



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**PETITION NO. 10 OF 2020**

**JAMES MUTHIANE M'MBIRITHU.....PETITIONER**

**AND**

**LAND ADJUDICATION AND SETTLEMENT OFFICER IGEMBE**

**CENTRAL/NORTH SUB-COUNTIES.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION.....2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR MAUA.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**JAMES KIREMA BAIKENDA.....INTERESTED PARTY**

**RULING**

1. Before me is an application dated 12.8.2020 brought by the petitioner where he is seeking injunctive orders against the respondents and the interested party from interfering with his parcel no. 1037 situated at Amwathi Mutuati 11A Adjudication section measuring 2.54 acres until the suit is heard and determined. He is also seeking conservatory orders stopping the respondents from continuing with any dealings in respect of the aforementioned parcel of land.

2. The application is premised on the grounds on the face of the application and in the affidavits of the applicant. The applicant contends that the parcel no. 1037 was plotted to him in 1995. However, his family has enjoyed peaceful occupation of the land since 1970's. The land is fully developed with extensive miraa plantations and indigenous trees and their homesteads are situated on the land. He contends that the interested party filed objection case no. 741 against petitioner's land no. 1037 claiming one acre as parcel no. 1148 whereby the interested party colluded with the 1<sup>st</sup> respondent to illegally and fraudulently award the interested party the one acre of land.

3. The applicant contends that he risks losing the one acre of land which means he will be deprived of his income from the miraa trees. He also contends that his rights under article 35, 40, 47, 48, 50, 60, 68, 64 and 159 of the constitution have blatantly been violated.

4. In support of his case the applicant has availed the following documents:

- Copy of record for parcel no. 1037.
- Photographs showing the miraa plantations, the indigenous trees and the homesteads for himself and his children.
- Proceedings in the objection case no. 741 against parcel 1037.
- Correspondence between counsel for applicant and land adjudication officer regarding request for consent to file suit.

5. The respondents have opposed the application vide the grounds of opposition dated 30.10.2020 and the affidavit of one Joseph Mbai filed on 12.11.2020. The respondents contend that the objection case no. 741 which was filed by the interested party was properly heard and

determined and that if any party was dissatisfied with the decision thereof, recourse was in filing a Judicial Review suit. It is further averred that the allegations of collusion or fraud are but sweeping statements.

6. The respondents aver that in the decision in A/R objection case no. 741, parcel no. 1037 was to be subdivided to create parcel no. 1148 measuring one acre in favour of the interested party. However, the decision has not been implemented on the ground due to the hostilities manifested by the petitioner. It is further averred that the applicant has not demonstrated how the process undertaken in the objection case violated his rights.

7. The interested party has opposed the application vide his replying affidavit filed on 16.11.2020. He contends that he bought 1 acre of land in 1994 from M'Iringa Njau and the same was demarcated as parcel no. 1148. He left his brother one Zakayo Muriungi Baikenda as his steward on the land. His land was intact until year 2012 when his brother Zakayo died. The interested party learnt that his land had been taken away by the applicant prompting him to file the objection case no. 741.

8. The interested party avers that the applicant fully participated in the objection case. Thus the applicant has not established a prima facie case and the balance of convenience tilts in his favour. The interested party has also availed the proceedings in case no. 741 to support his claim.

### **Injunction**

9. The provisions of order 40 rule 1 of the civil procedure rules provide as follows:

***“Where in any suit it is proved by affidavit or otherwise— (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit;***

***the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.***

10. For a court to exercise its discretion to grant a temporary injunction, an applicant has to establish a prima facie case with a probability of success and that the applicant is likely to suffer irreparable damage which would not be adequately compensated by an award of damages. Where the court is in doubt in respect of the aforementioned considerations, then the application will be decided on the balance of convenience. See the classic case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358.**

11. In **Mrao vs First American Bank of Kenya Ltd & 2 others (2003) KLR**, the court explained what a prima facie case is as follows:

***“It is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.***

12. In the case of **Nguruman Limited vs Jan Bande Nelsen & 2 others (2014) eKLR**, the court of appeal restated the law as follows:

***“It is established that all the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially”. – see Kenya commercial finance co. Ltd vs Afraha Education Society (2001) Vol 1 E.A 86. If the applicant establishes a prima facie case, that alone is not sufficient base to grant an interlocutory injunction. The court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage..... If prima facie case is not established, then irreparable injury and balance of convenience need no consideration...”.***

13. Thus the first issue to consider is whether the applicant has established a prima facie case. This petition was triggered by the decision of the 1<sup>st</sup> respondent delivered in A/R objection case no. 741 in respect of parcel 1037 of which the proceedings and the decision have been availed by both the applicant and the interested party.

14. A perusal of the aforementioned proceedings reveal that the committee visited the scene and made the following observations:

***“A ground visit was made on this land on 28.4.2017. The land is as captured on the sketch map below..... The disputed land is clearly different from the other land under the defendant’s (read applicant) developments..... The disputed land has young miraa crop and is fenced separately from the other land with the defendant’s homestead and mature miraa”.***

15. A sketch map drawn during the said ground visit depicts the disputed land as a distinct portion from the applicant’s land where his homestead and mature miraa crops are. The findings in the A/R objection case no. 741 are therefore not in tandem with the averments made by the applicant.

16. True, the applicant’s homestead and other developments like the mature trees are on his parcel no. 1037, but the disputed one acre portion is distinct, separate and has no developments save the young miraa crops.

17. Secondly, it is apparent from the proceedings in A/R objection case no. 741 that the dispute arose 44 years earlier in 1976 but was resolved. Apparently the family which sold the disputed land to the interested party is that of Munoru Tharianga. Munoru Tharianga in turn is the one who had a record of existing rights (RER) case with the applicant's father one Birthu Birthu in 1976. Munoru Tharianga won the case. This information is aptly captured in the findings in the A/R objection no. 741 as follows:

***“The sketch map drawn by the land Adjudication Committee in R.E.R objection decision of 7.10.1976 captures part of what is on the ground currently”.***

18. Thus the proceedings of the 1976 case were available and they set the record straight that the one acre belonged to the interested party.

19. From the material presented before me the applicant has not established any existing rights, over the one acre piece of land and he has not also demonstrated that the interested party has infringed on his rights. What emerges is the opposite. The applicant is the one who is attempting to scuttle a statutory process that was cemented way back in 1976 through the dispute resolution mechanisms provided under the Land Consolidation Act.

20. I conclude that the applicant has not established a prima facie case and I need not dwell on the other criterias.

#### **Conservatory orders**

21. In the *Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others* [2015] eKLR, the court laid down the principles for granting of conservatory orders as follows:

(i) ***“The need for the Applicant to demonstrate an arguable prima facie case with a likelihood of success and to show in the absence of the conservatory orders, he is likely to suffer prejudice.***

(ii) ***Whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights.***

(iii) ***The Court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.***

(iv) ***Whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order”.***

22. In the present matter, the court has already made a pronouncement that the applicant has not established a prima facie case. Thus there is no basis for issuance of the conservatory orders. Furthermore, this is not a public interest case. I also find that the proceedings in the objection case were conducted on the basis of a statutory mechanism established under Section 26 of the Land Consolidation Act where the applicant was an active participant.

23. All in all I find that the application dated 12.8.2020 is not merited. The same is hereby dismissed with costs to the respondent and the interested party.

**DATED, SIGNED AND DELIVERED AT MERU THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 19.11.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**