *inter alia*, that **Eric Kyalo Mutinda** had bought land parcel **Mulango/Kathungi/385** from the deceased when the same was fallow, and had now developed it by building a homestead. That **Wilson Munyasya Mutui** (now deceased) was the original owner of land parcel number **Mulango/Kathungi/387**. That the issue of the relation between land parcel **No. Mulango/Kathungi/387** and **Mulango/Kathungi/385** had been resolved in a decision made by the court in the **Principal Magistrate's Civil Case No. 326 of 2008 at Kitui**, a copy of which ruling was annexed to the affidavit.

In response to the replying affidavit, the plaintiff/applicant filed a supplementary affidavit on 25<sup>th</sup> February 2009. It was deponed *inter alia* that both **CMCC Nos. 450 of 2007** and **326 of 2008 at Kitui** were discontinued before final substantive decisions on merits were made. Annexed to the affidavit were notices of withdrawal of the two suits dated 28<sup>th</sup> May 2008 for **Kitui SRMCC 450 of 2007**, and 15<sup>th</sup> October 2008 with regard to **Kitui SRMCC No. 326 of 2008**.

Parties' counsel filed written submissions. The plaintiff/applicant filed submissions through counsel **M/s Kinyua Musyoki & Company** on 9<sup>th</sup> November 2012. The defendants filed their submissions through their counsel **J.K. Mwalimu & Company** earlier on 8<sup>th</sup> June 2012. On the hearing date, counsel for the plaintiff/applicant did not attend court. **Mr Mwalimu** for the defendants relied on submissions filed.

I have perused and considered the submissions.

This is an application for an interlocutory injunction. The parameters for consideration by the court in such an application are well settled. They were clearly spelt out in the case of **Giella –vs Cassman Brown Ltd (1973) EA 358**. An applicant has to show that he had a *prima facie* case with probability of success. Secondly, an injunction will not normally be granted unless an applicant will otherwise suffer irreparable loss or damage which cannot be adequately compensated in damages. Thirdly, if the court is in doubt, it will determine the application on the balance of convenience.

The issue in question revolves around the ownership of land. The plaintiff/applicant appears to have been claiming that the 1<sup>st</sup> defendant is developing the wrong piece of land. There is a dispute as to the exact portion of the land that was sold to the 1<sup>st</sup> defendant. That issue on the correctness of land sold will be determined in the main cause. In the meantime, however, I am of the view that the plaintiff/applicant has a *prima facie* case with probability of success.

Will the plaintiff/applicant suffer irreparable loss if an injunction is not granted? The plaintiff claims that the portion of land being developed by the 1<sup>st</sup> defendant is not the correct portion sold to him. In my view, if the injunctive orders sought are not granted, the plaintiff will suffer irreparable loss. Further development of the land might completely change its nature.

The balance of convenience is also in the plaintiff's favour, as he represents the estate of the deceased, who sold the land to the 1<sup>st</sup> defendant.

I cannot end this ruling without stating that the proceedings in the two earlier cases filed at the Kitui Magistrate's Court SRMCC 450/07 and SRMCC 326/08 were withdrawn. Those cases no longer exist. The interlocutory decisions or rulings made in those cases are no longer on record. They cannot therefore be relied upon by any of the parties, as the orders or rulings made in those cases no longer exist. The 1<sup>st</sup> defendant cannot therefore rely on those decisions.

In the result, I allow the application dated 29<sup>th</sup> October 2008 and grant prayer 3. Costs in the cause.

Dated and delivered this 15<sup>th</sup> day of **November** 2012.

**George Dulu**

**Judge**

**In the presence of:**

Mr K Musyoki for Plaintiff/Applicant  
N/A for Defendant/Respondent  
Mutinda – Court clerk