



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**Civil Suit 2 of 2009**

**JOHN MUHATIA.....PLAINTIFF**

**VERSUS**

**JOASH SHIVUKALE.....DEFENDANT**

**R U L I N G**

By a Notice of Motion dated 8<sup>th</sup> May, 2010 pursuant to the provisions of order XXXIX Rule 4 of the Civil Procedure Rules (Cap 21) Laws of Kenya the applicant seeks orders:

1. THAT this application be certified as urgent to be heard ex-parte in the first instance.
2. THAT this honourable Court be pleased to set aside the injunction orders issued on 19<sup>th</sup> March, 2009.
3. THAT in the meantime and pending hearing of this application inter-partes there be an order staying implementation of the injunction orders issued on 19<sup>th</sup> March, 2009.
4. Costs be provided for

The application is based on the grounds:

- (a) THAT the injunction orders are punitive as against the defendant/applicant.
- (b) THAT the defendant/applicant has always resided on and utilized the parcel of land.
- (c) THAT there is a valid decree which has not been set aside.

The application is predicated upon the annexed affidavit of Joash Shikuvale sworn on the 8<sup>th</sup> day of May, 2010.

On behalf of the applicant/defendant, it was argued that an injunction order restraining the applicant from utilizing the suit land was

issued by this court on 19<sup>th</sup> March, 2009. A copy of the said order is exhibited as “JS1”.

Before this suit was filed a decree had been issued in his favour in Kitale land case No. 62/07. A copy of the decree is exhibited as “JS 2”.

An attempt to vary the decree was made by the plaintiff/respondent vide an application dated 6/8/2006 which application was ultimately dismissed. A copy of the application is exhibited as “JS 3”

On 5<sup>th</sup> March, 2009, the decree of the lower court was executed and survey done in accordance with the decree. A copy of a letter inviting the parties to attend by the surveyor is exhibited as “JS 4”.

Arising from the survey work, there are now distinct boundaries of 1.26 acres each. However, by reason of the injunction order herein the plaintiff/respondent has been denied the use of the land and threatened with demolition of her house.

Last but not least, that he has resided in the land with the plaintiff since the purchase of the same and hence the plaintiff holds the land in trust for himself and his brother. That, he contends, was based on the decision of the Tribunal -Copies of the proceedings are exhibited as “JS 5”.

In the premises, the applicant contends that the decree in Kitale land case No. 62 of 2007 renders this suit *res-judicata* That injunction orders sought ought not to have been issued therefor.

The respondent/plaintiff, John Muhatia, opposed the application by filing a replying affidavit sworn on 18<sup>th</sup> May, 2010.

It was the respondent/plaintiff contention the application is a duplication. The same issues raised herein were raised in the supporting affidavit sworn on 8<sup>th</sup> May 2001 supporting the present application. Precisely in the replying affidavit sworn on 16<sup>th</sup> March, 2010 at Paragraph 4, 5, 6 and 7, the applicant herein raised the same issue.

The ruling of the court dated and delivered on 31<sup>st</sup> March, 2010 is evidence that Parcel No. Kwanza/Kwanza/Block 4/KOROSS/271 is registered in the name of John Muhatia Okot. Accordingly, by dint of section 29 of the Registered Land Act (Cap 300) Laws of Kenya, he is the absolute proprietor of the subject parcel. Accordingly, the injunction was properly confirmed hence this application is frivolous, vexatious and abuse of the court process.

I have carefully analyzed the evidence for and against the application. It is clear to me that the land is registered in the names of John Mahatia Okot, the plaintiff/respondent herein. It is worth repeating that such registration is conclusive evidence of ownership in terms of section 27 of the Registered Land Act (Cap 300) Laws of Kenya. There is no evidence in rebuttal on the basis of which I would find to the contrary. Accordingly, the temporary injunction issued against the defendant/applicant stands. The application is without merit. It is accordingly the same is dismissed with costs to the respondent/defendant. It is so ordered.

Dated and declared at Kitale this 28<sup>th</sup> day of June, 2010

**N R O OMBIJA**

**JUDGE**

N A for plaintiff

N A for defendant