

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 51 OF 2018

THOMAS RUTTO KANDA.....PLAINTIFF

VERSUS

WALTER TOROITICH KILIMO.....1ST DEFENDANT

MOSES KIPLAGAT.....2ND DEFENDANT

RULING

1. The application dated **19/2/2020** has been brought by the plaintiff. It seeks the following orders:

(1) That this court be pleased to certify this application to be of utmost urgency and service on the defendants/respondents be dispensed with in the first instance.

(2) That pending the *inter partes* hearing of this application an order of temporary injunction be issued restraining the defendants, whether by themselves, their family members, servants, agents and/or any other person (s) acting through the defendants from remaining, entering, trespassing, planting erecting any structure permanent or otherwise, wasting, damaging, alienating, charging and/or in whatever other way interfering with the plaintiff's quiet possession of title number TRANS-NZOIA/SUWERWA/1164.

(3) That pending the hearing and determination of this suit an order of temporary injunction be issued restraining the defendants, whether by themselves, their family members, servants, agents and/or any other person (s) acting through the defendants from remaining, entering, trespassing, planting erecting any structure permanent or otherwise, wasting, damaging, alienating, charging and/or in whatever other way interfering with the plaintiff's quiet possession of title number TRANS-NZOIA/SUWERWA/1164.

2. The application has been brought under **Order 40 Rules 1, 2 and 4** of the **Civil Procedure Rules 2010**. It is supported by an affidavit of the applicant dated **19/2/2020**.

3. The grounds on which the said application is made are that the plaintiff is a *bona fide* beneficial owner of **Trans-Nzoia/Suwerwa/1164** measuring **20 acres** which he obtained by transmission upon confirmation of grant in **Kitale High Court Succession Cause No. 106/2007**; that the defendants recently trespassed to the suit land have embarked on ploughing and fencing part of the suit land in readiness for sowing; that unless an order of temporary injunction is issued against the defendants, the plaintiff shall be denied and/or obstructed from peaceful and quiet possession and use of the suit land; that the orders sought in this application should also apply to **Kitale ELC No. 67/2019-OS**, the parties in the two suits being the same. The applicant depones in his affidavit that prior to the lodging of the suits he was the sole person in occupation and use of the **20 acres** comprised in the suit land.

4. The defendants filed a replying affidavit sworn on **27/2/2020** by the 1st defendant. The defendants' response to the application is that in **Kitale ELC No. 67/2019-OS**, the deponent and his two brothers claim **14 acres** out of the suit land by way of adverse possession, having allegedly taken possession of a portion of the suit land herein in **1992**. They further aver that by the time title was issued to the applicant's father in **1998** they were already in occupation. They aver that there is a road separating the portion of **14 acres** from the **6 acres** occupied by the plaintiff. They assert that the applicant's prayers are tantamount to an application for a mandatory injunction, and that at the most, the existing *status quo* should be preserved.

5. The defendants' submissions were filed on **11/6/2020**. The plaintiff did not file his written submissions on the instant application. This court will proceed to determine the same on the basis of what is in the record.

6. The instant suit was filed on **10/5/2018** and the instant application was filed on **19/2/2020**. The main suit in **Kitale ELC Land Case 67 of 2019-OS** was filed on **14/11/2019**. The defence of the 1st defendant filed on **28/2/2020** in the instant suit incorporates the claim that the plaintiff has not been in possession of the **14 acre** portion claimed by the 1st defendant and his brothers and that a claim in adverse possession had accrued against the erstwhile owner of **Trans-Nzoia/Suwerwa/25**, the mother title from which **LR No. Trans-Nzoia/Suwerwa/1164** was carved. It is argued that the same claim had accrued against the plaintiff herein who is his successor.

7. This court observes that if the orders of injunction sought were granted and they resulted in the eviction of the defendants before the suit is heard and determined that would not be just since the defendant's claim in their defence in this suit and their cause of action in **Kitale ELC No. 67 of 2019 (O.S)** is that they have been in occupation of the land and their possession would be interrupted. Proof of continuous occupation of land is crucial in a claim for adverse possession. Besides any orders that would have the effect of a mandatory injunction

should not be granted at an interlocutory stage unless in very exceptional circumstances such as where the respondent had attempted to steal a march on the applicant. (See the case of **Locabail International Finance Ltd -vs- Agro Export & Another [1986] ALL ER 901**)

8. In the circumstances outlined by both parties to the suit and having regard to the documentary evidence exhibited by the defendants this court is of the view that the plaintiff has failed to establish that he deserves the orders of injunction sought. Consequently this court finds that the plaintiff's application dated **19/2/2020** has no merit and the same is hereby dismissed with costs to the defendants.

Dated, signed and delivered at Kitale via electronic mail on this 21st day of July, 2020.

MWANGI NJORGE

JUDGE, ELC, KITALE.