



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 42 OF 2020**

**FRANCIS KIBET ARAP SEREM.....PLAINTIFF**

**VERSUS**

**MICHAEL KIMTAI NDIWA.....DEFENDANT**

**RULING**

1. The application dated 30/6/2020 has been brought by the plaintiff under **Article 159 of the Constitution of Kenya, 2010, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Cap 21, Order 40 Rule 1, 2 & 4, Order 51 Rule 1 of the Civil Procedure Rules 2010.** It seeks the orders which are set out verbatim as hereinbelow:-

**1. That the application be certified urgent and be heard ex-parte and service of this application be dispensed in the first instance.**

**2. That pending hearing and determination of this application, this honourable court be pleased to issue an order in the nature of a temporary injunction restraining the defendant/respondent from ploughing, cultivating or otherwise dealing with all those parcels of land being Land Reference Numbers 2177/92 (I.R. No. 182896); 2177/93 (I.R. No. 182897); 2177/94 (I.R. No. 182898); 2177/95 (I.R. No. 182899) and 2177/108 (I.R. No. 182900) each measuring approximately ten (10) acres and cumulatively approximately fifty (50) acres and immediately yield vacate possession to the plaintiff/applicant.**

**3. That pending hearing and determination of this suit, this honourable court be pleased to issue an order in the nature of a temporary injunction restraining the defendant/respondent from ploughing, cultivating or otherwise dealing with all those parcels of land being Land Reference Numbers 2177/92 (I.R. No. 182896); 2177/93 (I.R. No. 182897); 2177/94 (I.R. No. 182898); 2177/95 (I.R. No. 182899) and 2177/108 (I.R. No. 182900) each measuring approximately ten (10) acres and cumulatively approximately fifty (50) acres and yield vacate possession to the plaintiff/applicant.**

**4. That in the event that the defendant/respondent does not yield vacant possession of the above property, an order is hereby issued evicting the defendant/respondent from all those parcels of land being Land Reference Numbers 2177/92 (I.R. No. 182896); 2177/93 (I.R. No. 182897); 2177/94 (I.R. No. 182898); 2177/95 (I.R. No. 182899) and 2177/108 (I.R. No. 182900) each measuring approximately ten (10) acres and cumulatively approximately fifty (50) acres.**

**5. That the Officer Commanding Station (OCS) Cherangany Police Station does provide security to effect the order(s) and ensure compliance with this order and superintendence of the same.**

**6. That the costs of this application be provided for.**

2. Of great conspicuity is the discordant numbering sequence of the prayers above.

3. The application is supported by the affidavit of the plaintiff sworn on 30/6/2020 and a supplementary affidavit sworn on 31/8/2020. The grounds upon which the application is premised are as follows: that the plaintiff entered into an agreement for sale with the defendant in respect of plots whose reference numbers are given in the application as **LR NO. 2177/92, LR NO. 2177/93, LR NO. 2177/94, LR NO. 2177/95 and LR NO. 2177/108** each measuring approximately **10** acres and the defendant subsequently failed to honour and complete his part of the transaction in that he failed to pay the balance of the purchase price of **Kshs. 9,350,000/=**; as a result the plaintiff rescinded the agreement and demanded vacant possession from the defendant, who declined to vacate the suit lands and continues utilizing them to date. The plaintiff also avers the no land control board consent for the transaction was obtained. He avers that he would suffer irreparable harm if the application is not allowed.

4. In response to the application the defendant filed a replying affidavit sworn on 3/8/2020. His response is that though admitting the sale, his position is that the plots were to add up to **50** acres and he took up possession and extensively developed the land, but a subsequent survey established that the total acreage was only **44 acres**; nevertheless he communicated to the plaintiff seeking completion documents in

exchange for the full balance of the purchase price but the plaintiff failed to respond or even give an explanation for the default. It is his averment that the plaintiff has breached the agreement. He also states that the plaintiff having failed to avail the completion documents till year 2020, he is estopped from relying on the default clause in the agreement against the defendant.

5. The plaintiff filed his submissions on **1/9/2020** and supplementary submissions on **28/9/2020**. I have perused through the file record and found no submissions filed on behalf of the defendant. I have considered the application the response and the submissions filed.

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

*(a) Whether a temporary injunction should issue as in the circumstances of this suit.*

*(b) What orders should issue as to costs?*

7. The issues are addressed herein under:

*(a) Whether a temporary injunction should issue as in the circumstances of this suit*

8. The orders sought in the instant application are intended to compel the giving up of vacant possession by the defendant who took up possession pursuant to a sale agreement. Those orders would therefore have the effect of a mandatory injunction and can not be granted unless for a very good cause. The plaintiff has gone to the extent of seeking an order of actual eviction in the event the defendant does not yield vacant possession. One wonders if there would be any need for a hearing of the main suit perchance the orders sought were granted. Mandatory injunctions can only be issued very sparingly. One of the conditions for the grant of such orders is where the respondent has attempted to steal a march on the applicant and I do not find that to be the case herein going by the contents of the affidavits presented to court. In the circumstances it is clear that the application has no merit. On the strength of the holding in the decision in **Locabail International Finance Ltd -vs- Agro Export & Another [1986] ALL ER 901** this court is not able to grant such orders.

*(b) What Orders should issue?*

9. Consequently the application dated **30<sup>th</sup> June 2020** is hereby dismissed with costs. Parties shall ensure compliance within a time frame of **30 days**. The plaintiff shall ensure that he has complied with **Order 11** of the **Civil Procedure Rules** within the **first 15 days** and the defendant shall likewise comply within the **remaining 15 days**.

10. In effecting such compliance the parties shall file and serve their final consolidated bundles of copies of documents (comprising of all documents, to be relied on), duly indexed and paginated, including copies of witness statements and lists therein within the time frame given above. This suit shall be mentioned on the **1/12/2020** for the fixing of a hearing date.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 29<sup>th</sup> day of October, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**