



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVI CASE NO. 119 OF 2010.

VITALIS OTIENO OWUOR)
KENNEDY SIRALI) ::::::::::::::::::::::::::::::: PLAINTIFFS.
JOHN S. WACHOLI (Suing as the school committee of Lukhuna Primary school)

VERSUS

SAMSON WASIKE BUNYASI & 10 OTHERS ::::::::::::::::::::::::::::::: DEFENDANTS.

R U L I N G.

1. The plaintiffs are members of the School Management Committee of Lukhuna Primary School. The plaintiffs filed this suit on behalf of the school. They have sued the defendants over the property known as **Kitale Municipality Block 3/714 and 3/802**. The 1st defendant on his part filed a defence and counterclaim seeking for a permanent injunction to restrain Lukhuna Primary School from cultivating or occupying Kitale Municipality Block 3/714. The 1st defendant also filed a notice of motion which is principally taken out under the provisions of orders 40 of the Civil Procedure Rules seeking for an interim order of injunction to restrain the plaintiff, the management committee, teachers and pupils from encroaching, entering or occupying part of Kitale Municipality Block 3/714 pending the hearing and determination of this suit.
2. This application is supported by the grounds that Lukhuna Primary School has engaged in destroying the fence and trespassing on the 1st defendant's parcel of land since they filed this suit and the 1st defendant filed a counterclaim. The 1st defendant also contends that the plaintiff's suit is an abuse of court process for failing to comply with orders 3 rule 2 of the Civil Procedure Rules. The application is further supported by the grounds stated in the supporting affidavit which was sworn by **Samson Wasike Bunyasi** on 12th April, 2011. According to the applicant, he is the registered proprietor of the property known as; **Kitale Municipality Block 3/714** measuring 2.0009 hectares. He attached a copy of certificate of lease issued to him on 8th January, 1998. He contends that the plaintiffs have unlawfully encroached part of his land and ploughed it in preparation of planting.
3. The matter of illegal encroachment was reported to the authorities but the plaintiffs have persisted in trespassing on the 1st defendant's parcel. Moreover, the plaintiff's suit is defective for failure to comply with the provisions of Civil Procedure Rules. In further arguments, **Prof. Sifuna**, learned counsel for the 1st defendant submitted that the plaintiff failed to annex witness statements and documents as provided for in the Civil Procedure Rules. Whereas on the part of the 1st defendant, he has annexed documents of ownership and also statement by the witnesses thus they have a prima facie with a probability of success because the 1st defendant is the registered owner of the suit premises. He has a right that is protected by the law. Counsel urged the court to restrain the plaintiff by way of an order of injunction from encroaching on the 1st defendant's property. The 1st defendant's rights are protected by the provisions of section 27 and 28 of the Registered Land Act.
4. On the part of the respondent, this application was opposed. Reliance was placed on the replying affidavit by **Vitalis Otienu Juma**, the chairman of the School Management Committee of Lukhuna Primary School. He contends that the school has been ploughing and using the parcel of land which the defendant is referring as Kitale Municipality Block 3/714 since 1996 when the land was allocated to the school. It is further alleged that the 1st defendant obtained the certificate of title

fraudulently. According to the plaintiff, the 1st defendant has never used the land. It is the plaintiff who has been using the land since 1996. Sometimes in 1999, the school realized 1st defendant had fraudulently obtained the title of the plaintiff's land and that is why they filed the suit seeking the cancellation of the title.

5. Even before the 1st defendant obtained the title, the plaintiff was utilizing the land. **Mrs. Arunga**, learned counsel for the plaintiff submitted that the 1st defendant has claimed for damages in the counterclaim which is indicative that damages if any were suffered by the 1st defendant; it cannot be irreparable as the loss can be compensated. She urged the court to maintain the status quo in respect of the suit premises.

6. This case involves a dispute over the ownership of **LR. Kitale Municipality Block 3/714** which the plaintiff claim was allotted to the school. The 1st defendant is accused of fraudulently obtaining the title when the plaintiff was in occupation and was also issued with a letter of allotment. On the other hand the 1st defendant claims that he is the registered proprietor of the suit premises as he was issued with the certificate of lease which is registered under the Registered Land Act (Cap 300) which gives him absolute proprietorship.

7. a cursory glance at the certificate of lease that is registered in the name of the 1st defendant shows that the title is indeed issued subject to the agreements and other matters contained in the registered lease and subject to such overriding interests as set out under Section 30 of the Registered Land Act as may for the time being subsist and affect the land comprised in the lease. According to the plaintiffs they have been in occupation of the suit premises since 1996. This fact is not denied by the 1st defendant. Indeed the 1st defendant was issued with the certificate of lease on 8th January, 1998. Going by the evidence so far revealed in this case, I find there are some pertinent issues regarding the acquisition of the suit premises that are raised by the plaintiff which can only be determined at the trial.

8. The other matter that is worthy of mention in this ruling is the fact that the 1st defendant acquired the title of the suit premises in January 2008, while the school has been in occupation since 1996. On a balance of convenience, it is the plaintiff who has been in occupation of the suit land who should be protected until the allegations of fraud contained in the plaintiffs' suit are determined. I also hasten to point out that under the provisions of section 30 of the Registered Land Act (Cap 300), it contains what constitutes an overriding interest regarding a registered title as follows:-

“Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same without their being noted on the register –

(a) ...

(g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where an enquiry is made of such person and the rights are not disclosed.”

9. According, until this matter is heard, it is not possible to know whether an enquiry was carried out as provided for under the above provision. I am unable to grant an order of injunction or even to dismiss the plaintiffs' suit for failure to annex the witness statements which in my view is not fatal as the plaintiff can be given time within which to comply and avail the witness statements, and the documents in support of the suit. It is not in the interest of justice to strike a suit unless is so hopeless that it discloses no reasonable cause of action. (**See the case of D.T. Dobie & Company Kenya Ltd. vs. Joseph Mbatia Muchina CA No. 37 of 1978.** That case laid down the principles to be taken into account on whether or not to strike a defence. The Court of Appeal, in that case held that;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

10. For the aforesaid reasons, I disallow the notice of motion dated 12th April, 2011 and the costs will be in the cause. The plaintiff is given 14 days to comply with the Civil Procedure Rules.

Ruling read and signed this 8th day of July, 2011.

**MARTHA KOOME.
JUDGE.**