



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 49 OF 2011**

**JOEL MUTIE NZUKI.....APPELLANT/APPLICANT**

**VERSUS**

**WILLIAM MAKOVO NGUU.....RESPONDENT**

**R U L I N G**

1. The Appellant herein moved the court through a Notice of Motion dated **12<sup>th</sup> April, 2011** seeking orders that:

An injunction order do issue restraining the Respondent by himself, his agents and servants from entering, using, interfering, cutting down trees and vegetation or committing any works of waste, constructing, fencing, alienating the suit premises **Plot No. 959 Kisekini Adjudication Section** till the appeal is heard and determined.

2. The application is premised on grounds that the Applicant is the registered owner of **Plot No. 959 Kisekini Adjudication Section**; the Respondent entered and started cutting trees from the suit land sometime in **March, 2009** but stopped following a Court Order. His case against the Respondent was dismissed but he has appealed; the Respondent who now claims ownership of the land has entered the suit land and started cutting down trees which belong to him (Applicant). The appeal has high chances of success; damages cannot be adequate compensation such that if the injunction is not granted, the Applicant stands to suffer irreparable loss and damage.
3. The Applicant swore an affidavit where he deposed that he has built a homestead on the suit land and has since been in occupation of the same since 1980s. He has planted many indigenous trees on the land. The Respondent entered his land and cut down approximately 83 trees; He continued with the act of destruction until he was warned by court; No prejudice will be suffered by the Respondent if the order is issued since he lives more than 40 kilometers away, the Respondent has no color of right, reason to cut down any trees or enter and interfere with the suit land which he (Applicant) owns to his exclusion and should be barred from cutting down the trees or using the suit land in any manner.
4. In response thereto the Respondent filed a replying affidavit dated **26<sup>th</sup> April, 2011**. He averred that: The property was ancestral and it belongs to the family of **Nguu Muithya** who lives on it and cultivates it. The boundary dispute between **Nzuki Muithya** being the family of the Applicant and **Nguu Muithya** was fully and conclusively settled in 1956; the Applicant has not built a homestead on the property; the Applicant failed to prove ownership in the Lower Court Civil Case and subsequent Criminal Cases; on or about **27<sup>th</sup> June, 1984** when the dispute arose the area **District Officer, Kilome Division** granted a permit to conduct a **Kamba Oath** known as '**Ikithitu**' and he took oath as required and survived the wrath since the land belonged to him; the Applicant had not placed in court material fact relevant hence he was undeserving of the orders

- sought; the Applicant had come to court with unclean hands hence the orders sought were incapable of being granted.
5. The Applicant herein is seeking restraining orders. Principles for granting the order sought were set out in the case of **Giella v Cassman Brown and Company Limited (1973) EA, 358** where it was stated that: The Applicant must show a *prima facie* case with a probability of success at the trial but if the court is in doubt it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the Applicant would suffer an injury which cannot be compensated in damages.
  6. A *prima facie* case was described in the case of **Mrao vs. First American Bank of Kenya and Two Others (2003) eKLR 125** thus:

***“A prima facie case in a civil application 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 rebutted from the latter.”***

7. Looking at the evidence adduced by way of affidavit, the Applicant has stated that he was the owner of the suit property. He has attached a letter from the **Ministry of Lands** dated **13<sup>th</sup> January, 2010** authored by the **District Adjudication and Settlement Officer** which confirms that **Plot No. 959 Kisekini Adjudication Section Makueni District** is recorded in the name of **Joel Mutie Nzoki** (Applicant). This is however not conclusive proof of ownership as provided by the law. (**See Section 26 (1) of the Land Registration Act**). He should have adduced evidence of a Certificate of Title issued by the Registrar upon registration or a transfer/transmission by a proprietor in case of purchase. This would have been *prima facie* evidence that he is the absolute and indefeasible owner.
8. According to the record at the lands office, the land in issue was ancestral and as such had various interests that were the subject in the dispute. The Applicant having failed to prove ownership of the land, it cannot be concluded that he has a *prima facie* case with a probability of success. The balance of convenience does not tilt in his favour.
9. Consequently, I dismiss the application for lack of merit with costs to the Respondent.
10. It is so ordered.

**Dated at Kitui this 21<sup>st</sup> day of October, 2015**

**L. N. MUTENDE**

**JUDGE**

**Dated, Signed and Delivered at Machakos this 9<sup>th</sup> day of November, 2015.**

**P. NYAMWEYA**

**JUDGE**