



**VICTOR NYAMAI YUUNA ..... PLAINTIFF**

**VERSUS**

**MARY MWANGANGI**

**MUNICIPAL COUNCIL OF KITUI ..... DEFENDANTS**

**R U L I N G**

This application was dated 7/7/05. The applicant who is the plaintiff sought an order of injunction, restraining the defendants or their servants or agents, from developing constructing or interfering with the plaintiff's quiet possession of plot No. 110B Kaango Estate, in Kitui Town pending the hearing and determination of this suit.

For reasons not explained this application although filed together the suit on 7/7/2005, was not prosecuted until a year later.

The applicant's case is that he purchased plot No. 110B, Kaango Estate, in Kitui on March 1985 from one Kalumu Joel Muthoka. The 2<sup>nd</sup> defendant, the Municipal Council of Kitui in whose control and supervision the Kaango Estate is, on application by the applicant, recommended and approved the sale and a transfer of the plot to the applicant.

That applicant as the new owner began paying and has been paying yearly rates and rents from 1996 to the time of filing the case. It is applicant's further case that from August 2004, he saw the 1<sup>st</sup> defendant begin to develop the plot, claiming that the plot he was developing is not the applicant's plot No. 110B but plot No. K. Zone 9. The applicant deponed that there is no plot in Kaango Estate with the latter number, even in the 2<sup>nd</sup> defendant council's maps.

On the above basis, the applicant sought the temporary injunction, arguing that unless such order is given, the defendants can waste the property before a decision of the court on ownership is given. The applicant pointed out to 2<sup>nd</sup> defendant's council minutes by which the transfer was approved and the receipts for rates and rents which the council has yearly given the applicant on the latter's payments. On the other hand, the 1<sup>st</sup> defendant did not deny the claim or file any replying affidavit denying any of the applicant/plaintiff's facts. Both defendants as well did not controvert the fact that plot No. K Zone 9 did not exist.

In reply Mr Musyoka representing the defendants said that the applicant had not made a prima facie case. He pointed to photographs of plot showing advanced construction and questioned the plaintiff's judgment for not raising objection early enough to avoid loss since the construction is now almost complete making the granting of an injunction seriously objectionable. He said that the plot is not in danger of alienation or damage. He also argued that the delay denies the plaintiff any equitable relief like an injunction nor will it be able to redress anything in a situation where the construction is already complete and where therefore the correct remedy would be an order for demolition if the plaintiffs wins the case. He concluded that under these circumstances the court should entertain a doubt and leave things where they are.

I have carefully considered the application and the material drawn to court's attention. The defendants do not deny the fact that the plaintiff/applicant bought the piece of land in question and that with the approval of the 2<sup>nd</sup> defendant, it was transferred to the plaintiff. Nor do the defendants deny the fact the plaintiff has always paid his rates and rents which 2<sup>nd</sup> defendants happily receipted. So, there was no denial that the plot belongs to the plaintiff. The defendants' position was that the plaintiff's plot was elsewhere. The defendants did not point out to this other plot nor did they appear to care whether it

existed or not. The 2<sup>nd</sup> defendant's, the Kitui Town Council would from its plan point out the plot No. 110 B Kaanga Estate and confirm that it is different from the plot they termed plot K Zone 9. It failed to do so even after being so challenged. Nor did I understand the defendants to claim that plot 110 B was allocated later than K Zone 9 and on the latter. Infact the opposite is true. The plot called K Zone 9, was apparently demarcated and allocated later to the 1<sup>st</sup> defendant without apparently ascertaining whether or not the area was free for allocation. The 1<sup>st</sup> defendant, even in claiming the plot by another name, did not attempt to prove ownership of it.

I observe that the plot has been constructed to an advanced stage. But in my view, such construction cannot stand in the way of an injunction, especially where all the possible evidence tends to indicate ownership of the plot to be in the plaintiff. The plaintiff seeks an order to stop the defendant from continuing to construct, among others. Such would be a better order instead of allowing the defendants to continue to construct and later possibly order for demolition. I am therefore satisfied that the plaintiff has proved that he has a prima facie case with chances of success and that a restraining order might be the better order until the case is determined. A party who appears to have no basis of ownership or title should not be allowed to enter another's property, construct on it, and then be heard to say that he should be left to earn rent from it until the case is determined.

For the above reasons, this application has merit and is hereby allowed. The injunction sought is granted until the suit is heard and finally determined. Orders accordingly.

Dated and delivered at Machakos this 29<sup>th</sup> day of September 2006.

**D.A. ONYANCHA**

**JUDGE**