



**REPUBLIC OF KENYA**

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

**Civil Case 146 of 2002**

**DANIEL N. MUTUA)**

**ALFRED WAMBUA MUANGE) .....**  
**PLAINTIFFS**

**VERSUS**

**AGNES NDILA KANUA ..... DEFENDANT**

**RULING**

By chamber summons dated 13.11.2002 the plaintiff/applicants, Daniel N. Mutua and Alfred Wambua Muange moved this court under Order 39 Rules 1 and 3 Civil Procedure Rules and Section 3A Civil Procedure Act seeking the following orders:-

That pending the hearing and determination of this application the defendants one, Agnes Ndila Kanua her servants or agents be restrained by an order of injunction from interfering with the plaintiffs peaceful occupation of their plots No. 1053 and 1054 Nguu Ranch Settlement Scheme and secondly that the defendant, her agents and servants be compelled by a mandatory injunction to vacate and remove themselves from the plaintiffs land and that costs of the application to go to the plaintiffs.

The grounds upon which the application is founded are found in the body of the application. It is argued that the plaintiffs are the registered owners of plots Numbers 1053 and 1054 Nguu Ranch respectively and that the defendant has trespassed on the land by force, intimidation and threats and has prevented the plaintiffs from working on their pieces of land; that the defendant/respondent has no lawful claim to the land and the plaintiffs will suffer irreparably as they had crops grown on the land and they would be wasted.

The first applicant swore an affidavit dated 13.11.2002 and a further affidavit dated 21.2.2003 sworn by the same applicant. The applicants reiterated the grounds and added that the respondents, workers or agents invaded the two plots Numbers 1053 and 1054, chased away the applicants workers who were sowing seeds as a result of which they suffered loss and that the crop already planted needs to be attended to but the applicants fear for their lives and need protection. In the further affidavit, the applicants annexed letters of offer and acceptance for their plots DMM 2A and B, DMM 3A and B.

In opposing the application the respondent deponed that she joined membership of Nguu Ranching Co-operative Society as member 978. In 1994 they balloted for plots and she got plots totalling 70 acres. She annexed the ballots. She then obtained letters of allotment which she annexed. That her plots were irregularly allocated to other people and in 1996 she was given an alternative land measuring 70 acres in

the same scheme where she built a house and has cultivated 45 acres. But that on 16.9.2002 she came back home and found some people had invaded her land and chased her workers and she filed HCCC 128/02 where she sued the intruders where the court gave orders of status quo. She denies that the applicants are members of Nguu Ranching Co-operative and have obtained the plots irregularly, and prays that the application be dismissed.

For the court to grant an order of temporary injunction, the applicant has to establish a prima facie case with high chances of success; that if the injunction is not granted the applicant will suffer irreparable loss which cannot be compensated by damages and where the above do not apply the court to consider where the balance of convenience tilts.

I have considered submissions by both counsels, affidavits filed and annexures thereto. The applicants claim to be the registered owners of the 2 plots. They annexed letters of offer and acceptance to the further affidavit. In respect of 1<sup>st</sup> applicant, the offer was made on 29.9.95 and the acceptance was on 14.1.97. For 2<sup>nd</sup> applicant the offer was made on 29.9.95 and acceptance dated 22.1.96. The acceptance were in regard to plots 1053 and 1054 respectively. Though the respondent claims that she had been allocated some plots in 1994 which were plots 553, 554, 859, 928, 2424, 2925, 3395 the applicants plots are not included. She then went on to say that the said plots were allocated to other people and she was allotted another land measuring 70 acres. She has not annexed any evidence of what plots she was allocated. Respondent said she sued the people who invaded her land in 2002. A copy of the ruling of the court was availed in court in HCCC 128/02. Unfortunately the court cannot tell who the defendants were. Mr. Nyakweba submitted the applicants were not included amongst those sued in HCCC 128/02. It was never denied that the applicants were amongst the defendants sued. It follows that the applicants are not some of the people who allegedly trespassed on the respondents land and their plots are not what she claims to be her land. Apart from evidence that the respondent was a member of Nguu Ranching Co-operating Society she has not availed any evidence that she is the owner of the plots in dispute No. 1053 and 1054 Nguu Ranch. The Respondent has made several allegations that the applicants obtained the plots illegally but that is a mere sweeping statement without evidence to support it. Besides the respondent made allegations against the surveyors for making illegal allocations but she did not have these surveyors joined to the suit as defendants or third parties.

The allegation by Respondent that the applicants are not members of Nguu Co-operative society and not entitled to this land is not substantiated. The court would have preferred to see the register of members of the said co-operative society to ascertain whether or not the applicants are members. There is no evidence adduced to show that non members of the society were not eligible to be allocated plots in the said Nguu Scheme. To establish a right to the said land, the respondent would have had to show all these. So far the applicants have shown that they had valid documents of ownership of the land and have established a prima facie case with likelihood of success.

Counsel did not submit on the loss that may be suffered if an order of injunction is not granted.

Prayer 3 of the application seeks a mandatory injunction ordering the respondents out of the applicants pieces of land. Mr. Kurauka for respondent submitted that the courts jurisdiction was not properly invoked to grant the said prayer as the court should have been moved under Order 50 Civil Procedure Rules. The court was moved under Order 39 Civil Procedure Rules and Section 3A Civil Procedure Act. Order 39 Civil Procedure Rules deals with temporary and interlocutory injunctions. Mandatory injunction can be granted under the inherent jurisdiction of the court provided under Section 3A Civil Procedure Act. However the court would be moved by way of Notice of Motion. Since the prayers for both interlocutory and mandatory injunction were sought in one application I find no anomaly in the form of the application. Can the court grant an order of mandatory injunction? A mandatory injunction will be granted in the clearest of cases where all facts are clear. I cannot say the present case was all facts laid bare. There will be need for more evidence to be adduced at a hearing and evidence of surveyors to ascertain boundaries if need be. A mandatory injunction cannot issue at this stage.

Mr. Kurauka, counsel for respondent pointed out that the 2 affidavits sworn by the 1<sup>st</sup> applicant in support of the application are defective and offend Section 35 of the Advocates Act since they do not indicate

who the drawer is and are therefore null and void and should be struck off rendering the application without affidavits.

Section 35 (1) of the Advocates Act reads as follows

***“Every person who draws or prepares or causes to be drawn or prepared any documents or instrument referred to in Section 34 (1), shall at the same time endorse or cause to be endorsed thereon his name and address or the name and address of the firm of which he is a partner and anybody omitting so to do shall be guilty of an offence and liable to a fine not exceeding Ksh. 5000/- in the case of an unqualified person or a fine of Ksh. 500/- in the case of an advocate.*”**

*Section 35 (2) the Registrar ..... shall refuse to accept or recognize any document or instrument referred to in Section 34 (1) unless such document or instrument is endorsed in accordance with this section.”*

Section 34(1) prohibits any unqualified person from drawing or preparing any document or instrument “relating to any legal proceedings”.

In my view an affidavit is a legal proceeding and should comply with Section 35 (1) as regards endorsement of the name and address of the drawer. The High Courts have made similar findings in the cases of **BARCLAYS BANK LTD. V. DR. SOLOMON OTIENO ORERO HCCC 1736/01 AND MIBEN (K) LTD. V. MARK WANGAI KSM HCCC 234/01.**

Section 35 is couched in mandatory terms. It is not a mere irregularity as Mr. Nyakweba would have the court find. A penalty is provided for failure to comply. Failure to comply with that section is a breach of express statutory provisions that can not be cured by Order 18 Rule 7 Civil Procedure Rules and I do agree that without the endorsements and address, the 2 affidavits by 1<sup>st</sup> applicant are fatally defective and are hereby struck off. Since the affidavits are struck off there is no evidence to support the application and it is therefore similarly struck off with costs to respondents.

Dated at Machakos this 25<sup>th</sup> day of November 2004.

Read and delivered in presence of

R. V. WENDOH

JUDGE