



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Civil Case 126 of 2011**

**JAMES KAMULA MBEVO.....PLAINTIFF/  
APPLICANT**

**VERSUS**

**SABINA OMBORI.....DEFENDANT/  
RESPONDENT**

**RULING**

Before me is an application by way of Notice of Motion dated 4<sup>th</sup> June 2011 filed by the plaintiff herein who is the applicant. The application has 4 prayers, two of which have been spent as follows:-

- 1. (Spent).**
- 2. (Spent).**
- 3. That the court do issue an order of injunction restraining the defendant either by herself, her servant, agents or otherwise from trespassing, or encroaching, or fencing or interfering with the plaintiff's parcel of land No. 756 Malili Ranch until this suit is heard and determined.**
- 4. The costs of this application be to the applicant/plaintiff.**

The application has grounds on the face of the Notice of Motion. The grounds are that the applicant is the registered owner of parcel No. 756 Malili Ranch according to the records of Malili Company Ltd measuring about 7.9 acres; that the plaintiff has been in possession of the land since 22/2/2007 and had on 2/3/2011 given the defendant notice not to enter or interfere with the suit premises; that on 23/5/2011, the defendant through her agent or servant invaded the land and began to interfere with his cultivation, to fence the suit premises and to erect temporary structure and was in the process of destroying crops; that the defendant had no basis of entering or remaining or erecting temporary structures on the land; that the defendant was planning or intending to oust the applicant from the suit premises with force and unless restrained by injunction the applicant would suffer irreparable damages; that the damage to be incurred was not quantifiable in terms of money and that the applicant had established a *prima facie* case with probability of success.

The application was filed with a supporting affidavit sworn by the applicant on 4<sup>th</sup> June 2011. It was deponed, *inter alia*, that the applicant bought the land on 24/2/2007 from the original owner one Muema Mutiso, who was a shareholder of Malili Ranch; that the records of Malili Ranch were changed to acknowledge him as the owner of the parcel of land; that he was in possession of the land but on 2/6/2010, the defendant came to the site and claimed to be the owner of the premises; that he reported the

incident to the District Commissioner who invited the defendant by letter to go and resolve the issue but the defendant refused to cooperate; that on 2/3/2011, the applicant gave the defendant a notice not to interfere with the parcel of land; that the defendant kept off for sometime but on 23/5/2011, started erecting temporary structures on the parcel of land; that there was therefore justification to issue the injunctive orders sought until the suit is heard and determined.

The application is opposed. A replying affidavit sworn by the defendant on 5<sup>th</sup> July 2011 was filed. It was deponed that she and her husband Tom Mogeni Mbururu, on 5<sup>th</sup> May 2010, purchased Agricultural Plot No. 756 from Peter Nthiani Ngele, through Winnie Nyamai & Company Advocates for kshs.2,300,000/= . That prior to entering the agreement she visited the offices of Malili Ranch Ltd and confirmed from the computer records, assisted by one Ngina that the plot belonged to Peter Nthiani Ngele; that they were later shown the land by Albanus Musyoka and Kefa Zureti from the Malili Ranch offices; that she was not in the process of constructing a fence but that she had constructed a fence on 10<sup>th</sup> May 2010; that in May 2011 she noticed that someone had erected a temporary one bed-roomed mabati shelter and when she reported to Malili Police Station she was advised to construct her own structure but, as she was doing so, someone took her photographs at the plot; that she received the DC's letter dated 29<sup>th</sup> July 2010 on 11<sup>th</sup> August 2010; that at the DC's office the applicant failed to explain why he had not fenced the plot since 2007 when he claimed to have bought the plot; that her advocate had done a search to establish the genesis and transmission of the said plot which included information that the applicant had purchased the plot vide a letter dated 24<sup>th</sup> February 2007 from one Peter Mutua Kanyi who claimed to be the sole appointed agent for Muema Mutua; that the court should issue an order that the *status quo* be maintained and that the parties should be restrained from constructing any further structures.

The applicant also filed an affidavit he swore on 24<sup>th</sup> August 2011 in response to the defendant's replying affidavit. He annexed a number of documents to show that he had bought the plot from the Ranch in 2007. The documents include an affidavit sworn on 24<sup>th</sup> August 2011 by David Ndolo Ngilai the Chairman of Malili Company Ltd.

The defendant filed yet another affidavit she swore on 25<sup>th</sup> October 2011. She reiterated that her fears and reasons for maintaining the status quo had been proved right, as the applicant had done a lot of constructions on the land.

There is also an affidavit sworn on 25<sup>th</sup> October 2011 by Julius Kilonzo, who is not a party herein which was filed. He stated that he had a pending criminal case against him in respect to plots of the Ranching Company. He claims to have been the Secretary of the Company.

Both parties filed written submissions, which I have perused. On the hearing date Ms Thiongo for the applicant and Ms Kagwi for the defendant made brief submissions.

This is an application for interlocutory injunction. The parameters to be taken by a court in such an application have long been established since the decision in the now famous case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358**.

An applicant has to demonstrate a *prima facie* case with probability of success. Secondly, an injunction will not normally be issued unless the applicant will otherwise suffer irreparable loss which cannot be adequately compensated in the form of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

This is a case where there is evidence that the applicant entered into an agreement for purchase and transfer of the plot before the respondent. There are issues on the authenticity of the documents held by the two purported purchasers. There appears to have been confusion and opaqueness in the way the Ranching Company has been run. However, balancing the interests of the two contestants, I find that the applicant has a *prima facie* case with probability of success.

Will the applicant suffer irreparable loss if the injunctive orders are not granted? In my view yes. This is

land, and it appears both contesting parties want to construct. However, it is apparent that the defendant is coming late to develop. She seems even reluctant to resolve the matter with the Provincial Administration. Injunctions are equitable remedies and parties who want to take advantage of injunctive remedies have to come to court with clean hands. When I consider the interests and claims of the two contestants, I find that the balance is in favour of the applicant. I therefore find that if the orders of injunction are not granted, the applicant will suffer irreparable loss, as he appears to have substantially developed the plot.

I will also state that in general balance of convenience herein is in favour of the applicant who was the earlier purchaser.

Consequently, and for the above reasons I allow the application and grant prayer 3, but with the rider that the applicant will also maintain the current *status quo* as at today until the suit is heard and determined, or as may be hereafter ordered by the court.

Costs in the cause.

Dated and delivered at Machakos this 5<sup>th</sup> day of **October** 2012.

**George Dulu**  
**Judge**

**In presence of:-**

Mrs Kagwi for Respondent

N/A for Applicant

Nyalo – Court - Clerk