



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC SUIT NO. 16 OF 2020**

**ZABLON MURUNGI M'RINGEERA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JUSUF MAITIMA M'ALAI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE COUNTY LAND ADJUDICATION**

**AND SETTLEMENT OFFICER MERU COUNTY.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE COUNTY LAND ADJUDICATION AND**

**SETTLEMENT SURVEYOR MERU COUNTY.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**THE LAND REGISTRAR MERU**

**COUNTY.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE DIRECTOR OF LAND ADJUDICATION**

**AND SETTLEMENT.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE CHIEF LAND REGISTRAR.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE HONORABLE ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before me is a notice of motion dated 19<sup>th</sup> June 2020 brought pursuant to provisions of Article 40, 64 & 159 of the Constitution of Kenya 2010, Section 1A, 1B, 3, 3A, & 63 (e) of the Civil Procedure Act, Order 40 rule 1, & 2 and Order 51 rule 1 of the Civil Procedure Rules 2010. The applicant seeks the following orders:

1) Spent

2) Spent

3) *That there be temporary orders of Injunction restraining the defendants/respondents by themselves, their servants and/or agents and/or any other person whatsoever acting on their behalf from threatening to evict, trespassing onto, entering into, ploughing, planting, fencing, constructing, demarcating, developing, grazing or in any other way dealing or interfering with the plaintiff's/applicant's portion of land measuring 8.4 HA or thereabout known as **KIIRUA/NKANDO/605** pending the hearing and determination of this application inter-parties.*

4) *That there be temporary orders of Injunction restraining the defendants/respondents by themselves, their servants and/or agents and/or any other person whatsoever acting on their behalf from threatening to evict, trespassing onto, entering into, ploughing, planting, fencing, constructing, demarcating, developing, grazing or in any other way dealing or interfering with the plaintiff's/applicant's portion of land measuring 8.4 HA or thereabout known as **KIIRUA/NKANDO/605** pending the hearing and determination of this suit.*

5) That the O.C.S Subuiga Police Station to ensure compliance on (3) and (4) above.

6) **IN THE ALTERNATIVE** this Honorable Court be pleased to order the status quo prevailing as before 24<sup>th</sup> August 2015 regarding possession, user, occupation and registration of the parcel of land known as Title Number **KIIRUA/NKANDO/987** by the 1<sup>st</sup> respondent/defendant pending the hearing and determination of this application inter-parties or until further court orders.

7) That this Honorable Court be pleased to issue a temporary order of Injunction restraining the 1<sup>st</sup> defendant/respondent by himself, his servants, agents or any other person whomsoever from doing any of the following acts that is to say evicting, demolishing the plaintiff's/applicant's houses, selling, leasing, charging or otherwise howsoever interfering with the plaintiff's/applicant's quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of the parcel of land known as Title Number **KIIRUA/NKANDO/605** pending the hearing and determination of this suit.

8) Cost of the application.

2. The application is based on the 18 grounds on the face of the application as well as the content in the 50 paragraphs in the applicant's supporting affidavit. In summary, the applicant avers that he bought the land known as **KIIRUA/NKANDO/605** from Jennifer Kairuthi M'Ikiao measuring 8.4 Hectares through a sale agreement on 5<sup>th</sup> September 1987 and the same was registered in his name at the Adjudication Committee Offices as the rightful and legal owner. That he took possession and has since been in open, exclusive, continuous and uninterrupted occupation and has made developments on the said parcel of land.

3. The applicant was living peacefully on his land until year 2009 when some intruders interfered with his land by cutting trees for charcoal burning. This was followed by an invasion in the year 2012 when some intruders started cultivating the land claiming ownership of this land through their grandmother one Rebecca Mwonjoria M'Kirima. The plaintiff launched a formal application to evict the intruders through the District Officer and reported the matter to Subuiga Police Station. He also wrote a letter of protest through his advocates to the intruders whom he had come to learn were Laban Kirianki and Mworja Nyamu sons of Jusuf Maitima M'Alaine (the 1<sup>st</sup> respondent herein).

4. The applicant was summoned by the District Officer of Ruiru Tutua on 3<sup>rd</sup> May 2012 where he met the 1<sup>st</sup> defendant/respondent who was claiming to be the owner of parcel **Kiirua/Nkando/987**. The dispute was referred to the National Council of Njuri Ncheke Ya Ameru Elders at Kithima Location who delivered their judgment on 27<sup>th</sup> October 2012 in favor of the applicant. Despite the said judgment, the 1<sup>st</sup> defendant continued his trespass, prompting the applicant to write to the minister for Lands and Physical Planning requesting his intervention. He also visited the Meru Lands Adjudication & Settlement Office to inquire on his title and found that the registration of his land had a restriction with no justification.

5. The applicant proceeded to buy a RIM for Kiirua Nkando Registration section sheet no. 60. He found that his parcel of land no **605** had been illegally sub-divided into two parcels creating parcel Number **KIIRUA/NKANDO/987** from the original parcel **KIIRUA/NKANDO/605**. That the new parcel 987 measures 6.4 Ha and the said title was issued to the 1<sup>st</sup> defendant in 2015. For parcel 605, it was now measuring 1.98 Ha contrary to the demarcation map of Kiirua Nkando registration section.

6. The applicant also states that he did learn that the 1<sup>st</sup> respondent has further sub divided the illegal title no. **987** into four portions namely **KIIRUA/NKANDO/5780, 5781, 5782** and **5783** and has obtained titles for the same. He has written several letters to the DLASO (District Land Adjudication and Settlement Officer) seeking an explanation as to why his parcel of land was illegally sub-divided. It is his case that the 4<sup>th</sup> respondent erroneously issued title deeds in respect of the four parcels without regard to the demarcation map of Kiirua Nkando Registration Section First Edition.

7. The applicant contends that after the 1<sup>st</sup> respondent was issued with the titles, he (1<sup>st</sup> respondent) proceeded to occupy parcel **605**, blocking the applicant from using the borehole, water pans and piped water which are all worth over Kshs. 3,500,000. He is afraid the 1<sup>st</sup> respondent will alienate the land as potential buyers have been coming to view the land. The 1<sup>st</sup> respondent has also threatened the applicant and has forcefully trespassed on the applicants land. Against this back ground, the applicant prays that his application be allowed.

8. The 1<sup>st</sup> respondent has opposed the application via his replying affidavit dated 28/09/2020. It is equally a lengthy document containing 62 paragraphs! He avers that he has always been the registered owner of parcel **KIIRUA/NKANDO/987** which has given rise to 4 other land titles namely **KIIRUA/NKANDO/5780, 5781, 5782** and **5783**. He has occupied this land with his family members including his mother and siblings. He contends that the registration of the land into his name was legal and procedural as he is the 1<sup>st</sup> registered owner to the said land and he followed the land adjudication process.

9. He stated that he is the 1<sup>st</sup> born son of his mother one Rebecca Mwonjiru M'Ikirima(deceased) who was a squatter on the land parcel measuring about 44 acres as from 1963. His mother had successfully applied to be allotted the said land and the family continued to occupy and develop the same.

10. The 1<sup>st</sup> respondent avers that the issues concerning the suit parcel arose in 1990 when the adjudication process commenced. One committee member named Francis Kinoti had intentions to grab the land and with the influence of the Njuri Ncheke, 11 acres of their land was hived off and sold by the committee to the committee member and a further 10 acres was also sold to another person named as M'Maitai, which left about 22 acres for the family.

11. That his mother allowed him to have 16 acres which became **KIIRUA/NKANDO/987**, while the mother was left with 6 acres being **KIIRUA/NKANDO/605**. That in the intervening period, the said committee member named Francis Kinoti forged records and recorded the parcel **KIIRUA/NKANDO/605** in the name of Jennifer Kairuthi Francis who also happened to be his wife.

12. The mother of the 1<sup>st</sup> respondent filed three objection cases, including **case no. 688** and an arbitration case against the wrongful alienation of the 21 acres and the 6 acres, but she got unfavorable decisions. The 1<sup>st</sup> respondent did lodge an appeal to the minister which case is still pending. The dispute was also handled by Njuri Ncheke.

13. The 1<sup>st</sup> respondent avers that the water project being claimed by the applicant was funded by the government together with Kithima Water Project and further it was his mother who donated the water borehole location. The applicant never bought the land as alleged but the same was given to him irregularly by the biased adjudication committee to frustrate the 1<sup>st</sup> respondent's ownership and he was misled to buy the 6 acres which were left after his mother had given him the 16 acres. He further states that the applicant has never occupied the suit parcels.

14. The 1<sup>st</sup> respondent therefore states that the applicant has not established a prima facie case as he is not the registered owner nor has he proved occupation of the suit land. As such, the application should be dismissed with costs.

15. The application was canvassed by way of written submissions. The applicant filed his submissions on 14/08/2020 reiterating what he had stated in his supporting affidavit. He added that the 1<sup>st</sup> respondent irregularly hived off a portion of his land and fraudulently obtained a title and has further sub-divided it with the intention to sell it to prospective buyers. He is fearful that he will lose his home. He submitted that he meets all the criteria for the issuance of the orders sought.

16. The applicant has proffered the following authorities in support of his application; **Giella vs. Cassman Brown (1973)EA 358**, **Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003)eKLR**, **Suleiman V Amboseli Resort Ltd (2004) KLR 589**, **Tritex Industries Limited & 3 others V National Housing Corporation & Another (2004)eKLR**, and **Thomas Mungiria & 9 Others V Joseph Mutuma & 4 Others (2012)eKLR**.

17. The 1<sup>st</sup> defendant filed his submissions on 28.9.2020, where he has similarly reiterated the contents of his replying affidavit. He added that the applicant has failed to demonstrate why the orders sought should be granted as he has failed to produce a sale agreement relating to the suit land. He contends that the applicant has not demonstrated what injuries he stands to suffer if the orders are not granted. That the 1<sup>st</sup> respondent has on the other hand proven that he is the legal owner of the suit land. He therefore avers that the application is not merited.

18. The 1<sup>st</sup> respondent has relied on the case of **Giella vs. Cassman Brown & Another (1973) EA** and **Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003)eKLR**.

#### **Determination**

19. I have carefully perused the application, the supporting and replying affidavits as well as the rival submissions. I frame the issues for determination as follows;

- a) *Whether the applicant/plaintiff has met the threshold for the grant of temporary injunction.*
- b) *Whether the order of inhibition which was granted pending the hearing of the application should be confirmed,*
- c) *Who should bear the costs of this application?*

#### **Injunction**

20. The law relating to the issuance of interlocutory injunction is set out under **Order 40(1) (a) and (b) of the Civil Procedure Rules 2010** which provides:-

*"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."*

21. In the Court of Appeal case of **National Bank of Kenya Limited v Juja Coffee Exporters Limited [2021] eKLR**, the court had this to say on applications for injunctions;

*"In keeping with the long-standing principles in Giella vs. Cassman Brown Co Ltd [1973] E.A. 358, the grant or refusal of an interlocutory injunction is a matter of exercise of judicial discretion and an applicant is required to show a prima facie case with a probability of success; secondly, that it would suffer irreparable harm which would not be adequately compensated by an award of damage; and lastly if the court was in doubt, to determine the application on a balance of convenience".*

22. The first question to determine is whether the Plaintiff has established a prima facie case. A prima facie case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**[2003] eKLR as follows:

***“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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 latter.”***

23. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others** [2014] eKLR, the court held that:

***“We reiterate that in considering whether or not a prima-facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima-facie case. The applicant need not establish title; it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima-facie case is on a balance or, as otherwise put, on a preponderance of probabilities”.***

24. Both parties claim to be in possession and occupation of the suit land, each claiming that the other acquired ownership through fraudulent and illegal means. A keen look at the case of the applicant reveals that the orders sought in the application are inconsistent with the averments made in his supporting affidavit and in his pleadings.

25. In the body of the application, the applicant primarily seeks protection from threats of eviction, that respondents (read 1<sup>st</sup> respondent) be restrained from trespassing on the suit land 605 and to prevent the latter from generally utilizing the said land. The supporting affidavit of the applicant however indicates that the element of invasion of the suit land commenced way back in year 2009 (see paragraph 9 of the supporting affidavit).

26. The invasion continued again in year 2012 (see paragraph 10 thereof). In paragraph 26 of the said affidavit, applicant contends that 1<sup>st</sup> respondent has constructed 2 semi-permanent houses and he has denied the applicant the right to use and occupy the suit land. He contends that after the 1<sup>st</sup> respondent got his title to the land, he blocked the applicant from usage of the water pans, borehole, water tanks and grazing field. These averments tend to be in tandem with the prayers sought in the plaint whereby in **prayer (e)** thereof, the applicant has sought the following orders:

***“An eviction order of the 1<sup>st</sup> defendant by himself, his servants and or agents from the land parcel known as parcel Kiiroa/Nkando/605 measuring 8.4 hectares or thereabout for being trespassers together with damages for trespass”.***

27. In essence, the 1<sup>st</sup> respondent is in occupation of the suit land. Thus If this court was to grant injunctive orders sought for by the applicant at this interlocutory stage, it would be tantamount to granting one of the major reliefs sought in the main suit. In the case of **Daniel Atibu Jasimba v Ainea Sandanyi Magana** [2013] eKLR, the court had this to say in respect of a prayer relating to a major relief;

***“Since the Plaintiff’s suit is for eviction of the defendant from the said residence, such an injunction will amount to granting a major relief in the suit without the benefit of a hearing”.***

28. Likewise, this court cannot grant a major relief at the interlocutory stage before the suit is heard on its merits.

29. Another point of consideration is that the element of immediate danger is missing in the application. The applicant has mentioned the first time of invasion as year 2009, the second one was in year 2012. By year 2015, the applicant had apparently been dislodged from the suit land (see paragraph 42 of applicant’s supporting affidavit). In the case of **Noormolhammed Janmohammed vs. Kassam Ali Virji Madhani (1953) 20 IRK8** cited in **Aniello Storelli vs. Damaris Mwongeli & Another (2019) eKLR**, it was held that;

***“Temporary injunctions are granted where there is evidence of immediate danger to property be sale or other disposition. The purpose of injunction is to preserve the suit property”.***

30. It is also quite clear that the applicant has not been in “open exclusive, continuous and uninterrupted” occupation of the suit land since 1987 as he alleges in paragraph 4 of his supporting affidavit. It is crystal clear that the current suit is not the first point of call in the dispute resolution mechanism explored by the parties or the claimants predecessors in respect of the suit land. The applicant has given a lengthy account of how he sought interventions from the ministry of lands and physical planning, the Ministry of Lands Adjudication and Settlement as well as the Land Registry. He also states that the dispute appertaining to the suit land was deliberated upon by the Njuri Ncheke ya Ameru council of elders culminating in a judgment in his favour way on 27.10.2012.

31. On the other hand, the respondent has given an account of how the suit land was subjected to objection cases years ago leading to an appeal to the minister in the year 1993. Such objection proceedings and appeals to the minister are ordinarily conducted under the dispute resolution mechanisms provided for under the adjudication statutes, primarily the Land Adjudication Act Cap 284 laws of Kenya and the Land Consolidation Act Cap 283 Laws of Kenya.

32. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others** [2014] eKLR, the court stated that;

***“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected (emphasize added) which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and***

**substantive and there must be an urgent necessity (emphasize added) to prevent the irreparable damage that may result from the invasion”.**

33. The applicant has certainly not established a clear and unmistakable right, nor is the dispute a recent phenomenon. Instead, the material so far presented before me paints a grim picture of a deep rooted odyssey of the dispute. This requires the court to sift through the history of the said dispute particularly in the adjudication arena in order to dissect or sever the Gordian knot in which some parcels disappeared while others came to life.

34. Further, weighing the interest of the parties at this stage, I discern that the claim of the applicant dates back from 1987 through purchase, while that of the 1<sup>st</sup> respondent dates back from 1963 through squatter occupation.

35. It is also apparent that the person who acquired rights of proprietorship in form of registration of the land is the 1<sup>st</sup> respondent going by annexure “zmr-16”, which is a search in respect of parcel 987.

36. At this juncture, I discern that the applicant has not established a prima-facie case with a probability of success. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others (supra)**, it was held that;

***“If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration..”***

I therefore need not interrogate the other criterias.

37. I must however say something about the prayer for maintenance of status quo which has been sought as an alternative remedy. In the case of **Agnes Adhiambo Ojwang vs. Wycliff Ojijo, Kisumu HCCC NO. 205 of 2000**, the court held that;

***“The purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.***

38. The alternative remedy sought is the maintenance of status quo prevailing as before 24.8.2015. The question is, how can the court know what the status was in the year 2015, given the convoluted nature of the dispute existing even before that date?

39. In the case of **Cyanamid Co. vs Ethicon Ltd (1975) 1 ALL ER 504; (1975) A.C 396 HL** cited in **Tritex Industries Limited & 3 others vs National Housing Corporaiton & another (2014) eKLR**, it was held that;

***“It is no part of the court’s function at this state of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial”.***

40. If this court was to analyse the status quo appertaining in year 2015, it would in essence attract detailed arguments in the nature of evidence which ought to be subjected to the usual rigorous trial processes. In terms of registration, the status quo appertaining before year 2015 would entail the canceling of the title to parcel No. 987 issued to the 1<sup>st</sup> respondent on 24.8.2015, its subdivision thereof as well as the canceling of the resultant titles numbers 5780-5783.

41. The nullification of the title to parcel 987 and its resultant sub-divisions is a major relief sought in **prayer a), b) and c) in the plaint**. As already stated earlier on, this court cannot proceed to grant a major relief at the interlocutory stage.

42. In dealing with an application for interlocutory injunction, the court is not required to decide the issues of fact but rather to weigh up the relevant strength of each sides proportions- See **Mbuthia vs Jimba Credit Corporation Ltd (1988) KLRI**. To this end, I need not reinvent the wheel in considering the interlocutory application.

43. What resonates from the history of the dispute as advanced by both parties is that the 1<sup>st</sup> respondent is on the suit land that is why the applicant seeks for his eviction in the main suit. A conundrum would be in the offing, if this court was to grant injunctive orders at the interlocutory stage. Instead, parties should endeavor to have the trial expedited.

### **Inhibition**

44. As regards the prayer for inhibition, I make reference to provisions of **Section 68 of the Land Registration Act** where it is provided that:

***“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”.***

45. The 1<sup>st</sup> respondent has already subdivided the land parcel 987 to give rise to 4 more parcels namely 5780-5783. Land being a very emotive issue in Kenya, it is essential to preserve the same so as to prevent its alienation. This court has already granted the inhibition orders on temporary basis. I deem it necessary to confirm the said orders.

### **Conclusion**

46. In the final analysis the application dated 19.6.2020 and filed on 22.6.2020 is dismissed save for prayer no. 2 which is allowed until the case is finalized. The costs of the application shall abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 21<sup>ST</sup> DAY OF APRIL, 2021 IN PRESENCE OF:**

C/A: Kananu

Charles Otieno Ogwande for plaintiff

Atheru for 1<sup>st</sup> defendant

Mbaikyata for AG

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**