



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

**Civil Suit 41 of 2005**

**JOSEPH KIMONGOO KASAU .....PLAINTIFF/  
APPLICANT**

**VERSUS**

**BENARD KIMITI.....1<sup>ST</sup>  
DEFENDANT/RESP.**

**JACINTA SYOKAU BERNARD .....2<sup>ND</sup>  
DEFENDANT/RESP.**

**R U L I N G**

The application before the court is dated 12.5.2005. It seeks interlocutory injunction to restrain the defendants from entering, digging, cultivating, building and cutting trees on the land which is in dispute. The applicant relies on grounds on the application and the affidavit of support. He swears that the land in dispute, land parcel No. Masii/Mbaani/336, is registered in his name after the family subdivided the family land and allocated him this one. It would appear however that the plaintiff's mother, sold the piece of land to the defendants who took occupation of it in May 2005, but have not built on the land. The applicant represented by Mrs. Nzei also argues that the fact that he is the registered owner, gives him the colour of right to seek vacant possession. He argues also that his mother who had no title or claim, could not pass any rights on the land to a purported purchaser. This remains, so he claims, despite the fact that the mother has filed a civil claim over the land against the plaintiff and a third person under the purported Agreement of Sale. He also points out that even the sale agreement does not confer any rights to the defendants because the sale transaction was not given consent by the Local Land Control Board within the required 6 months, the land being an agricultural land. The applicant further argues that failure to attain the consent to the transaction, voids the sale to the respondents.

Mrs. Kiusya representing the defendants replies that the land in question was sold to the defendants by the mother of the plaintiff, although the land was registered in the plaintiff's name. That the latter discovered that she had been coned by her sons during a division of the family land and had to file a court claim No. HCCC No. 35 of 2005 against the plaintiff and another son. Mrs. Kiusya states that although the land is registered in the name of the plaintiff, the latter holds it in trust for her and in the pending suit she therefore seeks cancellation of the registration alternative, to the trust she also claims. Kiusya concludes that even the sale to the defendants did not include the whole land but only part of it.

Responding to what Mrs. Kiusya said Mrs. Nzei referred the court to a supplementary affidavit which deponed inter alia, that the original family land, Masii/Mbaani/30, had been subdivided into three – Masii/Mbaani/335, Masii/Mbaani/336 and Masii/Mbaani/337. That plaintiff had taken No. 336, his brother No. 335 and mother, No. 337. That soon after division, the plaintiff's brother Nicholas Kimeu Kasau, sold his piece No. 335 to one Isaac Mutua Musyoki. That later the mother exchanged her piece of land No. 337 with part of No. 335 which the said Isaac Mutua Musyoki gave her with a permanent building on it. That the said mother lives in the said house until presently.

I have considered the arguments from both sides and the material upon which the arguments rest. There is no denial fro both sides that the defendants claim the piece of land No. Masii/Mbaani/336

because they bought it from the mother of the plaintiff. There is no denial also that the land is currently registered in the name of the applicant/plaintiff. The defendants admit having no title. They did not deny the fact that they have never obtained a Land Control consent for this agricultural land, nor did they expect getting the consent as long as the plaintiff owns the land. It was not disputed by the plaintiff either, that defendants took possession of the land in May 2005 but have not put up any building on it. I am aware from the facts on the record that the mother has filed a claim in this court against the plaintiff and a third party claiming a cancellation of the plaintiff's ownership registration of the disputed land or in the alternative, a trust. The question is whether, anticipation under the said suit HCCC No. 35 of 2005 gives her and the defendants enough rights which this court should consider in an application like this. On the other hand, does the fact that the plaintiff who is the registered owner alone give him a prima facie case with high chances of success. I have considered this factor, and I am of the view that registered ownership as is the position in this case, is a good starting point which puts the applicant some distance ahead. The same is coupled with the fact that the plaintiff is said to have put structures on the land although he, day-to-day, lives away in Mtito Andei. On the other hand the defendant moved into the land only in May, 2005 and does not appear to have constructed any building on it.

There is also the issue that the piece of land, being an agricultural land, required a consent of the Land Control Board within six months of the sale to validate the transaction. This was not done, thus making the sale void for all purposes. This would suggest that the purchaser's rights in the circumstances, remain in a refund of the purchase price as provided by the provisions of sections 6(1) and 7 of the Land Control Act. To that end the Court of Appeal in **John Onyando and Javan O. Bulemi versus Samson Luwayi, Civil Appeal No. 93 of 1985** stated as follows (on page 5,

**‘Besides, in my judgement, an agreement that is held to be void for all purposes, could not be the basis for reference to a panel of elders. If a transaction is void for all purposes, nothing of it is left that could constitute a case of a civil nature. No complaint of any nature remain to be resolved after a transaction related to an agricultural land is held to be void. ... The words “void for all purposes” must be interpreted to mean what they say.’**

The purchasers therefore have little to expect under the sale agreement.

The next issue to resolve is whether the applicants will suffer irreparable damage if the injunction sought is not granted. The land is registered in the name of the applicant. The defendants cannot therefore be able to alienate it. But they can cultivate it or can cut trees on it or they can construct buildings, including permanent ones on it. Would such be irreparable damage which may not be compensable in damages? The answer would definitely be in the negative. On the other hand, why should they be allowed to enter and cultivate a piece of land which they have presently no interest in or right on, with little prospect to obtain one in the foreseeable future. Were they already residing on the land, the balance of convenience could tilt in their direction. There is no evidence presently that they live on the land itself.

For the above reasons it is my view and finding, that the applicant has demonstrated a prima facie case with good chances of success. While the damage likely to result in not granting an injunction may be compensable, there is no evidence on the other hand, that the defendants themselves will suffer any loss if the injunction is granted. The third test of convenience, does not appear to be relevant to this case since neither party resides on the land itself.

This application must succeed therefore. It is granted as prayed. Costs are in the cause. Orders accordingly.

Dated and delivered at Machakos this 20<sup>th</sup> day of December 2005.

D. A. ONYANCHA

JUDGE