



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 62 OF 2019

DISMUS ONYANGO.....PLAINTIFF

VERSUS

MICHAEL MLAINGA MBITO.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. This is a ruling in respect of the application dated 9/10/2019 brought by the plaintiff. It seeks the orders which I set out verbatim as hereinbelow:-

(a) spent

(b) spent

(c) That the court be pleased to grant a temporary injunction restraining the defendants whether by themselves, agents and/or servants from dealing, interfering, alienating, selling and/or otherwise disposing of the suit property being land parcel No. Block 4/317 Kitale Municipality measuring 0.15 Ha or thereabout situate in Trans-Nzoia County within the Republic of Kenya pending hearing and determination of this suit.

(d) That the O.C.S. Kitale Police Station be directed to oversee compliance of this order.

(e) That costs of this application be provided for.

2. The application is brought under **Order 40 Rule 1, 2, 3 and 9, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act 2010.**

3. The application is supported by the two affidavits of the plaintiff sworn on 9/10/2019 and 19/1/20219. Those affidavits reiterates the same matters set out in the grounds at the bottom of the application.

4. The grounds upon which the application is premised are as follows: that the plaintiff owns the land having been allocated the same by Commission of Lands in 1995; that the 1st and 2nd defendants colluded to have a double allocation of the same land without due regard to the plaintiff's ownership; that the 1st defendant has threatened to evict the plaintiff and he may suffer considerable and irreparable loss and damage. It is stated that if the defendants disposes of the suit property or evicts the plaintiff the whole suit may be rendered nugatory.

5. The 2nd respondent filed grounds of opposition dated 15/11/2019. Those grounds state that the application offends **Section 23 (2)** of the Land Act and **Section 15** of the Land Registration Act that the applicant has not proved by way of receipts that he paid the requisite fee signifying acceptance of letter of allotment and that the application is therefore an abuse of process. I consider the matters raised by the 2nd respondent in the grounds analysed above to be matters requiring investigation at the hearing of the main suit.

6. In response to the application dated 9/10/2019, the 1st defendant filed a replying affidavit dated 27/11/2019. His response is that he is the registered proprietor of **LR No. 2116/2010** - Trans Nzoia County, having purchased it from one **Akbar Abdul**, a beneficiary of the estate of **Abdul Rehman** (deceased) and the same was transferred to him on 6/8/2014, while the plaintiff claims that the land was allocated to him on 28/9/1995. It is his position that the land having been granted to Abdul Rehman on 10/1/1956, the same was not available for allotment to the plaintiff in 2019. He claims the plaintiff's letter of allotment is a forgery and exhibits his rates clearance certificate in respect of **LR No.**

2116/2010.

7. The applicant filed his submissions on **6/2/2020**. I have gone through the record and found no submissions filed on behalf of the defendants. I have considered the application the response and the submissions filed.

8. The issues that arise from the application are as follows:

(a) Whether a temporary injunction should issue against the defendants restraining them from interfering with the suit land;

(b) What orders should issue?

9. The issues are addressed herein under:

(a) Whether a temporary injunction should issue against the defendants restraining them from interfering with the suit land;

10. The conditions requisite for the grant of temporary injunction were set out in the case of **Giella Cassman Brown [1973] EA 358** and affirmed in **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR**. In the Mrao case the court stated as follows:-

“(a) The applicant must show a prima facie case with probability of success.

(b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.

(c) If the court is in doubt it would decide an application on the balance of convenience.”

11. In the same case also the Court of Appeal added as follows:

“A prima facie case 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.”

12. Reverting to the facts of this case the plaintiff filed a plaint claiming the following prayers:-

(a) A declaration that the allotment letter with LR No. 2116/2010 purported to be issued and in possession of the 1st defendant was obtained fraudulently and that the 1st defendant does not have a legitimate claim over land parcel No. Block 4/317 Kitale Municipality measuring 0.15 Ha or thereabouts and the suit land belongs to the plaintiff.

(b) An order of permanent injunction restraining the 1st defendant from interfering with the suit land.

13. In the body of the plaint he averred that he is the beneficial and equitable owner of **Kitale Municipality Block 4/317** measuring **0.15 Ha** which was allotted to him in **1995** in respect of which the 1st and 2nd defendants have caused a double allotment in favour of the 1st defendant. He avers that the 1st defendant obtained his letter of allotment fraudulently.

14. In the application the plaintiff exhibits a letter of allotment dated **28/9/1995** in respect of commercial **Block No. 4/317 Kitale Municipality**. He also exhibits photographs of what is said to be the suit land as well as single business permits for various years issued by the County Government of Trans Nzoia. There is also a copy of a letter dated **14/7/2015** from the 2nd defendant's Kitale office requesting for preparation of another lease in respect of **Kitale Municipality Block 4/317**.

15. On the other hand the 1st defendant exhibits a title to **LR No. 2116/210** which has an endorsement dated **6/8/2014** showing that the suit land was transferred to him. In addition the rates clearance certificate dated **1/1/2019** for what appears to be another plot number to wit **201 Section XII** has been exhibited. No sale agreement is attached to the replying affidavit. There is no information as to whether there were any attempts before the demand letter dated **25/9/2019** to evict the plaintiff. It is a noteworthy omission on the part of the 1st defendant who claims to have purchased the land in **2014**.

16. I have considered the application and the response. It is clear that both parties claim the same land on the ground while referring to it by way of different numbers, with the 1st defendant referring to it by two different numbers without any explanation therefor. However the plaintiff is in possession and is conducting his motor vehicle repair business thereon while the 1st defendant is not in possession. The plaintiff claims to have been in possession for **12 years**. None of the parties has produced any evidence by way of a survey report to establish that the numbers they refer to are in respect of the suit land. There is much confusion to which number correctly refers to the suit land and this court requires to apply caution in issuing any interim orders.

17. This is a case where neither the plaintiff nor the defendant have laid clear evidence of ownership that demonstrates the particular parcel in dispute as physically present and identifiable on the ground, is registered in the names of either of them and therefore, the plaintiff, who is the applicant, has not laid out the essential *prima facie* case with a probability of success he required to win an injunction order. However I consider that the plaintiff has established that he is in possession and has been in such possession for a number of years. I also consider that given that he has been conducting his business on the suit land he would suffer possible loss if evicted, but in my view that is not loss that

cannot be compensated for by way of damages in any event.

18. In my view this is an application that should be determined purely on a balance of convenience as the other conditions in **Giella -vs- Cassman Brown** case (supra) have not been satisfied. For the reason that the plaintiff is in possession and has been conducting business thereon, this court is persuaded that balance of convenience tilts in favour of maintaining the current *status quo* on the suit land pending the resolution of this dispute.

(b) What Orders should issue?

19. Consequently the application dated **9/10/2019** is resolved in the following terms:-

(i) The *status quo* on the said land currently prevailing shall be maintained pending the hearing and determination of the suit.

(ii) The costs of the application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale on this 5th day of March, 2020.

MWANGI NJOROGE

JUDGE

5/3/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Mukabane for plaintiff/applicant

Mr. Bisong for 1st defendant

N/A for 2nd defendant/respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

5/3/2020.