



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 7 OF 2020**

**JOSEPH KEDIMUK LOTUKUMA.....PLAINTIFF**

**VERSUS**

**MAXWEL MWAYA BURUDI.....1<sup>ST</sup> DEFENDANT**

**MARY MOHONJA MWAYA.....2<sup>ND</sup> DEFENDANT**

**JOSHUA MWACHI BURUDI .....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiff filed an application dated **28/4/2020** seeking an order of a temporary injunction restraining the defendants from interfering with the suit land which is two acres located within that land parcel known as **Kwanza /Kwanza Block 3 /Luhya 270**.
2. The plaintiff identifies the portion by the extent of land which he alleges to have been in possession of since the year **2006** to date, and which he claims to have been cultivating before the defendants prevented him from planting his crops thereon and have threatened him with actual violence should he enter into the land despite his having ploughed in readiness for the 2020 planting season..
3. According to the plaintiff, he purchased the two pieces that form the two acre portion on two occasions from one *Kemadio Akemuluk* who had purchased the same from the 1<sup>st</sup> defendant.
4. The application is supported by the sworn affidavit of the plaintiff dated **28/4/2020** which reiterates the grounds in the application and to which is attached several exhibits including the agreements vide which he claims to have purchased the land.
5. The plaintiff maintains that he paid for the land in full and took actual possession of it immediately. By the time of purchase the land was registered in the name of the 1<sup>st</sup> defendant. However the 1<sup>st</sup> defendant subsequently transferred the whole parcel, including the land purchased by the plaintiff, to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on **4/10/2006**.
6. In a replying affidavit of the 1<sup>st</sup> defendant which is *not* said to be sworn on behalf of all the defendants he states that the application is fatally defective; that he and his family are in possession of the suit land; that a temporary injunction would disrupt the status quo; that the suit is *res judicata* by virtue of the decision in **Kitale ELC Appeal No 4 of 2018**; that the plaintiff is guilty of material non-disclosure and that the agreements attached to the application do not show the plot numbers of the land sold.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants have not filed any reply to the application.
8. I am not convinced that sufficient material has been placed before this court to warrant this court to rule that the suit herein is *res judicata* vis-a-vis **Kitale ELC Appeal No 4 of 2018**. In any event the claim in this suit is premised on fraud and the cited appeal was merely a direct challenge to a decision made by the land disputed tribunal over the suit land and this court found that the said decision was null for want of jurisdiction on the part of the tribunal. I do not see, and the respondents have not persuaded me in any submissions, that that decision could render the instant claim *res judicata*.
9. An assessment must be done now of the application at hand to determine if the plaintiff deserves confirmation of the orders of interim injunction earlier issued in this matter.
10. The conditions for the grant of an interim injunction are set down in the case of **Giella vs Cassman Brown 1973 EA 358**. They are that the plaintiff must establish that he has a prima facie case with a probability of success; that he would suffer loss that can not be compensated for by way of damages if the orders were not issued; lastly, in the event the court is in doubt, it will rule on a balance of convenience.

11. The plaintiff has premised his case on fraud on the part of the defendants. He has set out the particulars of fraud in his plaint. No defence has been filed yet on the part of the defendants. I find that the plaintiff has established a *prima facie* case against them.

12. As for loss, the plaintiff has asserted that he has been in possession of the suit land and I do not find any strong rebuttal from the defendants stating that the plaintiff has not been in possession of the two acres of land. No evidence of their possession has been brought forward. I would have expected more evidence from both sides on this issue but considering the evidence on the record I must give the plaintiff the benefit of doubt since his evidence appears to have more weight in the present circumstances.

13. I find that the plaintiff has not established that he may suffer loss that would not be capable of compensation by way of damages. However I must consider that the claim is properly set out and served and the defendants have not filed any defence to the matter, and that it is not known whether they will file any. In these circumstances, this court finds it proper to rule on a balance of convenience in the application; the balance of convenience lies in confirming the orders of temporary injunction pending the hearing and determination of the suit.

14. I therefore grant prayer **No 3** in the application dated **28/4/2020**. The costs of the application shall be in the cause.

**Dated signed and delivered way of electronic mail at Nairobi this 18<sup>th</sup> June 2020.**

**MWANGI NJOROGE.**

**JUDGE ELC KITALE.**