



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MACHAKOS**

**ELC. CASE NO. E 053 OF 2021**

**ABDULATIF OSMAN MOHAMUD.....PLAINTIFF**

**VERSUS**

**MUNGAI NGARUIYA.....1<sup>ST</sup> DEFENDANT**

**ELIZABETH WANJIKU NGARUIYA.....2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF MACHAKOS .....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. Before me is a Notice of Motion dated 19<sup>th</sup> May, 2021 and filed on 24<sup>th</sup> May, 2021, brought under Orders 40 and 51(1) 3, 4 and 10(2) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, 2010 seeking for the following orders;

**a. Spent**

**b. Spent**

**c. That this Honourable Court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents, their agents, their servants and any other person whomsoever acting under them from entering and interfering in any manner whatsoever with the land known as L.R. No. 12715/277 situated in the North West of Athi River within Machakos County pending the hearing and determination of the main suit herein.**

**d. That the OCS Mlolongu Police Station be directed to supervise compliance of the court orders.**

**e. That cost of the application be provided for.**

2. The Application is premised on the grounds on the face of the Application together with the Supporting Affidavit sworn by the Plaintiff/Applicant on 19<sup>th</sup> May, 2021 as well as the Further Affidavit of the Applicant sworn on 26<sup>th</sup> July, 2021 and filed on 28<sup>th</sup> July, 2021.

3. The Application is opposed. The 1<sup>st</sup> Defendant filed an Affidavit sworn on 30<sup>th</sup> June, 2021 as well as a Supplementary Affidavit sworn on 29<sup>th</sup> July, 2021 and filed on 19<sup>th</sup> August, 2021 in response to the Application.

4. The brief facts of the Plaintiffs' case are that the Plaintiff/Applicant avers that he is the registered proprietor of all that parcel of land known as L.R. No. 12715/277, situated in the North West of Athi River within Machakos County, herein after referred to as the suit property. That on or about June, 2020, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents trespassed on the suit property and put up a temporary structure thereon in preparation of erecting permanent structures thereon. That the Defendants/Respondents have denied the Plaintiff/Applicant access to the suit property. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants continue to intimidate and threaten the Plaintiff's life making it difficult for him to access the suit property. That unless the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are restrained by an order of injunction, they will continue in trespassing on the suit land and waste the same, causing irreparable damage.

5. The brief facts of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents' case is that the suit property is jointly owned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who acquired the same in 1993, by way of purchase from Syokimau Farm Limited, where they were members. They further contended that the Certificates of Title and Official Search relied upon by the Plaintiff were forgeries. They also stated that they were the ones who were paying all the requisite land rates and rents since the year 1993 to date. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the suit land is in their possession,

whereof they have in fact received an approval from the Water Resource Management Authority to drill a borehole on the suit property. That they even applied for and obtained a change of user of the suit property, from single dwelling to Commercial cum residential use. According to them, the Applicant does not meet the threshold for grant of interlocutory orders.

6. By way of rejoinder to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' allegations, the Applicant stated that he was the indefeasible registered proprietor of the suit property, having purchased it from one Josaphat Musyoka Nganga on 4<sup>th</sup> September, 2007 and was registered as proprietor thereafter, whereof he took possession from then to date. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents allegation that they purchased the suit land from Syokimau Farm Limited is not supported by any Sale Agreement. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' contention that they were members of Syokimau Farm Limited is not supported by any evidence.

7. The Applicant further contended that he was registered as proprietor of the suit property on 6<sup>th</sup> June, 2008 and a Certificate of Title issued to him but subsequently noticed patent errors in the Certificate of Title in that the I.R. Number and the name of the instrument registered were not indicated, which prompted the Land Registrar to recall the Certificate of Title to rectify the errors, which errors were rectified and a Certificate of Title re-issued. He further stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not in possession of the suit land. That the allegation by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that they obtained approvals to drill a borehole on 3<sup>rd</sup> May, 2012 and change of user on 24<sup>th</sup> January, 2014 are not correct as to date, no borehole has been drilled or any development done on the suit land by the Respondents. He concluded that the Respondents had no legal or equitable rights in the suit property and their trespass on the same should be stopped.

8. In response to the Applicant's Supplementary Affidavit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents stated in their Supplementary Affidavit filed on 19<sup>th</sup> August 2021, that they were the genuine owners of the suit property, and that it is questionable that the Applicant and the Land Registrar only noticed the errors in his Certificate of Title after the same was pointed out by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents. They contended that under the law, the Land Registrar may only rectify a Certificate of Title after the lapse of 90 days upon the proprietor being served with such notice of intention to make alteration, hence the Applicant's allegation that the title was recalled on 22<sup>nd</sup> July, 2021 and rectified by 26<sup>th</sup> July, 2021, was irregular and not credible.

9. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants further averred that no letter from the Applicant to the Land Registrar requiring him to rectify the title, has been produced and that under the Registration of Titles Act Cap 281 (*now repealed*), titles are never re-issued because only new entries are made on the original title in the event of any transaction. That entry No. 2 was a new entry made which ought not to have been the case while ordinarily entry No. 3 should have been cancelled and entry No. 4 created, so that both entries No. 3 and No. 4 are visible on the title. That the Plaintiff's documents are forged.

#### **THE APPLICANT'S SUBMISSIONS:**

10. The Applicant submitted that he was the registered proprietor of the suit land and therefore his title is protected under Section 26(1) of the Land Registration Act 2012. He relied on the cases of **Giella v. Cassman Brown (1973) E.A 358**, to argue that for a party to be granted injunctive orders, they must satisfy the three conditions set out in that case. The Applicant further argued that he had established a *prima facie* case by showing that he purchased the suit land from one Josaphat Musyoka Nganga for valuable consideration. That although the suit land was first allotted to Syokimau Farm Ltd, the same was transferred to Josaphat Musyoka Nganga on 14<sup>th</sup> March, 1991. He maintained that the Defendants alleged that they acquired the suit land on 8/6/1993 from Syokimau Farm, which according to the applicant, means that the applicant's title had priority over that of the respondents. Counsel cited the cases of **Gitwany Investment Limited & 3 Others v. Commissioner of Lands HCCC No. 1114 of 2002**, **Moses C. Muhia Njoroge & 2 Others v. Jane W. Lesaloi & 5 Others** and **Robert Mugo Wa Karanja v. Eco bank (Kenya) Limited & Another [2019] eKLR** all of which the court has considered. They argued that the applicant had met conditions for grant of injunction.

11. The Applicant further argued that he stands to suffer irreparable loss and damage if the Respondents are not restrained by way of injunction as they have already obtained approval for change of user and they also intend to drill a borehole on the suit land. On the question of balance of convenience, the Applicant relied on the case of **Robert Mugo Wa Karanja (supra)** to argue that if an Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting the injunction. He argued that since he had title to the suit land, its sanctity must be protected.

He stated further that the Defendants were not in possession of the suit land, hence the balance of convenience titled in favour of the Applicants They placed reliance on the case of **Amir Suleiman v. Amboseli Resort Limited [2004] eKLR**, which the court has considered.

#### **THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS' SUBMISSIONS:**

12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on Order 40(1) (a) and (b) of the Civil Procedure Rules and the case of **Giella v. Cassman Brown [1973] EA 358**, to argue that, for a court to grant injunctive orders, the Applicant must establish three conditions set out in the said case. They argued that the Applicant had not met the threshold for grant of injunction. The Respondents disputed the Applicant's ownership of the suit property and stated that the same is jointly owned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as they had purchased the same from Syokimau Farm Limited in 1993. They argued that the Applicant's title was a forgery and stated that under Section 79 of the Land Registration Act No. 3 of 2012, the Land Registrar can only rectify a Certificate of Title after lapse of 90 days of service of notice, which according to them did not happen in the instant case.

13. It was further contended for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the Applicant had not approached the court with clean hands. Counsel referred the court to the case of **Peter Kairu Gitu v. Kenya Commercial Bank Kenya Limited & Another [2021] eKLR** where the court held that an injunction is an equitable remedy and may be denied where the Applicant's conduct does not meet the approval of the court of equity. He also relied on the case of **Sunrise Properties Limited vs. Fifty Investments Limited & Another [2007] eKLR**, which the court has considered; to argue that the Applicant had not established a *prima facie* case.

14. On the question of whether the Applicant will suffer irreparable harm, they argued that the Applicant had failed to establish that he stands to suffer irreparable harm if an injunction is not granted. They argued that the Applicant was neither in possession of the suit land nor had he developed the same. They relied on the case of **Nguruman Ltd vs. Jan Bonde Nielsen & 2 Others (2014) eKLR**, which this court has considered.

15. On the issue as to the balance of convenience, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, argued that the balance of convenience tilts in their favour as they were in actual possession of the suit property. They placed reliance on the case of **Gitwany Investment Limited & Others v. Tajmal Limited & 3 Others [2006] e KLR**, which the court has considered.

**ANALYSIS AND DETERMINATION:**

16. I have considered the Application, the Affidavits in support, the Replying Affidavits and the parties' submissions. The issue that arise for determination is whether the Applicant has satisfied the conditions for grant of temporary injunction.

17. Order 40(1) (a) and (b) of the Civil Procedure Rules provides for grant of injunction as follows:

**“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.”**

18. Conditions for grant of injunction are now well settled. In the case of **Giella v. Cassman Brown [1973] EA 358**, the court set out three conditions for grant of interlocutory injunction as follows:

**a. The Applicant must establish that they have a *prima facie* case with a probability of success.**

**b. The Applicant must demonstrate that they shall suffer irreparable injury if the injunction is not granted.**

**c. If the court is in doubt, it will decide an application on the balance of convenience.**

19. In the instant case, both the Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents allege to be the registered proprietors of the suit land.

They have all produced titles to show ownership of the suit land. The Applicant alleges to have obtained a superior title over the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, as he argues that his title was issued earlier than that of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the other hand, argue that the Plaintiff's title is a forgery. The issues raised by both parties are weighty issues, which must be determined at the trial. Besides, each party allege being in possession of the suit property to the exclusion of the other. I have looked at the photographs of the suit land; it is clear that no party has developed the suit land. This court is enjoined by law to ensure that the ends of justice are met.

20. In the interests of justice and for purposes of protecting and preserving the subject matter of this suit, pending hearing and determination of this suit, this court makes the following orders;

**a. That the status quo obtaining as of today in respect of land parcel number LR No. 12715/277 be maintained pending hearing and determination of this suit. For avoidance of doubt, the order for maintenance of status quo means that no party shall dispose of, charge, lease, transfer, deal or in any way interfere with the ownership thereof or construct on or further develop the suit property.**

**b. All the parties in this matter are ordered to keep off the suit land until this matter is heard and determined.**

**c. All parties are directed to file and serve their witness statements and documents within 30 days of this Ruling to fast track the hearing and determination of this matter.**

21. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021**

**A. NYUKURI**

**JUDGE**