



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE 246 OF 2010**

**JACKSON KASUKU MBANDI..... PLAINTIFF**

**VERSUS**

**REGINA MUNYAO**

**NICHOLAS MATATA MUKOSI.....DEFENDANTS**

**RULING**

By an application dated 25<sup>th</sup> November, 2010 and filed in court the following day, **Jackson Kasuku Mbandi** , hereinafter “*the applicant*” sought that **Regina Munyao** and **Nicholas Matata Mukosi** ,hereinafter “ *the 1<sup>st</sup> and 2<sup>nd</sup> Respondents*” respectively be-

**“temporarily restrained by orders of this court from entering, clearing, cutting down trees, grazing and/or often otherwise using or preventing the Plaintiffs use and possession of parcels Nos Makueni/Mbiu Nzau/245 and Makueni/Mbui Nzau /547 respectively till this application is heard inter-pates and thereafter until the main case is determined.”**

The salient facts informing the application as gathered from the pleadings so far are that, the applicant is the sole owner of the two parcels of land; hereinafter “245” and “547” respectively However, the 1<sup>st</sup> respondent had entered upon 245, built a semi permanent house, cleared bushes and cultivated a portion thereof. On the other hand the 2<sup>nd</sup> respondent had interfered with the common boundary, dug terraces, cut down trees, cultivated and build a grass thatched house. Thus the respondents were committing acts of waste and destruction upon 245 and 547. Their acts amount to trespass. This had been ongoing since 15<sup>th</sup> October, 2010. In the premises, the applicant felt that unless the order of injunction was granted, he stood to suffer irreparable harm and loss.

In response, the respondents swore separate affidavits dated 28<sup>th</sup> January, and 1<sup>st</sup> February, 2011 respectively. Where pertinent, the 1<sup>st</sup> respondent deponed that she bought a portion of land measuring approximately 1 acre from **Kimanthi Kitonyo Mutisya** deceased in 2004 and took possession thereof. Since then she had put up a permanent house in which she resides with her family. The deceased was the registered proprietor of land parcel Makueni/Mbui Nzau/342 that borders 245 and to the best of her knowledge and after the land she bought was identified to her, she had never encroached on the applicant’s land. Accordingly, the application was tainted with falsehoods as the applicant had all along been aware of the permanent house she had put up and did not only discover it in October, 2010 as he had claimed. That disposition was therefore calculated to mislead the court for selfish gains and it was actually an abuse of the court process. The applicant alleged trespass on his land, is a fact which in any event can only be established on evidence. She therefore urged me to dismiss the application.

As for the 2<sup>nd</sup> respondent, he deponed that he was surprised that the applicant was claiming 547 which parcel of land has been and is part of his family land. During land adjudication the portion claimed by the applicant formed part of the family land then known as Makueni/Mbui Nzeu/335 and at no time did he file any claim over the said land. To him therefore he must have obtained the title to 547 through deceit and or fraud as at no time did he file any claim against them or called them to demarcate part of 335 to create 547. The applicant's homestead is less ½ km from 547 which the 1<sup>st</sup> respondent has been in open, notorious and hostile occupation since 1994. He had put up a permanent homestead, a well developed farm with mature fruit trees and had been in occupation without any claim whatsoever by the applicant for the last 16 years. He did not therefore enter the parcel of land on 1st October, 2010 as claimed by the applicant. 547 was the 2<sup>nd</sup> Respondent's land and he was therefore not a trespasser. He had challenged the applicant's title in this suit as he believed that it was obtained through fraud and or mistake. In the alternative, he was entitled to the parcel of land on account of adverse possession. On those grounds, he also urged me to dismiss the application.

When the application came before me on 30<sup>th</sup> January, 2012 for *interpartes* hearing, **Mr. Mutinda** for the applicant, **Mr. Mutua** for 1<sup>st</sup> respondent and **Mr. Kaluu** for the 2<sup>nd</sup> respondent all agreed to canvass the same by way of written submissions. However, it was not until 11<sup>th</sup> May, 2012, that they filed and exchanged the said written submissions which I have carefully read and considered alongside cited authorities.

The issue for determination in this application is whether the applicant has satisfied the principles for the granting of the injunction that he seeks. In the case of **Charterhouse Investment Ltd vs Simon K. Sang & 3 Others[2010] eKLR**, the Court of Appeal observed-

***“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by court of equity has never been guaranteed as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties...”***

So that interlocutory injunction is not granted as a matter of course. The application must satisfy the conditions laid down 39 years ago in the celebrated case of **Giella vs Cassman Brown & Co. Ltd [1973] E.A. 358**. Those principles have withstood the test of time. Time and gain they have been tested but have never been found wanting. What then are these principles;-

- An injunction is an equitable remedy
- An injunction is discretionary remedy
- An applicant must show that he has a *prima facie* case with a probability of success.
- An injunction will not normally be granted unless the applicant might suffer irreparable damage that is not compensatable by an award of damages.
- When the court is in doubt, it will decide the application on the balance of convenience.

An injunction being first and foremost an equitable and discretionary remedy, it behooves the person seeking it to come to court with clean hands and also be candid. In this case however, I feel that the applicant has come to court with dirty hands and lying lips. The applicant lied that it was not until 15<sup>th</sup> October, 2011 that he discovered that the respondents had put up semi permanent and grass thatched houses, interfered with the common boundary, dug terraces, cut down trees and cultivated his parcels of land. Looking at the photographs of their houses exhibited by the respondents it is quite clear that the houses are old permanent houses. The respondents have deponed and the applicant has not discounted the same that they have been in occupation of their respective houses since 2004 and 1994 respectively. The look and state of their respective houses, seem to attest to this disposition. It is common knowledge that

trees take long to mature and a house cannot be built in a day. It is also instructive that the applicant is a neighbour. That being the case, will it have escaped his notice as the respondents were putting up those permanent houses in the parcel of land he claims to be his? I do not think so. I also note that the title document annexed to the applicant's supporting affidavit was issued on 19<sup>th</sup> October, 2010. Yet in paragraph 3 of the same affidavit he deponed that on 15<sup>th</sup> October, 2010-

***“while touring my farms in order to start cultivation, I discovered that the 1<sup>st</sup> defendant had entered into plot No. Makueni/Mbui Nzau/245 and built a semi permanent house, cleared bushes and cultivated part of the land while the 2<sup>nd</sup> defendant had interfered with common boundary, dug terraces, cut down trees, cultivated and build a grass thatched house...”***

How can the applicant claim the parcels of land to be his on 15<sup>th</sup> October, 2010 when the title deed is self explanatory that the land if at all only became his on 19<sup>th</sup> October, 2010? Isn't the applicant lack of candidness any clearer? This ground alone is sufficient to deny the applicant the remedy of an injunction sought. However, for completeness sake, I will deal with the other aspects that the court considers when granting injunction.

The applicant believes that he has established a *prima facie* case with probability of success by reason that he is the registered proprietor of the parcels of land. On the other hand, the respondents dispute the applicant's proprietorship of the lands. They claim to have been in occupation of the same lands from 1994 and 2004 respectively. This deposition has not at all been discounted by the applicant which means it must be true. That the title deeds in respect of the parcels of land were issued to the applicant on 19<sup>th</sup> October, 2010 can mean that the respondent are speaking the truth when they talk about their occupation of the lands. In any event, the 1<sup>st</sup> respondent has categorically stated that she had never moved the boundary or encroached on the applicant's alleged parcel of land. Further from the applicant's affidavit in support of the application, his alleged parcels of land are not a first registration which cannot be impeached.

The 2<sup>nd</sup> defendant has filed a counterclaim to the applicant's claim. It raises weighty issues of fraud as well as adverse possession. Those issues cannot be easily wished away. It also does appear that the land parcel claimed by the applicant may include those of the respondents. The question then must be, who sold the same to the applicant? The applicant did not exhibit any sale agreement as opposed to the 1<sup>st</sup> respondent who did. Accordingly, by the time the applicant registered the parcels of land in his name, the 1<sup>st</sup> respondent it would appear had already purchased her parcel of land from **Kimanthi Kitonyo Mutisya**. Considering all the foregoing, I am not convinced that the applicant has established a *prima facie* case with probability of success.

The respondents too, have deponed that the applicant is not in actual possession of the parcels of land. Instead, it is the respondents. This fact has not been denied by the applicant either. The respondents have put up their residential homes and engaged in other developments therein. During all these time they have been in open and uninterrupted occupation, a fact that the applicant is aware of as they are neighbours. In those circumstances, I do not think that the applicant can claim irreparable loss. If anything, I think, it will be the respondents who will suffer such loss. They have all invested heavily in their parcels of land. The said parcels of land are not going anywhere any soon. Nor has the applicant been chased from his homestead. Instead, I believe he is the one likely to cause damage and injury by chasing away the respondents from their respective permanent homes on the parcels of land. On those two grounds, the applicant has failed to demonstrate irreparable loss and that the balance of convenience titles in his favour.

The end game is that, the application lacks merit and is accordingly dismissed with costs to the respondents.

**RULING DATED, SIGNED and DELIVERED at MACHAKOS, this 6<sup>TH</sup> day of JULY, 2012.**

**ASIKE-MAKHANDIA**  
**JUDGE**