



**REPUBLIC OF KEN YA**

**IN THE ENVIROMENT AND LAND COURT AT MAKUENI**

**ELC SUIT NO 118 OF 2018**

**DR ANDREW MULEI.....PLAINTIFF/APPLICANT**

**VERSUS**

**DANIELL KIOKO KASANGI**

**JOHN KIMANTHI RAYMOND.....DEFENDANTS/RESPONDENTS**

**RULING**

1. Before this court is a Notice of Motion Application dated 10<sup>th</sup> of August 2021 brought under Article 48 and 50(1) of the Constitution, Section 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules. The Applicant sought for the following orders;

**i) Spent.**

**ii) Spent.**

**iii) That the Defendants/Respondents herein be restrained from trespassing or undertaking any construction activities on the parcel of land known as plot no 18 in KIKIMA MARKET or interfering with the Applicant's use of the said land in any way pending the hearing and determination of this application inter-partes and pending the hearing of the main suit herein.**

**iv) That the cost of the application be provided for.**

2. The application is premised on the grounds on the face of the application namely: -

**a) That the Applicant was confirmed by Machakos CMCC 175 of 2002 as the sole registered owner of plot no 12 Kikima Market.**

**b) The Defendants have been laying illegal claim to the property.**

**c) That the Respondents have no right to be on the Plaintiff's land since the Applicant has never sold the property to them or any other person.**

**d) That at the beginning of August the Applicant established that the Respondents had commenced construction activities in the suit property to defeat the Plaintiff's claim.**

**e) That the Applicant cannot access his land which the Defendant continues to use without any right.**

**f) That it is only fair that the prayers sought are granted.**

3. The application is supported by the affidavit of Dr Andrew Mulei sworn on the 10<sup>th</sup> of August 2021.

4. The Applicant avers that he is the registered owner of the suit land and therefore the Defendants have no right to lay claim over it. He annexed a letter from the County Government of Makueni (Department of Lands, Mining, Physical & Urban Development) that confirmed that the land register was rectified as per the order of the Chief Magistrate in Civil Suit no 176 of 2007 to reflect that he was the owner of the suit land. He further averred that he had since established that the Respondents had commenced acts of wanton destruction of the property and that their continued occupation and illegal use of his land infringed on his rights to property.

5. The application was opposed vide the replying affidavit of Daniel Kioko Kasangi sworn on the 22<sup>nd</sup> of September 2021 who averred that the application is frivolous, vexatious, an abuse of the courts process and a waste of judicial precious time. He avers that Raymond Kalovya(deceased) was the registered owner of Plot NO 12 Kikima Market. He stated that the suit land was sold to him by the administrator of the Estate of Raymond Kalovya. He further averred that the County Government of Makueni vide a letter dated 4<sup>th</sup> of May 2021 annexure DKK3 notified plot owners who had defaulted in paying rates. That Raymond Kalovya was in the list of the rate defaulters with regards to his land, Plot 12 Kikima Market. He averred that a letter annexure DKK2 confirmed the transfer of Plot NO 12 from Raymond Kalovya to Daniel Kasangi and himself. That the application for transfer by Raymond Kalovya had been recommended for approval by the Mbooni Sub County Land Processing Committee way before the letter produced by the Applicant was issued. He contends that having purchased the land from the administrators of the estate of Raymond Kalovya as per the sale agreement annexure DKK3, he was entitled to all the rights and privileges thereto. He further averred that Raymond and his family had been utilising the suit parcel since 1978 and it will be unreasonable for the court to issue restraining orders against him.

6. The application was canvassed by way of written submissions. The Applicant's written submissions were filed on the 21<sup>st</sup> of October 2021 while the Defendant filed their submissions on the 5<sup>th</sup> of November 2021 which I have read and considered.

### **ANALYSIS AND DETERMINATION**

7. The issue for determination is whether the Applicant has met the threshold for the grant of an injunction.

8. The principles applicable in an application for an injunction were laid down in the celebrated case of **Giella Vs Cassman Brown & Co Ltd 1973 358** as submitted by both parties herein. The court held that;

***In order to qualify for an injunction;***

***Ø First the Applicant must show a prima facie case with a probability of success.***

***Ø Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm which would not be adequately be compensated by an award of damages.***

***Ø Thirdly if the court is in doubt, it will decided on a balance of convenience.***

9. The first issue for determination is whether the Plaintiff has established a *prima facie* case with a probability of success.

10. In the case of **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) eKLR** the court of appeal described the meaning of a *prima facie* case and stated 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.”***

11. The Applicant contends that vide a Court order in Machakos CMCC No. 175 of 2002, he was declared as the rightful owner of Plot NO, 12 Kikima Market. That the Court further ordered that the register to be rectified to reflect him as the owner of the suit land. The Applicant attached a letter from the Makueni County Government to demonstrate how he acquired the land. On the other hand, the Defendant avers that he is the owner of the suit property having purchased the same from the administrators of the estate of the late Raymond Kalovya. He attached a copy of the sale agreement and application for transfer to prove that indeed he was the owner of the suit land. It is evident that both the Plaintiff and the Defendant are claiming ownership over the same parcel of land. These are issues that need to be canvassed in a full trial by calling evidence and interrogating it through cross examination. At this stage, the Court is not required to determine the issues which will be canvassed at the trial.

12. This was the holding in the case of **Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd Nbi Milimani Court Civil Case No. 1118 of 2002** here the court held that: -

***“In interlocutory applications, the court is not required to determine the very issues which will be canvassed at the trial with finality.”***

13. As it is evident that both Plaintiff and the Defendant are claiming ownership over the same parcel of land, the court cannot at this juncture hold with certainty who between the Plaintiff and the Defendant holds a good title to the land. I therefore find that the Plaintiff has not established a *prima facie* case.

14. On the issue whether the Applicant will suffer irreparable loss which cannot be compensated by way of damages, the Applicant must establish that he will suffer irreparable loss if an order of injunction is not granted.

15. In the case of **Nguruman Ltd Vs Jan Bonde Nielsen and 2 Others (2014) eKLR**, the court of appeal stated as follows: -

***“On the second factor, the Applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate prima facie the nature and the extent of the injury. Speculative injury will not do; there must be more than an***

*unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot be adequately be compensated by an award in damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never be adequate remedy.”*

16. Irreparable loss was described in the case of **Paul Gitonga Wanjau Vs Gathuki Tea Factory Co. Ltd and 2 others Nyeri HCCC No. 28 of 2015** as simply injury or harm that cannot be compensated by damages and would be continuous.

17. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.

18. The Applicant contends that he is the registered owner of the suit property. He submitted that the Respondent was illegally on the suit property and attached photo graphs to demonstrate the construction activities that the respondent was undertaking on the suit land. As earlier stated, it is evident that both the Plaintiff and the Defendant are claiming ownership over the suit property. From the Applicants pleadings and annexures it is evident that he has not been in possession of the suit land.

19. The Court is far from satisfied that the Applicant has demonstrated that he will suffer irreparable injury as he is not in occupation of the suit land. This Court finds that the Applicant has failed to satisfy the second crucial requirement for the grant of an interim injunction.

20. Finally, the Applicant submitted that the balance of convenience was in his favour.

21. The concept of balance of convenience was defined in the case of **Paul Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR** as follows;

*“The meaning of balance of convenience in favour of the Plaintiff is that if an injunction is not granted and the suit is ultimately dismissed in favour of the Plaintiffs, the inconvenience caused to the plaintiff would be greater than which would be caused to the Defendant if an injunction is granted but the suit is ultimately dismissed. Although it is called a balance of convenience, it is really a balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them is greater than that which may be caused to the Defendants.”*

22. Having held that the Applicant has not established a prima facie case and the Applicant having confirmed that he is not in occupation/possession of the suit land, I find that the balance of convenience does not tilt in his favour.

23. The upshot of the foregoing is that the application has no merit and the same is dismissed with costs to the Respondent.

24. Parties are directed to comply with order 11 within the next 30 days.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2021.**

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**HON. T. MURIGI**

**JUDGE**

**IN THE PRESENCE OF: -**

Loki for the Plaintiff/Applicant

Kitindio for the Defendant/Respondent

Court assistant – Kwemboi