



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

**AT NAKURU**

**Civil Case 187 of 2005**

**PETER MUCHIRI MWANGI.....PLAINTIFF**

**VERSUS**

**MOLOLINE SERVICES LTD.....1<sup>ST</sup> DEFENDANT**

**MUNICIPAL COUNCIL OF NAKURU.....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff, Peter Muchiri Mwangi has filed an application under the provisions of **Order XXXIX rules 1, 2, 3 and 9 of Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking the order of this court to restrain the defendants by themselves, their servants or agents from encroaching, trespassing interfering or in any other way dealing with parcel number NAKURU MUNICIPALITY BLOCK 10/12 (*formerly Plot No. LR 451/604 Nakuru Town*) (hereinafter referred to as the suit land) to the detriment of the plaintiff's right to quiet and peaceful enjoyment of the same as a registered owner. The grounds in support of the application are that the applicant contends that he is registered owner of the suit land. He further states that the defendants had interfered with the said suit land to his detriment as the registered owner. He states that he would suffer irreparable loss and damage if the injunction is not granted. The application is supported by annexed affidavit of the plaintiff. The plaintiff filed a further affidavit on the 12<sup>th</sup> of July 2005 in support of his said application. The application is opposed. The 1<sup>st</sup> defendant has filed a replying affidavit and grounds of opposition in objection to the application. The 2<sup>nd</sup> defendant filed two replying affidavits through its Municipal Engineer Mr Stephen K. Mburu sworn on the 16<sup>th</sup> of August 2005 and the 7<sup>th</sup> of October 2005 respectively. In the said replying affidavit, the 2<sup>nd</sup> defendant has opposed the plaintiff's application.

At the hearing of the application, the plaintiff who was acting in person, submitted that the suit land was allocated to him and later a title to the same issued to him. He submitted the suit land was not within the Bus Park owned by the 2<sup>nd</sup> defendant but outside it. The plaintiff annexed documents in support of his application which gave a history of how he had applied and was allocated the suit land by the government. He submitted that the 1<sup>st</sup> defendant with the connivance of the 2<sup>nd</sup> defendant had occupied part of the suit land and thus prevented him from enjoying its ownership. He further submitted that the 2<sup>nd</sup> defendant had acknowledged his ownership of the suit land when they issued him with an approval of a plan that he had presented to them when he proposed to build a perimeter wall round the said plot. He submitted that he had established a prima facie case to enable this court to grant him the orders sought. He submitted that the 1<sup>st</sup> defendant had built their offices in such a manner that they had blocked the entrance to his parcel of land. He urged the court to grant the orders sought.

Mr Okeke, Learned Counsel for the 1<sup>st</sup> defendant reiterated the contents of the replying affidavit and the ground of opposition filed. He submitted that the 1<sup>st</sup> defendant operated its business in the area with the permission and consent of the 2<sup>nd</sup> defendant. Learned Counsel for the 1<sup>st</sup> defendant submitted that the plaintiff was actually claiming a piece of land which constituted part of a road reserve and an open area reserved for recreation. He further submitted that the plaintiff had not proved that the 1<sup>st</sup> defendant had encroached on his parcel of land. He further submitted that the offices of the 1<sup>st</sup> defendant are *in situ* and are already in use. He submitted that the plaintiff could not seek to restrain the 1<sup>st</sup> defendant from doing what it had always done without interference by the plaintiff. To grant injunction to the plaintiff would amount to this court upsetting the status quo. He submitted that the plaintiff was seeking to prevent by means of a temporary injunction what had already taken place. He further submitted that the plaintiff had never made any demand on the 1<sup>st</sup> defendant concerning the suit land before the suit was filed in court. He urged this court to dismiss the plaintiff's application with costs.

Mr Mbeche, Learned Counsel for the 2<sup>nd</sup> defendant associated himself with the submission made on behalf of the 1<sup>st</sup> defendant. He submitted that it was suspicious the way the plaintiff acquired title to the suit land. From the time the plaintiff was allegedly allocated the suit land in 1976 to the time he acquired title in the year 2004 so much time had passed, that doubt has been raised as to how the plaintiff acquired the said title. During the period that the plaintiff was alleged to be in possession of the suit land, it was submitted that no land rates were paid in respect of the said parcel of land. He further submitted that the plaintiff had not been candid with the court because he had not told the court where the suit land was actually situate on the ground. According to the documents annexed to the plaintiffs' application, it was clear that the plaintiff was claiming part of the parcel of land which was maintained by the 2<sup>nd</sup> defendant as a recreational park. He further submitted that the orders sought by the plaintiff cannot be granted since he has been in breach of the conditions of allocation as he had not undertaken any development on the suit land. Learned counsel submitted that the procedure adopted by the plaintiff in filing his claim in court was inappropriate. He urged the court to dismiss the application with costs.

In response to the submissions made, the plaintiff replied that he was 1<sup>st</sup> registered owner of the suit land and therefore his title was indefeasible. He submitted that he had proved that he was the lawful owner of the suit land and was therefore entitled to take occupation of the same. He further submitted that the defendants had not produced any documents to establish that they owned the suit land. He submitted that he had paid all the taxes in respect of the suit land and had done so without fail. He urged this court to allow his application as prayed.

I have considered the submissions made in this application. I have also read the pleadings filed by the parties to this application in support of their respective positions. The issue for determination by this court is whether the plaintiff has established a *prima facie* case as to entitle this court to grant him the orders of injunction sought. As was held by the Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society [2001]1E.A. 86** at page 89:

***“The sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella –vs- Cassman Brown and Co. Ltd. 1973 E.A. 358 at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the 1<sup>st</sup> one is satisfied and when the court is in doubt then the third condition can be addressed.”***

In this case the plaintiff has been able to establish that he is the owner of that parcel of land known as **Nakuru Municipality Block 10/12**. However he was not able to establish where the said parcel of land was situate on the ground. Although he submitted that the 1<sup>st</sup> defendant had erected offices in such a manner that it blocked the frontage of his said plot, the 1<sup>st</sup> defendant was able to raise doubts as to the allegations made by the plaintiff. The 1<sup>st</sup> defendant submitted that there had been authorized by the 2<sup>nd</sup> defendant to erect offices on a road reserve near the bus stage. The 1<sup>st</sup> defendant submitted that their

offices were *in situ* and have existed in their present location for some time now. The 2<sup>nd</sup> defendant submitted that part of the land that the plaintiff was claiming was within the suit land was actually a recreational ground maintained by the 2<sup>nd</sup> defendant on behalf of the residents of Nakuru Town. The 2<sup>nd</sup> defendant raised doubt as to the manner in which the plaintiff acquired title to the said parcel of land.

Having carefully considered the said arguments made it is clear that there is doubt as to exact location on the ground that the plaintiff is claiming to comprise the suit land. The photographs annexed to the application and a copy of the RIM annexed to the application actually show that the parcel of land which the plaintiffs claim is part of the recreational grounds maintained by the 2<sup>nd</sup> defendant near its bus park. Although the plaintiff has proved that he is the registered owner of a parcel of land, he has not been able to establish where the said parcel of land is actually located on the ground. Secondly, the plaintiff has not established what injury he anticipates to suffer by the conduct of the defendants so that this court can maintain the status quo pending the hearing and determination of the suit.

What is clear is that the 1<sup>st</sup> defendant has maintained his offices on a road reserve near the Bus Park for sometime now. Similarly the 2<sup>nd</sup> defendant maintains a recreational park behind the offices of the 1<sup>st</sup> defendant. The plaintiff has not undertaken any development on the ground to establish his ownership of any part of the parcel of land occupied by the defendants. In the circumstances of this case therefore the plaintiff has failed to establish a *prima facie* case to enable this court grant him an order of injunction. An injunction being an equitable remedy is discretionary. The plaintiff has placed no material before this court to enable this court exercise its discretion in his favour. The plaintiff appears to actually want to seek orders of injunction in order to enable him evict the defendants from what he alleges to be an area comprised of the suit land. That cannot be.

It will be unnecessary for me to consider the other principles laid down in the case of **Giella -vs- Cassman Brown**. The plaintiff has failed to establish a prima facie case and in the circumstances therefore the application herein fails. It is dismissed with costs to the defendants.

**DATED at NAKURU this 22<sup>nd</sup> day of February 2006.**

L. KIMARU

JUDGE