



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 108 of 2007

MICHAEL MUEMA KANYUMU PLAINTIFF

VERSUS

NTHENYA MUTUA 1ST DEFENDANT

KIOKO MUTUA 2ND DEFENDANT

MUOKI MUTUA 3RD DEFENDANT

ITAMBO MUTUA 4TH DEFENDANT

KING'OO MUTUA 5TH DEFENDANT

RULING

1. The Applicant herein, Michael Muema Kinyumu by his Summons premised an Order XXXIX of the Civil Procedure Rules and dated 26/11/2007 seeks orders that the Respondents be restrained from encroaching into, trespassing, entering and/or constructing any structures whatsoever on plot Number Mbooni/Iiani/251 until the suit is heard and determined.

2. I have seen the Supporting Affidavit sworn on 26/11/2007 by the Plaintiff/Applicant, the Replying Affidavit sworn on 4/12/2007 by Kioko Mutua, 2nd Respondent. I have also taken into account the brief submission made before me. I note that the Plaintiff is the registered proprietor of the suit land having acquired title to it on 17/10/2007. In his Complaint he seeks a declaration that he is the lawful and bona fide owner thereof and that he is entitled to possession and occupation thereof. He also seeks a perpetual injunction in the same language and tenor as the temporary injunction now being sought as expressed above. He avers in that Complaint that the Respondents entered the land in November 2007 and attempted to set up structures on it. He repeats the same averments in the Supporting Affidavit aforesaid.

3. The Respondents admit that they have no title to the land but state that the Applicant obtained title by fraudulent means. No particulars are given and so the claim is moot. They also claim that they have lived in the suit for a period in excess of forty (40) years but having alleged fraud also claim that the

Applicant actually bought the land from their grandmother and they challenged the sale vide a case before the **Mbooni Land Tribunal Case No. 28 of 2006** which was still pending. In fact, I have seen the proceedings of that case and the award dated 26/10/2006 was to the effect that the suit land should be transferred to the Applicant and so it was.

4. The matter before me is very simple; the Applicant is the registered proprietor of the suit land and I see nothing in the Replying Affidavit nor the Statement of Defence dated 4/12/2007 jointly by all the Defendants to dissuade me from that clear position. Further, the Tulimani Land Disputes Tribunal having heard the Defendant's objection to the transfer of the land to the Applicant decided that their claim was baseless. No appeal or challenge has been made to that decision and so it remains a valid decision.

5. Prima facie therefore, and following Giella vs Cassman Brown (1973) EA 358, the Applicant has established that he has a prima facie case with a probability of success. On the second principle applicable, I note that the Defendants claim that the land is ancestral land but that fact is not clearly pleaded and no remedy is sought on the basis of that claim. They have no title to the land and I do not see what loss they will suffer if the injunction is not granted. If there is any, none has been claimed, pleaded or even remotely mentioned and I cannot go on a speculative mission to show the point.

6. Lastly, I have shown on a balance of convenience, that the Applicant who has lawfully purchased the land, proved his claim before the Mbooni (Tulimani) Land Disputes Tribunal in case No. 28/2006 and who has title to the land is clearly entitled to the orders sought. Conversely, the Defendants' claim is lazy and unsure.

7. I will without further ado grant prayer 3 of the Application dated 26/11/2007 with costs.

8. Orders accordingly.

Dated and delivered at Machakos this 29th day of **September** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Musyoka for Plaintiff/Applicant**

Defendant present in person

ISAAC LENAOLA

JUDGE