



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 221 OF 2014**

**JONES MULULU MUEKE.....PLAINTIFF/APPLICANT**

**VERSUS**

**SIMON MWANIKI KAUNGA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ANTONY KIOKO MWANIKI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Notice of Motion dated 8<sup>th</sup> November, 2019 was filed pursuant to the provisions of Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 8 Rule 3 and 5, Order 40 Rules 1 and 4, and Order 51 Rule 1 of the Civil Procedure Rules 2010. In the Application, the Plaintiff is seeking for the orders:

***a) That this Honourable Court be pleased to issue an order for temporary injunction restraining the Defendants/Respondents, their agents, employees and/or personal representatives or any other person authorized by the Defendants/Respondents from trespassing into, alienating or disposing off damaging or destroying and/or any way interfering with the Plaintiff's occupation and/or possession of the property known as L.R. No. Machakos/Mua Hills/1486 (also known as L.R. No. Machakos/Mua Hills 1500, 1501, 1502, 1503, 1504, 1505 and 1506) pending hearing and determination of this application and suit herein.***

***b) That the Plaintiff/Applicant be granted leave to amend his Plaint as per the draft annexed hereto.***

***c) The Defendants/Respondents be at liberty to file an amended Statement of Defence if they so wish.***

***d) That the costs of this Application be borne by the Respondents.***

2. The Application is supported by the Affidavit of the Plaintiff who deponed that he purchased 9.5 acres then comprised in L.R. No. Machakos/Mua Hills/601 (formerly 143) from the 1<sup>st</sup> Defendant between the years of 1996 and 1998; that the 1<sup>st</sup> Defendant refused to effect transfer of the land to him prompting him to file this suit and that on 22<sup>nd</sup> September, 2017, this court issued interim orders protecting his interest in L.R. No. Machakos/Mua Hills/601 pending the hearing and determination of the suit.

3. According to the Plaintiff, in spite of the orders of the court, the Defendants caused the sub-division of the suit land into four more portions; that in the Ruling dated 4<sup>th</sup> October, 2019, the court noted that the sub-divisions were done *pendente lite* and that unless injunctive orders are issued, the Defendants would proceed to transfer the land which would be detrimental to him.

4. The Plaintiff deponed that it was imperative that the Plaint in this matter be amended so as to bring out the real matters in controversy between the parties; that the proposed amendments would not occasion any prejudice to the Respondents and that it is in the interest of justice that the orders sought be granted.

5. The Application was strenuously opposed by the Respondents vide their Grounds of Opposition. The Respondents stated that the Application was *sub judice* as there was a similar Application dated 10<sup>th</sup> January, 2019 which was yet to be determined.

6. The Application was canvassed by way of written submissions. Counsel for the Applicant submitted that it was imperative that the court issues injunctive orders during the pendency of this suit so as to maintain the *status quo* and to prevent the Defendants from alienating and or disposing of the suit property.

7. Counsel submitted that there was need to amend the Plaintiff so as to reflect the current Land Reference Number of the suit property and that the proposed amendments will not occasion any prejudice to the Respondents.

8. Counsel for the Respondents submitted that the Applicant had filed an Application dated 22<sup>nd</sup> November, 2018 where he sought to have the Respondents jailed for contempt of the court orders issued on 22<sup>nd</sup> September, 2017; that when the court delivered its Ruling on 4<sup>th</sup> October, 2019, it was noted that the sub-divisions alleged by the Applicant had been done a few days before the injunctive orders were issued and that since this court issued injunctive orders on 22<sup>nd</sup> September, 2017, the Respondents have never sub-divided any of the suit properties.

9. It was submitted that the Applicant had not tendered any evidence to show that he had any proprietary rights over any of the suit properties; that his only allegation is that he settled on one of the suit properties herein, which allegation is not backed with any evidence and that the Applicant did not produce any photographs to show that he had constructed any permanent structures on the suit land.

10. Having considered the pleadings and the submissions, the issues which arise for determination are:

i. *Whether the Application is sub judice.*

ii. *Whether the court should issue an injunction.*

iii. *Whether the Plaintiff should be allowed to amend his Plaintiff.*

11. This suit was commenced by way of a Plaintiff and an Application for an injunction dated 31<sup>st</sup> July, 2014. In the Application dated 31<sup>st</sup> July, 2014, the Plaintiff sought for orders of injunction in respect to parcel of land known as Machakos/Mua Hills/143 and its sub-divisions being Machakos/Mua Hills/601 and 602.

12. After hearing the Application *inter-partes*, on 22<sup>nd</sup> September, 2017, the court found that indeed the Plaintiff had established a *prima facie* case with chances of success and issued an injunction pending the hearing of the suit.

13. However, unbeknown to the court and the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had entered into a consent in Machakos ELC No. 188 of 2016 and had the suit property sub-divided into parcels of land number Machakos/Mua Hills 1484-1487. It is because of the creation of the new parcels of land that the Plaintiff has filed the current Application for injunctive orders and amendment of the Plaintiff.

14. The *sub judice* rule is a rule of general application and is spelt out in Section 6 of the Civil Procedure Act as follows:

*“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same time, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

15. The purpose of this rule is to prevent courts of concurrent jurisdiction from entertaining parallel proceedings in respect of the same subject matter between the same parties. It is therefore necessary to establish that the issues in the former proceedings are also directly and/or substantially the same issues in the latter suit.

16. The Defendants have averred that the current Application is *sub judice* the Application dated 10<sup>th</sup> January, 2019 which has not been heard and determined. In his submissions, the Defendants’ advocate did not make any reference to this issue. Indeed, this court has not come across an Application dated 10<sup>th</sup> January, 2019 which is pending in this court raising similar issues

17. In any event, the current Application has been filed because of the Defendants’ actions of sub-dividing the suit property during the pendency of the suit. The court having already found that the Plaintiff has a *prima facie* case in respect to the initial property, an injunction should issue to forestall any further dealings in the initial suit property and the subsequent sub-divisions.

18. Order 8 Rule 3 of the Civil Procedure Rules 2010 provides that the court may at any stage of the proceedings allow a party to amend his pleadings. Considering that the Application to amend the Plaintiff has been occasioned by the sub-division of the suit land *pendente lite* by the Defendants, I shall allow the Plaintiff to amend the Plaintiff.

19. In the circumstances, and for the reasons I have given above, I allow the Application dated 8<sup>th</sup> November, 2019 as follows:

**a) An order of temporary injunction be and is hereby issued restraining the Defendants, their agents, employees and/or personal representatives or any other person authorized by the Defendants from trespassing into, alienating or disposing off, damaging or destroying and/or any way interfering with the Plaintiff’s occupation and/or possession of the property known as L.R. No. Machakos/Mua Hills/1486 (also known as L.R. No. Machakos/Mua Hills 1500, 1501, 1502, 1503, 1504, 1505 and 1506) pending hearing and determination of this suit.**

**b) The Plaintiff be and is hereby granted leave to amend his Plaintiff as per the draft Amended Plaintiff.**

**c) The Amended Plaintiff to be filed and served within fourteen (14) days from the date of this Ruling.**

*d) The Defendants are at liberty to file an amended Statement of Defence within fourteen (14) days from the date of service.*

*e) The costs of this Application to be borne by the Defendants.*

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30<sup>TH</sup> DAY OF APRIL, 2021.**

**O. A. ANGOTE**

**JUDGE**