



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KITALE**

**Miscellaneous Civil Application 59 of 2008**

**REPUBLIC.....APPLICANT**

**VERSUS**

**1. KIMININI L.DT.....1<sup>ST</sup> RESPONDENT**

**2. THE C.M.'S COURT – KITALE.....2<sup>ND</sup> RESPONDENT**

**3. LAWRENCE WANYAMA OGESA.....3<sup>RD</sup> RESPONDENT**

**EX-PARTE – RONALD SAWENJA WALUBENGO**

**R U L I N G**

By a Notice of Motion dated 2<sup>nd</sup> December 2006 pursuant to the provisions of sections 3 and 3A of the Civil Procedure Act, Order LIII Rule 1(4) of the Civil Procedure Rules, the applicant seeks orders:

1. That this application be certified as urgent, and service thereof be dispensed within the first instance.
2. That the honourable court be pleased to make an order directing that the status quo prevailing on 23/11/2008 be preserved pending the hearing and determination of the main application for orders of certiorari.
3. That the costs of this application be in the cause.

The application is based on the grounds:

1. That the ex-parte applicant has entered onto the land in question and committed deliberate acts of waste on the property.
2. That the ex-parte applicant deliberately committed these acts in the anticipation that this court would grant stay of execution of the proceedings in Kitale CM's Court Land Case No.49 of 2008.
3. That the ex-parte applicant has not been acting in good faith, and there is obvious malafides in the actions of the ex-parte applicant.
4. That on 24/11/2008 the ex-parte applicant went on the subject property and pulled down a fence belonging to the 3<sup>rd</sup> respondent/applicant.
5. That on the same date, the ex-parte applicant, using a group of hired thugs went on to the subject property and

broke down doors to a house belonging to the 3<sup>rd</sup> respondent/applicant, and severely damaged the roof while attempting to decapitate the house.

6. That all these acts were done despite the fact that the 3<sup>rd</sup> respondent/applicant has been living on the land since 1993 when he bought it.
7. That all these acts were committed despite the fact that the ex-parte applicant is a mere busy body with no locus standi to move this court.
8. That the ex-parte applicant has in the past similarly entered onto the subject land and committed similar acts of waste.
9. That on or around 8/11/2008, the ex-parte applicant herein went onto the land and drained some water from fish ponds belonging to the 3<sup>rd</sup> respondent/applicant, causing serious financial loss to the 3<sup>rd</sup> respondent.
10. That previously, the ex-parte applicant had again entered onto the subject land and completely brought down a house belonging to the 3<sup>rd</sup> respondent.
11. That the ex-parte applicant is therefore a person that is used to resorting to violence in achieving his goals, and it is apparent the 3<sup>rd</sup> respondent shall never know peace unless this honourable court restrains the ex-parte applicant.
12. It is in the interests of justice that the orders sought herein be granted.

The application is predicated upon the annexed affidavit of Lawrence Wanyama Ogesa sworn on the 2<sup>nd</sup> day of December 2005.

On behalf of the 3<sup>rd</sup> respondent, it was argued that he has lived on the subject property since June 1993 upon purchase of the same. In proof of sale he exhibited a sale agreement as exhibit "LWO1 (a)" and consent to transfer as exhibit "LWO1 (b)".

That in utter disregard of his proprietary rights the brother of the ex-parte applicant commenced systematic destruction of the developments on the suit land. In order to vindicate his rights he moved to Kiminini Land Disputes Tribunal. A copy of the award of the said Tribunal is exhibited as "LWO2".

The Tribunal's award notwithstanding, on the 24<sup>th</sup> of November 2008, the ex-parte applicant using a group of about ten men entered into the suit land and caused extensive damage as exhibited in LWO3 (a) and (b) and LWO4 (a), (b) and (c).

The said wanton destruction of the property was reported to the police and a criminal charge was preferred against the agent of the respondent, one Nelson .W. Sawenja.

On 8<sup>th</sup> November 2007, the ex-parte applicant using his brother Peter Waswa Walubengo again trespassed onto the subject property and drained 4 fish ponds which translates into a loss of approximately Sh.494,830/- captioned in exhibit "LWO7 (a), (b), (c) and (d)".

By reason of the foregoing unless the ex-parte applicant is restrained he is likely to cause more wanton damage to the subject property hence this application.

On behalf of the ex-parte applicant, it was argued that in 1989 he bought 10 acres of land from one Pius Gumo Magero. The said land comprised of Plots No.21 and 22. The same are registered as L.R No.66488 and 5733 respectively as per exhibit "RSW1".

That having taken possession in 1989 he has been in physical occupation of the same. That it is the 3<sup>rd</sup> respondent who has been trying to forcefully encroach into his land. That in point of fact the 3<sup>rd</sup> respondent has been occupying Plots No. 21 and 22. That has been the status-quo even at the time the matter went to the Tribunal. That it is the enforcement of the decree in Kitale CMCCC Land Case No.49/2008 that changed the status quo as per the court order of

3<sup>rd</sup> November, 2008.

Notwithstanding the order of 3<sup>rd</sup> November, 2008, the 3<sup>rd</sup> respondent on 16<sup>th</sup> November, 2008 planted a barbed wire fence on Plot No. 21 but the police ordered him to remove the same on the basis of the applicant's complaint.

That unless restrained the 3<sup>rd</sup> respondent is bent on changing the status-quo in order to occupy Plot No. 21 yet his claim is in respect of Plot No. 33.

Last but not least the mud house whose photograph is annexed to the 3<sup>rd</sup> respondent's affidavit in support has no doors. The same had forcibly been constructed by the said 3<sup>rd</sup> respondent on Plot No. 21 despite the applicant's resistance. By reason of the foregoing the 3<sup>rd</sup> respondent's application is made in bad faith as a cover-up for his own disobedience of the court order regarding status-quo.

In the premises, it is clear to me that there is a court order of 3<sup>rd</sup> November 2008. In order to preserve the status-quo that order should be complied with. Accordingly, I order that the status-quo prevailing as at 23<sup>rd</sup> November 2008 be preserved pending the hearing and determination of the main application for orders of certiorari. Costs shall abide the outcome of the main application.

By way of direction the parties are directed to fast track the hearing of the Notice of Motion application for certiorari. In this regard the Civil Registry is directed to give priority to this application.

Dated and delivered at Kitale this 5<sup>TH</sup> day of **OCTOBER** 2009.

**N.R.O OMBIJA**  
**JUDGE**

**Mr Ingosi for Ex-parte Applicant**  
**Mr Njoroge for Defendant**