



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC SUIT NO. 181 OF 2018

(formerly machakos hccc no.103 of 2010)

SAMMY MULI (Suing on his own behalf and that of

The estate of NZISA MULI the deceased) PLAINTIFF/APPLICANT

VERSUS

EDWARD MULI BUNA 1ST DEFENDANT/RESPONDENT

KAMWELI MWANGANGI KITUKU 2ND DEFENDANT/RESPONDENT

R U L I N G

1. What is before this Court for ruling is the Plaintiff's/Applicant's Notice of Motion application expressed to be brought under Order 40 Rules 1, 2, 3 Sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 of the Laws of Kenya and all other enabling provisions of the law for orders: -

1) Spent

2) Spent

3) THAT a temporary injunction be issued against the Defendant, their servants, agents or anyone claiming under them or on their behalf from selling, disposing, transferring, leasing, charging and/or in any manner whatsoever parting with possession of all that parcel of land known as MAKUENI/UNOA/67 pending the hearing and determination of this suit.

4) THAT costs of this suit be provided for.

The application is dated 18/08/11 and was filed in court on 17/08/11. It is predicated on the grounds on its face and is supported by the affidavit of Sammy Muli, the Applicant herein, sworn at Nairobi on 12th August, 2011.

2. The Respondents have opposed the application vide the replying affidavit of Kamweli Mwangangi Kituku, the 2nd Respondent herein, sworn at Machakos on 02nd July, 2012.

3. It is only the Respondents who filed their submissions in response to the Court's direction to dispose off the application by way of written submissions.

4. Amongst the grounds that the Applicant has raised are that the suit property was fraudulently sold and transferred to the 2nd Respondent by the 1st Respondent without the Applicant being consulted and/or informed and/or given any alternative land, that the Respondents colluded to defraud the Applicant of his only known home and if he and others are evicted, they will be landless, homeless and left destitute.

5. The Applicant has deposed in paragraphs 2, 3, 4 & 5 that he is the administrator of the estate of his late mother, Nzisa Muli who died on the 19th day of November, 2009 as can be seen from the copies of certificate of death and grant marked SM1, that his mother was sued for trespass by the 2nd Respondent but she died before the suit could be determined, that he has been informed by his Counsel on record which information he verily believes to be true that the said suit which was for eviction did not raise the issue of fraudulent sale, registration and transfer of Makueni/Unoa/67 and that the Respondents have failed to recognize the Applicant and the other children of their late mother need to live peacefully on the said land without any interruption.

6. On the other hand, the 2nd Respondent has deposed in paragraphs 4, 5, 7, 8, 9 and 13 of his replying affidavit that he is the registered owner and, therefore, entitled to the possession of the suitland as can be seen from a copy of the title deed marked KMK-1, that the suitland was transferred to him by one Edward Muli Buna, the 1st Respondent herein who is also the father of the Applicant, that it is true that the 2nd Respondent sued the Respondent's mother (now deceased) vide Machakos HCCC No.256 of 1996 and that the Applicant has conveniently not disclosed that he and his brother, one Mwanja Muli were also sued in the said suit as can be seen from a copy of the plaint marked KMK-2, that the Applicant filed a defence and counter claim through the law firm of M/s Mussilli & Mussilli Advocates as can be seen from a copy of defence and counter claim marked as KMK 3 and that the matter was determined vide the judgement delivered on 18/07/2001 in which the Respondent's (plaintiff in the suit) suit therein was allowed and the Applicant's (defendant in the suit) defence and counterclaim was dismissed with costs. That the application does not meet the threshold set out in the case of *Giella vs. Cassman Brown's* case.

7. I have read the submissions by the Respondents and needless to say in order for the orders sought by the Applicant to be granted, he must satisfy the three principles enunciated in the said *Giella vs. Cassman Brown and Co. Ltd [1973] EA 358*. I need not repeat the three principles herein but what comes out clearly is that the 2nd Respondent is the registered owner of Land parcel No.Makueni/Unoa/67. The Applicant has not exhibited any title deed to the suitland. Neither has he controverted the deposition by the 2nd Respondent that the issue of ownership of the suitland was conclusively determined in Machakos HCCC No.256 of 1996.

8. Arising from the above, the Applicant has not demonstrated that he has a prima facie case with probability of success. Regarding the 2nd principle, the Applicant has not shown how his eviction from the suitland will cause him to suffer irreparable harm or injury which cannot adequately be compensated by an award of damages. Thirdly in view of the reasons I have given in principle one and two, it is clear that this court is not in doubt and even if it were, the balance of convenience would still tilt in favour of the Respondents. In the circumstances, therefore, my finding is that the application has no merits and I proceed to dismiss it with costs to the Respondents.

Signed, Dated and Delivered at Makueni this 1st day of October, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

No appearance for the Plaintiff/Applicant

Mr. Nagwere holding brief for Mr. P. M. Mulwa for the Defendant/Respondent

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

01/10/2019.