



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO.1398 OF 2013

PHILIP MUTISO MAKAU.....1ST PLAINTIFF

=VERSUS=

THE HEADMASTER,

TISYA PRIMARY SCHOOL.....1ST DEFENDANT

THE CHAIRMAN,

TISYA PRIMARY SCHOOL COMMITTEE.....2ND DEFENDANT

TISYA PRIMARY SCHOOL.....3RD DEFENDANT

RULING

The matter coming up for determination is the Notice of Motion dated **31st October, 2013** brought by the Plaintiff/Applicant herein **Philip Mutiso Makau** seeking for orders against the Defendant herein. The orders sought are: -

- a. *That a temporary injunction to issue restraining the defendants/ Respondents whether by themselves and through third parties from starting or continuing any acts of waste, destruction and/or any construction on physical development of any kind on the suit land pending the hearing and determination of the main suit already filed.*
- b. *That costs of this application be provided for.*

The application was premised on the following grounds:-

That the Defendants/Respondents have been clearing a number of trees from the suit land and using the material gathered to erect a fence, development which have not been authorized by the Plaintiff/Applicant who is the registered owner of the suit land. Further, that the Defendants/Respondents have displayed a lot of arrogance, defiance and impunity on the suit land which they have no legal entitlement whatsoever. It was further alleged that the Defendants/Respondents want to forcefully take over the suit land from the Plaintiff/applicant. In addition, the Plaintiff/applicant stands to suffer irreparable loss as some of the felled trees are highly valuable and take several years to mature. The Applicant urged the court to allow

the instant Application.

The Notice of Motion was supported by the annexed Affidavit of **Philip Mutiso Makau**, who averred that he is the registered owner of the suit property as evidenced by the attached Certificate of Title. He further averred that the Defendants are carrying on deforestation on the suit land and have been using the felled trees to fence around the suit land. Applicant further contended that he has not given authority to the Defendants to cut the trees and he further fears that the Defendant might alienate and irregularly sell part of the suit land thus this application.

The application is opposed by the Defendants. One **Benson Mulinge Mutiso**, the Head teacher of **Tisya Primary School**, 3rd Defendant, swore a replying affidavit. He averred that the 3rd Defendant took possession of the land way back in 1996 and has been in possession of the same since then as per the available records **BMMI**. He further averred that since the year 1996, the school has been in occupation of the land and the Plaintiff has never laid any claim until November, 2012, when he wrote a demand letter to the school. The Respondent further contended that the Ministry of Education is aware of the existence of the school on the suit property and has issued Certificate of Registration of the school, **BMM2**. He also contended that the Plaintiff never laid any claim on the land since 1996 and it is on the Public Interest that the Plaintiff's application should be dismissed.

The court directed the parties herein to file their written submissions to canvass this application. The Plaintiff herein filed their written submissions on 21st February, 2014. However, the Defendants did not file any written submissions as ordered by the court.

I have however considered the dispositions herein, I have also carefully considered the Plaintiff's written submissions and the annexure thereto, and I make these findings.

There is no doubt that the suit herein was filed on 19th December, 2012 at Machakos High Court. The defendants filed their defence on 28th February, 2013. Further the applicant later filed the instant application and on 12th November, 2012 and this file was ordered transferred from Machakos High court to the nearest Environment and Land Court. The matter was finally dealt by this Division on 19th November 2013 and interim orders were issued in terms of prayer No. 2 of the Notice of Motion dated 31st October, 2013. The said interim orders have been extended severally by this court. The applicant is therefore seeking the confirmation of the said interim orders until the final determination of this suit.

The orders sought by the applicant are equitable remedies. These are remedies that are issued by the courts discretionary. However, this discretion must be executed judicially. See the case of **Ts Muwanga Vs East Africa Steel Corporation Ltd, Kampala High Court Civil Suit No. 10 of 1997** which is a persuasive authority and the court held that: -

“The granting of an injunction is an equitable matter and as such the court has wide discretionary powers which of course must be exercised judicially”.

The Applicant herein has sought for the above referred equitable remedies. In considering whether or not to grant the injunction sought, the court must be satisfied that the conditions set down or established in the case of **Giella Vs Cassman Brown Ltd (1973) EA 358** have been met. There conditions are: -

- a. Applicant must establish that he has a prima facie case with probability of success.
- b. That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.
- c. When the court is in doubt, to decide the case on a balance of convenience.

Has the Applicant been satisfied the above stated conditions?

The Applicant herein stated that he is the registered owner of the suit land plot no. **Kibwezi-Masongaleni/280**. He attached certificate of title for title **No. Makueni/Masongaleni/280** in the Name of

Philip Mutiso Makau issued on 14th August, 2012. In the Plaintiff, the applicant alleged that he got registered as the proprietor of the suit land after taking over a loan agreement from one **Ainsworth Matheka Kioko**. The Applicant did not state when he took over the loan agreement, but he averred that in the year 2006, he saw some structures coming up within the suit land and he later learnt that the structures belonged to the 3rd Defendant. The applicant did not explain why he never filed an application for injunction then.

I have considered the replying affidavit by the 3rd Defendant and it is indeed true that the 3rd Defendant, started in the year 1996. From the records attached to the Replying Affidavit, It is event that the school has grown steadily from 1996 to date. There is evidence that this is a Public School registered by the Ministry of Education. At this juncture, I am mindful to the fact that the court is not required to determine the very issues which will be canvassed at the trial with finality. This was the finding in the case of **Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd, Nairobi (Milimani) High Court, Civil Case of 1118 of 2002.**

There is no doubt that the 3rd Defendant, Tisya Primary School, has existed on this suit land since 1996. There is evidence from the letter dated 24th July, 2009, attached to the 3rd Defendant Replying Affidavit from the Ministry of Lands to the Permanent Secretary, Ministry of Education, that indeed the suit land was in the name of **Ainsworth Matheka Kioko**, but Tisya Primary School had built on the suit land.

The circumstances that led to the 3rd Defendant's being built on the suit land can only be unraveled after calling evidence through a full trial. Plaintiff alleged that he took over loan agreement between the said **Ainsworth Matheka Kioko** and **Masongaleni Settlement Scheme**. However, the above position can also be settled after evidence is called, and interrogated in court during a full trial but not through affidavits. I find that the Certificate of title was issued on 4th August, 2012, whereas the school has been in existence since 1996. For the above reasons I find that the applicant has not established a prima facie with probability of success.

On the second issue of irreparable damages, the applicant has alleged that the Defendants are cutting down trees and that if allowed to continue with the said act, the applicant will suffer irreparable loss. What is not in doubt is that the applicant herein has not been in possession of the suit land. The 3rd Defendant has been in possession of the suit land since 1996. There was no evidence that any trees had been felled or cut down by the Defendants herein. Even if there were trees which have been cut or felled by the Defendants, the said trees can be quantified and applicant compensated on monetary terms. I will be guided by the decisions of the case of **American Cynamid Company Vs Ethycon Ltd (1975) IALL ER 504**, where the court held that: -

“If damage in the measure recoverable at common law could be an adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff claim appear to be at that stage.”

In the instant case, the trees that have allegedly been cut by the defendants can be quantified and costs of the same ascertained and in the event the applicant succeeds in his claim, then he can adequately be compensated by an award of damages.

In the instant case, there is no doubt in the mind of the court. However, I have noted that the 3rd Defendant is a Public school which caters for Children from the neighbouring villages. The applicant got registered as a proprietor of the suit land in the year 2012 whereas the school has been in existence since 1996. The school has been expanding since then. An injunction cannot issue to restrain an event that has taken place. See the case of **Esso Kenya Ltd Vs Mark Makwato Okiya , Civil Appeal No. 69 of 1991.**

Having considered all the circumstances herein and for the public interest, I find that the balance of convenience would tilt in favour of the 3rd Defendant which is a Public School. The court has to ascertain how the applicant got registered as proprietor of the suit land in 2012 while the 3rd Defendant was in

occupation of the suit land. The said aspect needs to be ascertained by calling witnesses and interrogating their evidence.

From the forgoing analysis, the court finds that the applicant's Notice of Motion dated 31st October, 2013 is not merited. The same is dismissed with costs to the Defendants. Applicant should endeavor to set down the matter for hearing so that the underlying issues can be resolved expeditiously.

It is so ordered.

Dated and delivered in Nairobi this 9th day of June 2014.

L. GACHERU

JUDGE

In the Presence of:-

..... for the Plaintiff/Applicant

.....for the Defendants/Respondents

Kabiru: Court Clerk

L. GACHERU

JUDGE