



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 2 OF 2019

JOSEPH SAWENJA WANINGILO.....PLAINTIFF

VERSUS

SAMMY BARAZA.....1ST DEFENDANT

EDDAH BARAZA.....2ND DEFENDANT

R U L I N G

1. The application dated **3rd January, 2019** and filed in court on the same date has been brought by the plaintiff. He seeks an order that pending the hearing and determination of the suit herein the honourable court be pleased to issue a temporary injunction to restrain the defendant by himself, his servant, agent or any other person acting on or on their behalf whatsoever from entering, trespassing into, tilling, planting, leasing, selling off or carrying on any operation and/or activities of any nature or doing any such nature of things whatsoever on that parcel of land known as **Trans-Nzoia/Koronga/11**. He also prays for costs of this application be awarded to the applicant.

2. The application is supported by the sworn affidavit of the plaintiff dated **3rd January, 2019**.

3. The grounds upon which the application is made are contained in that affidavit and at the foot of the application. In brief they are that the plaintiff purchase that parcel of land known as **Goronga Scheme Plot No. 11** measuring **50 acres**, took possession and had been in occupation, use and control of the same from **1985**; that on **29th December, 2018** and **31st December, 2018** strangers acting on the instructions and authority of the defendant and their other family members started making wild claims over the suit property and threatening to gain entry and plough the land to the detriment of the plaintiff; that the plaintiff has no debt to the defendant whatsoever; that the defendant claims, threat and or action amount to trespass and infringement to the plaintiff's lawful property; that the plaintiff risks to lose his lawful property hence suffer massive loss and inconvenience and that the applicant has a good claim and balance of convenience tilts in his favour.

4. The respondents filed a replying affidavit sworn on **11/2/2019** by Sammy Baraza Khaoya the **1st** defendant. Their reply is that the defendants are children and administrators of the estate of John Baraza Khaoya (deceased) who died on **24/3/1987**; that the plaintiff is a bona fide purchaser for value of the suit land having allegedly fundamentally breached the sale agreement dated **7/2/1985** between himself and the deceased in that he failed to transfer **Plot No. 5 Site and Service Scheme Kitale Municipality** to the deceased in part payment of the agreed purchase price for the suit land, that he failed to pay the balance of **Kshs.228,000/=** to the deceased and that he failed to relinquish possession of **Plot No. 5 Site and Service Scheme Kitale Municipality** to the deceased all contrary to their said agreement; that the suit land was transferred to the respondents on **1/7/2016** and thereafter they cleared the outstanding loan balance owed to the Settlement fund trustees and that the plaintiff's alleged occupation of the suit land has not surpassed the 12-year limitation period which in their argument started running **1/7/2016**; that the applicant does not have *locus standi* to institute the suit and he will not suffer any loss if the injunctive orders sought were declined. They aver that the balance of convenience tilts in their favour being the registered proprietors of the land.

5. The supplementary affidavit of the applicant was filed on **28/2/2019**. The notable response in that affidavit is that he approached the family in **1987** in an attempt to establish the status of the administration of the estate of the deceased and the family was quiet over the issue and hence he was not able to engage any administrator to address the arising issues. Further he reiterates that the respondents do not dispute that he has had quiet, peaceful and uninterrupted occupation of the land for **33** years with the knowledge of the respondents and the respondents have never been in possession of the suit land; that succession proceedings were filed secretly in Nairobi outside the jurisdiction with a view to concealing the material facts; that since **1987** when the deceased died, the applicant was held impotent with regard to perfecting the agreement as no further action could be undertaken without letters of administration over the estate which the respondents allegedly deliberately failed to seek. It is his opinion that the respondents should rather than attempt to breach or repudiate the agreement, apply for the completion of the same. It is deponed that the respondents' mother witnessed the lease agreements over the land and hence recognised his ownership of the land

6. The defendants filed submissions on **12/3/2019**.

7. This is a suit in which the claimant is admitted to be in possession, having allegedly taken such possession in the year 1985, and it is not disputed that he purchased the suit land from the defendants' father when he was alive. The question is whether notwithstanding the obvious lack of an administrator to the estate of the deceased- from 1987 to 2014- he can be held to have breached the agreement between him and the deceased. It is alleged that the defendants obstructed the completion of the transaction by remaining silent when the plaintiff enquired of the status of the succession in respect of the estate.

8. I find that the plaintiff has established a prima facie case with a probability of success. In regard to the issue of substantial damage, the plaintiff has leased out the said land to third parties. I do not find that he would suffer any substantial loss that may not be capable of being compensated for by way of payment of damages. Nevertheless, the defendants also have not been in possession of the premises at all, and are seeking to seize them after finally processing the letters of administration, which process the plaintiff alleges was done secretly. The plaintiff would possibly be inconvenienced by any disposal of the land by the defendants who now hold the title thereof.

9. I find that in the special circumstances of this case the balance of convenience lies in granting the orders of injunction sought.

10. Consequently I allow the application dated 3/1/2019 and issue the following orders:

a. An order of temporary injunction to restrain the defendants by themselves, their servants, agents or any other person acting on their behalf whatsoever from entering, trespassing into, tilling, planting, leasing, selling off or carrying on any operation and/or activities of any nature or interfering in any other manner whatsoever with that parcel of land known as Trans-Nzoia/Goronga/11 pending the hearing and determination of the suit herein.

b. The costs of this application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale on this 28th day of March, 2019.

MWANGI NJOROGE

JUDGE

28/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Karani for plaintiff/applicant

N/A for defendant/respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

28/03/2019