



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

ELC CASSE NO.E003 OF 2021

**MUTHIANI NDONYI (suing as the Administrator of the Estate of
Ndonyi Mruvi (Deceased).....PLAINTIFF/APPLICANT**

-VERSUS-

1) THE DISTRICT LAND ADJUDICATION & SETTLEMENT

OFFICER MUTOMO SUB COUNTY

2) THE DIRECTOR OF SURVEY

3) THE HONOURABLE ATTORNEY GENERAL

4) MUSYOKA KITHEKA

5) KYALO KITHEKA

6) MUTISYA KITHEKA

7) MUSEMBI KITHEKA

8) NDONYI KAVINGA

9) KITUI LAND REGISTRAR...DEFENDANT/RESPONDENTS

RULING

1. This Ruling relates to the application dated 1st November, 2021. The said application is a Notice of Motion supported by the Affidavit or the Plaintiff/Applicant sworn on 1st November, 2021. The application was filed under Certificate of Urgency and came before the court on 1st November, 2021 when the court directed that the Respondents be served for *inter partes* hearing on 17th November, 2021. On the said 17th November, 2021 Counsel for the Applicant was directed to serve the application afresh and file an affidavit of service for *inter partes* hearing on 23rd November, 2021.

2. An Affidavit of Service was filed by one Benedict M.Mutua sworn on 19th November, 2021 and filed in court on 23rd November, 2021. The Court is satisfied that based on the said affidavit the Respondents were served. No documents were filed in reply to the Notice of Motion and the Respondents did not attend Court on 23rd November, 2021.

3. The Counsel for the Applicant applied for orders in terms of prayer 3 and 4 of the Notice of Motion dated 9th November, 2021. The said prayers are:

i) That pending the hearing and determination of this suit, an Order of Injunction do issue restraining the Respondent whether by themselves or their representatives, servants, agents and/or assigns from howsoever trespassing onto, selling, alienating and/or in any other manner whatsoever dealing with the suit property known as KTUUWI Adjudication Section P/No. 929 measuring 1560 acres.

ii) **That pending hearing and determination of this suit, an Order of Injunction do issue restraining the 1st, 2nd and 9th Respondents whether by themselves or their representatives, servants, agents and/or assigns from howsoever from releasing title deed in respect of Plot Nos.594,595,596,597 and 928 to the 4th to 8th Respondents.**

4. From the Counsel's submissions I will assume that the other prayers in the application have been abandoned.

5. The Plaintiff/Applicant claims the land known as KITUUWI adjudication Section P/No. 929 measuring 1560 acres 24 acres by virtue of a decree or order issued on 5th October 2010 in Resident Magistrates Court Case No. 13 of 2009 between Kavingalkuthu vs Ndonyi Mbuvi. The Defendant in that case was the Plaintiffs father who is now deceased. He claims the deceased was in occupation of the land.

6. The Applicant claims that sometime in June 2019 the 1st and 2nd Defendants, during adjudication and survey process, allocated to the 4th to 8th Respondents some land parcels which are within the Plaintiff's plot No. 929 to wit plot Nos 594,595,596,597 and 928 thus reducing the Plaintiffs land from 1560 acres to 24 acres.

7. The Applicant further claims that out of the above allocations the 4th to 8th Respondents trespassed upon the suit land threatening the Applicant, demolishing the structures thereon, pulling down the live fence, cutting down trees while burning charcoal and causing damage onto the suit property and carrying out all manner of activities being farming and grazing cattle.

8. The Applicant claims that unless restrained by an Order of this court the acts complained of will continue to the detriment of the Applicant.

9. Having read the application herein dated 1st November, 2021 and the Supporting Affidavit together with all the attached documents, I am of the view that the issue for determination is;

i. Whether the application satisfies the conditions for grant of injunctions as provided in the case of **Giella – vs- Casmann Brown.**

ii. What Orders can the court grant in the circumstances of this case?

10. By the Applicants own admission the land in dispute KITUVWI Adjudication Section P/No. 929 is the subject of land adjudication under the Land Adjudication Act. It is claimed that the same land was the subject of a suit in the Resident Magistrate's court at Mutomo.

11. It is also admitted that it is through the land adjudication process that the Applicants land's acreage was reduced from 1560 acres to 24 acres and the 4th to 8th Defendants were awarded land parcels 594, 595, 596, 597 and 928. The Applicant has however not attached to his application any documents to show the commencement of the Land adjudication process, the stage in the said process, the acreage of his land was reduced and parcel numbers issued and whether or not during that process he registered his dissatisfaction with the decision made to deprive him of part of his land. He has further not disclosed to the court whether the process of land adjudication has been completed.

12. Failure by the Applicant to provide the information indicated above and documents curtails the courts ability to arrive at a just and fair conclusion of the issues that arise for determination. In the case of **Kenleb Cons. Ltd. –vs- New Gatitu Serive Station & Another (1990) KLR Bosire J** as he then was held that

“To Succeed in an application the injunction an Applicant must not only make a frank and full disclosure of all the relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

13. Further it is the courts view that the question of determination, ascertainment and recording of rights and interests in land falling under an adjudication section is to be dealt with as provided under the Land Adjudication Act. The Act provides and has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of Trust land are supposed to be dealt with.

14. In the case of **Mutanga Tea and Coffee Company Ltd. Vi Shikara Ltd. (2015) eKLR** the Court of Appeal held that

“We entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the constitution or a statute, to resort to that mechanism first before purporting to involve the inherent jurisdiction of the High Court.”

15. The Court is of the view that the mechanism under the Land adjudication Act ought to be exhausted before coming to court.

16. However, it is noted that the Applicant has made available a letter dated 21st October, 2021 giving consent to the Applicant to institute civil proceedings in Court under Section 30 of the Land Adjudication Act. The said letter is said to have been issued by the Sub County Land Adjudication and Settlement Office Mutomo/Ikutha Sub – Counties. According to the said letter the writer states that he shall in due course require a copy of the final orders of the Court in order to complete the adjudication process.

17. It is only for the reason of the consent given to the Applicant to refer the dispute herein to Court for determination and in order to preserve the suit property pending the hearing of the suit herein that I make the following orders: -

a. That the status quo prevailing in relation to land parcel No. KITUVWI Adjudication Section P/No. 929 be maintained for

a period of 90 days from the date hereof.

b. The Applicant is directed to prosecute the suit herein within the said period of 90 days failure to which the orders will automatically lapse.

c. Costs in the cause.

DATED, SIGNED AND DELIVERED AT KITUI THIS 24TH DAY OF NOVEMBER, 2021

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

In the presence of:

C/A C Nzioka

M/S Vundi.....for the Plaintiff/Applicant

N/A..... for Defendant/Respondents