



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.293 OF 2010**

**KIPTOO ARAP TANUI.....APPLICANT/PLAINTIFF**

**AND**

**NELSON JAMES KERICH .....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**JOHN KOSKE.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**JOSEPH CHERUIYOT LANGAT.....3<sup>RD</sup> RESPONDENT/DEFENDANT**

**DANIEL K. ROTICH.....4<sup>TH</sup> RESPONDENT/DEFENDANT**

**AND**

**LANGWENDA FARMERS CO-OPERATIVE SOCIETY LTD.....THIRD PARTY**

**RULING**

By his chamber summons, the applicant, Kiptoo Arap Tanui, is seeking that the respondents be restrained by an order of temporary injunction from

**“.....trespassing, invading, or entering upon, felling trees, uprooting fencing posts, constructing or erecting any structures, or preventing the plaintiff from accessing, damaging or wasting or alienating or in any other way whatsoever interfering with the plaintiff’s free enjoyment of all that parcel of land known as LR No.NAKURU/LANGWENDA/180”**

pending the hearing and determination of the suit herein.

Apart from being too windy, the above prayer has muddled up the reliefs sought. The applicant appears to be seeking both prohibitory and mandatory orders of injunction for the reasons I will shortly explain. It is the applicant’s contention that he purchased the suit land measuring 3 acres in 2006 from Rebbly Cherotich and took possession immediately. On the suit land were 3000 mature white eucalyptus trees. Upon taking possession, the applicant began to fence the suit land. Following the 2008 political skirmishes the respondents took advantage of the confusion in Langwenda where the suit land is situated and invaded it. That the respondents have so far felled and sold 1,130 trees, damaged 200 fencing posts, are constructing permanent structures; that due to these activities, the applicant has been ejected from the suit land.

On behalf of the respondents, the 1<sup>st</sup> respondent, Nelson James Kerich has averred that the suit land, (NAKURU/LANGWENDA/180) was excised from NO.LANGWENDA SETTLEMENT SCHEME 545/169, the property of Langwenda Farmers Co-operative Society Limited, being a grant issued in 1973; that the Co-operative Society subdivided the land and distributed it to its members, leaving Parcel No.LANGWENDA SETTLEMENT SCHEME 545/169 reserved as a forest for the members. Instead, parcel No.545/169 has illegally been sub-divided into Nos.180 (the suit land), 181, 182, 183, 184, 185, 186 and 187, yet parcel No.545/169 had been in 1987 placed under the supervision and management of

the Parents Teachers Association (PTA) of Langwenda Primary School; that two months before the applicant acquired the suit land, the PTA had resolved to put up a secondary school on parcel No.545/169; that the acquisition of the suit land by strangers has been reported to the Kenya Anti Corruption Commission.

I have considered the rival arguments and the written submissions by learned counsel for the applicant. I must also point out that learned counsel for the respondents, despite being aware of the date for arguments, failed to attend to canvass the averments in the replying affidavit. But since the affidavit is on record I am bound to consider it in arriving at my decision in this matter.

Being an application for interlocutory injunction, it must be demonstrated that the applicant has a *prima facie* case with a probability of success at the trial; that the applicant stand to suffer an injury not capable of compensation if the relief sought is not granted; and finally, should the court be in doubt it must decide the matter on a balance of convenience. See **Giella Vs. Cassman Brown and Company Limited** (1973) EA 358. The applicant has, in the various affidavits filed in this matter recounted the history of the suit property starting with an allotment to one Stanley Omula in 1984 of No.545/169 before it was repossessed due to failure by the said Stanley Omula to comply with the terms of allotment. No.545/169 was subsequently sub-divided as explained. The suit land No.,180 was eventually purchased by the applicant from one Rebbly Cherotich. The annexures to the affidavit in support of the application confirm the allocation of the suit property to Rebbly Cherotich; that a consent was granted for the transfer of the suit land from Rebbly Cherotich to the applicant; stamp duty duly paid and a transfer executed. Only registration is pending. The respondents' claim on the other hand is that the original parcel No.545/169 belonged to Langwenda Farmers Co-operative Society limited. No evidence to prove this was exhibited. The letter of offer from the first President of Kenya, Mzee Jomo Kenyatta did not in itself confer title.

Secondly, the respondents appear to be asserting the interest of the Co-operative Society without disclosing in what capacity. They have further argued in one breath that No.545/169 was reserved as a forest, again without any proof and in another breath that land was placed under the supervision of the PTA that resolved to utilize it for the construction of a secondary school. Was the parcel reserved as a forest or was it for building of a school? The respondents have deposed that the construction has commenced.

They ought to have proved that the land was reserved for a forest, that they have the relevant consent to convert it (by cutting down the forest) into a school. It was also incumbent upon them to demonstrate that indeed the original parcel belonged to the Co-operative Society. Incidentally, the Co-operative Society has been joined in these proceedings and although leave was granted to it to reply to this application none was filed. For these reasons, I am persuaded that the applicant has a *prima facie* case. The balance of convenience is to maintain *status quo* as at the time of this ruling by the respondents being restrained from doing any of the following thing:

- i) felling trees on the suit land;
- ii) uprooting fencing posts on the suit land;
- iii) continuing with the construction on the suit land;
- iv) wasting in any manner the suit land, pending the hearing of final determination of the suit.

There is evidence that the applicant is out of the suit land. Although a mandatory order of injunction can issue, both at interlocutory and trial stages, it is rarely issued at interlocutory stage unless the facts are straight forward, plain and not controverted. This is not one such a case.

I award costs to the applicant.

**Dated, Delivered and Signed at Nakuru this 3<sup>rd</sup> day of June, 2011.**

W. OUKO

JUDGE