



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO.59 OF 2020**

**ISOMI KATAKA.....PLAINTIFF**

**VERSUS**

**WILLIAM WANGILA WESONGA.....1ST DEFENDANT**

**ROBERT WANYAMA LIWA.....2ND DEFENDANT**

**VITUS OCHIENG OMWADHO.....3RD DEFENDANT**

**RULING**

1. The application dated **28/9/2020** and filed in court on **30/9/2020** has been brought by the plaintiff under **Order 40 Rules 1, Order 51 Order 1 of the Civil Procedure Rules, Section 1A, 3 & 3A and 63 (e)** of the **Civil Procedure Act**. The plaintiff seeks the following orders:-

(a) ...spent

(b) That this honourable court be pleased to issue an order of prohibition to stop any dealings with title number **KIMININI/KIMININI BLOCK 3(WEHONYE) 359** and the resultant subdivisions **248-352** pending the hearing and determination of this suit.

(c) That this honourable court be pleased to issue an order of injunction to restrain the defendants, their agents/principals or anyone claiming through them from surveying, subdividing, alienating, selling and/or selling and/or transferring any part of title number **KIMININI/KIMININI BLOCK 2(WEHONYE) 359** or subdivisions thereof pending the hearing and final determination of this suit.

(d) That pending the hearing of this application the respondents, do supply the plaintiff/applicant with copies of the 2 applications for consent filed at **Kiminini Land Control Board**, a copy of the area list generated, a copy of the consent of the **Land Control Board** given on **15th September, 2020** to enable him appraise himself with the happenings on his land.

(e) That costs of this application be provided for.

2. The application is supported by the affidavit of the plaintiff sworn on **28/9/2021**. The grounds on the face of the application are that the applicant is the registered owner of title **No. Kiminini/Kiminini Block 2(Wehonye) 359** measuring approximately **54 acres**; that the said property was acquired through succession from the estate of **Kataka Omusula** (Deceased); that there are several buyers in possession of part of the property and the applicant is intent on transferring the purchased portions to the respective owners; that the 1st and 2nd respondents in collusion with the 3rd respondent (a surveyor) have caused a survey to be carried on the said suit property without the consent of the applicant or authority and an area list generated which he has been denied access to; that on **16/9/2020**, the 2nd respondent in the company of 2 men hijacked the applicant and presented him before the **Kiminini Land Control Board** where a consent to subdivide was given in spite of the applicant's protests; that the respondents are hell-bent on acquiring the suit property and even presented to the applicant a prepared "power of attorney" "donating" power to them in order to sanitize the illegalities committed in respect of his land; that there is a **Land Control Board (Kiminini)** sitting scheduled for **30/9/2020** which is set to hear the respondents' application for transfer of the suit property; that the applicant is to lose his right over the suit property if the orders sought are not granted; that the applicant has a right to protect his property and the action of the respondents infringes on that right and that allowing this application shall serve the ends of justice.

3. I have perused the file record and I have found no affidavit filed in response to the instant application.

**Submissions**

4. There are no submissions filed on behalf of the applicant in the record. However the respondent filed his submissions on **16.2.2021** and, citing **Joash Wamang'oli –vs- Housing Finance of Kenya Ltd and Another Nairobi Milimani Commercial Court Civil Case No. 1537 of 2000 [2005] eKLR, Giella -vs- Cassman Brown & Co. Ltd [1973] 1 EA 358 and Wairimu Mureithi –vs- City Council of Nairobi Civil Appeal No. 5 of 1979 [1981] KLR 322**, urged this court to dismiss this application with costs.

#### **Determination**

5. I have considered the application and the filed submissions. There is no affidavit controverting the facts put forward by the applicant. A replying affidavit to an application is crucial where it is necessary to deny certain facts relied on by the other side otherwise they may be deemed as correct.

6. In this particular case the plaintiff makes serious allegations to the effect that the 1st and 2nd defendant have without any lawful excuse or consent of the plaintiff caused his land to be subdivided by the 3rd defendant who is a surveyor. The bona fide of the land control board consent to subdivide obtained to authorize that subdivision has also been put into doubt. Further the plaintiff alleges that he was coerced into attending a land control board meeting at which the board approved the consent his protests notwithstanding. These are serious allegations which in the absence of any replying affidavit this court must accord the necessary weight in determining the instant application.

7. I am of the view that the applicant has established a prima facie case against the defendants.

8. The second issue to address is whether he would suffer any loss that may not be compensated for by way of damages.

9. It must be remembered that the rights of a registered owner are protected by the provisions of Section 26 of **the Land Registration Act**. Under the provisions of **Section 25 of the Land Registration Act** the applicant must be deemed to be the owner of the land and the production of a certificate of title in his name shall be taken to be conclusive proof of his ownership thereof.

10. Whether the defendants and others purchased the land from the applicant's father or from the applicant, I do not find any rebuttal to the allegation that the applicant is now the registered owner of the land with rights protected by the law, and who, unless otherwise ordered by a court of law, may deal with his land in the manner that he desires. I must also consider that the probable rights of the defendants are protected by the same law where applicable.

11. I am not however convinced that the applicant would suffer any loss that may not be capable of compensation by way of damages from the defendants' interference with the suit land. Nevertheless, this court is of the view that allowing more interference with the suit land may complicate this suit further and there is therefore need to preserve the current status of the suit land pending the hearing and determination of this suit.

12. I must therefore determine the instant application on basis of the balance of convenience and I therefore allow it in terms of **Prayers (b), (c) and (d)**.

13. The costs of the application shall be in the cause.

14. This suit shall be mentioned on **1/3/2021** for directions as to hearing and parties shall in the meantime comply with the rules.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 16th day of February, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**