



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 40 of 2006**

**JOHN MUTITIKA MWANIKI .....PLAINTIFF**

**VERSUS**

**DR. A.K. MONTET .....DEFENDANT**

**R U L I N G**

The Plaintiff who claims to be the registered proprietor of a piece or parcel of land known as Scheme 305 NGONG 14138 BLOCK I/167 (“the suit land”) has sued Dr. A.K. Montet, alleging that Dr. Montet entered into the suit land sometime last year and pulled down part of the fence, cut down mature acacia trees and built a stone wall on one side of the suit land. The Plaintiff also says that Dr. Montet intends to erect buildings on the suit land. The Plaintiff seeks a temporary injunction against Dr. Montet to restrain him from trespassing on the suit land and a mandatory injunction to remove the stone wall he has erected and reinstate the original fence.

Simultaneously with the filing of the Plaint, the Plaintiff has taken out a Chamber Summons under Order 39 rules 1,2 and 3 of the Civil Procedure Rules seeking interim relief in terms of the prayers in the Plaint. The application is supported by the Plaintiff’s own affidavit made on the 16<sup>th</sup> January 2006 in which he has repeated all the averments in the Plaint.

Dr. Montet has entered appearance but has yet to deliver a Defence. In relation to this application, he filed a replying affidavit on the 24<sup>th</sup> January 2006 denying the claim made against him by the Plaintiff. In paragraph 3 of the affidavit, Dr. Montet deponed that he is not the owner of the suit land but points out that it is owned by his son, Saitabau Mulet, to whom it was allotted by the County Council of Olkejuado on the 20<sup>th</sup> February 1998. The suit land was also allotted to the Plaintiff by the same County Council and he, the Plaintiff, has a Certificate of Lease dated the 21<sup>st</sup> December 2005 for a term of 99 years from the 1<sup>st</sup> March 1998.

Dr. Montet says he has no interest in the suit land and denies the acts of trespass alleged against him by the Plaintiff. The Plaintiff says he has seen Dr. Montet around the suit land but that is not enough to connect him with the acts of trespass alleged against him. This appears to me to be a case where the wrong person has been sued as a Defendant. Dr. Montet has, in my view, produced credible evidence showing that he does not own the suit land and that the person who also claims to own it is one Saitabau Mulet who happens to be the Doctor’s son. Saitabau Mulet is an adult and can therefore own property in his own right.

As against Dr. Montet therefore, and on the evidence before me, the Plaintiff has not established a *prima facie* case with a probability of success to entitle him to an order of injunction. For that reason, the Plaintiff’s Chamber Summons application dated the 16<sup>th</sup> January 2006 fails and it is hereby dismissed with costs to the Defendant.

Dated and delivered at Nairobi this Tenth day of February  
2006.

**P. Kihara Kariuki**

**Judge**