



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 60 OF 2019

JACKTON SIUNDU MUKHWANA.....PLAINTIFF

VERSUS

PROTUS SAWENJA.....1ST DEFENDANT

JOHN WAKOLI SAWENJA.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated 28/4/2020 and filed in court on 13/5/2020 brought under **Order 40 Rules 1,2 and 4** of the **Civil Procedure Rules, Section 1A, 1B and 3A** of the **Civil Procedure Act**, the plaintiff seeks the following orders:

(a) ...spent

(b) ...spent

(c) **That pending hearing and determination of this suit, there be issue an order of temporary injunction restraining the defendants/respondents, whether by themselves, their servants, agents and/or any other person(s) acting through the defendants/respondents from constructing any structures, disposing of and/or in any manner dealing with land parcels Kiminini/Kiminini Block 8(Birunda Farm)/342 and Kiminini/Kiminini Block 8 (Birunda Farm)/340.**

(d) **That there be made such other and/or further orders as the end of justice may demand.**

(e) **That costs be provided for.**

2. The application is supported by the affidavit of the plaintiff sworn on 30/4/2020. The grounds upon which the application is based on are that the plaintiff claims proprietary interest in the land parcels **Kiminini/Kiminini Block 8(Birunda Farm)/342 and Kiminini/Kiminini Block 8(Birunda Farm)/340**; that the defendants forcibly removed the plaintiff from the suit land without justification; that defendants are now in the process of constructing permanent structures in the said parcels of land and that it is in the best interest of justice and fairness that the *status quo* is maintained until the dispute herein is heard and determined; that the defendants will not suffer any prejudice if the orders sought are granted.

3. I have perused through the file record and found no replying affidavit filed by the defendants in respect of the instant application. However, the plaintiff filed his written submissions on 5/6/2020. The defendants filed their submissions on 24/7/2020.

4. The issue that arises in the instant application is whether an order of temporary injunction should issue pending the hearing and determination of this suit.

5. I have noted that the factual averments of the plaintiff in his supporting affidavit are not controverted. It has been established that they are building materials deposited on the said land. The act of depositing the said materials cannot be attributed to any other person than the defendants in this suit who claim to have an interest in the land.

6. The plaintiff's claim in the plaint is that he acquired **plot Number 1** from Birunda Farm Company Ltd in 1986. On 25th August 2017 he was evicted by goons from the suit land. In 2015 the defendants' mother sued him in **Kitale ELC 91 of 2015, Rael Naliaka Sawenja -vs- Jackton Siundu Mukhwana**, and during the pendency of that suit, the defendants and their mother fraudulently caused **Plot Number 1** to be subdivided thereby resulting in **plot Numbers 341, 342 and 343**. That suit however was not determined on the merits but was dismissed for want of prosecution. The plaintiff thereafter filed the instant suit and in it he seeks a declaration that the registration of the defendants as proprietors of the suit land is null and void *ab initio* and that it be cancelled and he be registered as proprietor in lieu of the defendants and an eviction order.

7. I have perused the file record and I have found that the plaintiff has established a *prima facie* case against the defendants. However the construction of the structures on the suit land by the defendants has not been demonstrated to be capable of occasioning the plaintiff loss of an irreparable nature. Nevertheless this court is of the opinion that it is necessary to determine the instant application on a balance of convenience. In this court's considered view the balance of convenience lies in preserving the land in its present state till the hearing and determination of the instant suit. In the circumstances the application dated **28/4/2020** has merit and I grant it in terms of **Prayer No (c)** thereof.

8. Parties shall comply with the rules in readiness for the fixing of the main suit for hearing. There shall be a mention of this matter by teleconference on the **30th September 2020** for the purpose of confirming compliance and for issuance of a hearing date.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 4th day of September, 2020.

MWANGI NJORGE

JUDGE, ELC, KITALE.