



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 14 OF 2019

OSCAR WAFULA WALUBENGO.....PLAINTIFF

VERSUS

HASSAN MUCHAI KHAEMBA.....1ST DEFENDANT

JOHN WANYONYI WAMBULWA.....2ND DEFENDANT

IBRAHIM OGARO.....3RD DEFENDANT

HACKTON WANYONYI.....4TH DEFENDANT

RULING

1. The Notice of Motion dated 7/2/2019 and filed on 13/2/2019 seeks the following orders:

- (a) That this honourable court be pleased to certify the application herein as urgent and service thereof be dispensed with in the first instance.
- (b) That pending the hearing and determination of this application *inter-partes*, this honourable court be pleased to issue a temporary injunction restraining the defendants, their agents or servants from trespassing in, fencing, dealing, selling or in any manner whatsoever interfering with the plaintiff's quiet use, possession and/or interest in the land known as Namanjalala Block 4 Plot No. 34.
- (3) That pending the hearing and determination of the suit herein, this honourable court be pleased to issue a temporary injunction restraining the defendants, their agents or servants from trespassing in, fencing, dealing, selling or in any manner whatsoever interfering with the plaintiff's quiet use, possession and/or interest in the land known as Namanjalala Block 4 Plot No. 34.
- (d) That the order issued herein be served upon the OCS Kitale Police station to ensure compliance.
- (e) That costs be in the cause.

2. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavit of the plaintiff sworn on 7/2/2019. These are that the plaintiff is the owner of the land known as **Namanjalala Block 4 Plot No. 34**; that on or about 23/1/2019, the 1st defendant with the support of the 2nd, 3rd and 4th defendants without any colour of right and/or justification whatsoever invaded the said plot, fenced it off using iron sheets and has threatened to take over the same and/or sell it and thus interfere with the plaintiff's quiet use and possession; that the 1st defendant's action is sanctioned by the 2nd, 3rd and 4th defendants who purport to be officials of Namanjalala Market Committee; that according to the Namanjalala Block market area list, the 1st defendant's plot is known as **Namanjalala Block 1 Plot No. 9** which is in the name of one **Gilbert Khaemba** (deceased) who is the 1st defendant's father and that the actions of the defendant are therefore unlawful and illegal hence the plaintiff seeks a remedy. In his documents the applicant avers that he is the one who leased the land to a church called Exodus Church which conducts its services thereon.

3. The 1st defendant filed his sworn replying affidavit dated 18/3/2019 on the same date in response to the application. He depones that the plaintiff has no *locus standi* to institute this suit; that his late father Gilbert Khaemba Kitukhulu was and is still the registered owner of plot No. 42 at Namanjalala trading centre having applied for it in 1972 and having been issued with a letter of allocation on 29/12/2009; though he died in 1997 the letter of allocation was issued in 2009 in his name since the application had been pending. He avers that the requisite fees were paid in 2009 and that land rates had been regularly paid and that the remittance has been in the name of the deceased for the reason that the 1st defendant has not obtained letters of administration. He denies knowledge of any land known as **Namanjalala Block 4 Plot 34**

claimed by the plaintiff and casts doubt on the contents of his supporting affidavit and sale agreement allegedly executed on **20/6/2006**. He questions why Moses Khamala Mutolo does not possess a letter of allotment and denies any claims of wrongful trespass into **plot No. 42**. He also avers that the church which had been operating illegally in a structure erected on **Plot No. 42** has voluntarily agreed to remove itself from the plot. Further he raises the issue of whether the plaintiff had obtained letters of administration prior to filing the suit and, just like 2nd defendant reiterates that Trans-Nzoia Investment Co. Ltd is non-existent. It is his case also that the County Government of Trans Nzoia has the proper record relating to the land in Namanjalala market.

4. A replying affidavit sworn by the 2nd defendant on his behalf and on behalf of 3rd defendant was filed on **12/3/2019**. He denies the plaintiff's claim to ownership of **Namanjalala Block 4 Plot 34** and terms the area list the plaintiff relies on as inauthentic; he also depones that he has no records of the transaction the plaintiff alleges in the plaint that is the purchase of the suit land from one Moses Khamala Mutolo. He avers that Trans-Nzoia Investment Co, Ltd is non-existent and that the plaintiff may have been swindled. He avers further that the proper source of documentation or authentic record regarding Namanjalala market land is the County Government of Trans-Nzoia and that according to those records, which he has accessed, the proper owner of the suit land is not Moses Khamala Mutolo. Lastly he states that the Trans-Nzoia Investment Co. Ltd had by the year **1975** surrendered the Namanjala market to the Nzoia County Council and the records the market officials keep must be in tandem with the records of the County Government of Trans-Nzoia, the successor to Nzoia County Council.

5. Regarding the agreement between the 1st defendant and the Exodus Church to the effect that the church would demolish its place of worship and remove itself from the premises, this court notes that that is not sufficient proof of ownership of the plot. Besides, it refers to a different plot from the one claimed by the plaintiff and only confirms that the plaintiff had leased the land to the church which the 1st defendant is now asking to remove itself from the land. I find that the action of the church is merely meant to remove itself to a safe distance away from the disputed land for the sake of its own peace.

6. Whether **number 34** and **number 42** refer to one and the same parcel of land at Namanjalala Market is for this court to determine on the strength of the evidence that both parties should call at the hearing of the main suit. The same case applies to the issue of who between the Trans Nzoia Investment Co Ltd and the County Government of Trans Nzoia, should keep the proper records in respect of the land that should be relied on by this court in the determination of this suit.

7. I do not find the documents annexed to the defendant's replying affidavits to be conclusive proof that the land is **plot number 42** or that it belonged to the 1st defendant's father in the manner a registration under the Land Registration Act would. The list annexed to the applicant's supporting affidavit is purported to be the final one to be relied on in the issuance of the relevant titles to the plots listed therein which include the plot subject matter herein.

8. The mere fact that the 1st defendant is not in possession and that the applicant is in possession of the disputed land and has been leasing out the land to third parties for a period, and has approached this court first with documents which, though also not full proof at this interlocutory stage that the land belongs to him, support his claim affords good cause for this court to pause and reserve this matter for hearing on the merits to establish how he came into possession of the suit land. I therefore find that the plaintiff has established a prima facie case against the defendants.

9. Regarding substantial loss which can not be compensated by way of damages, I find that it would occur if the plaintiff were evicted from a plot that he has known as his for quite some time before the main hearing of the suit.

10. Consequently I find that the plaintiff has established a *prima facie* case and potential loss that can not be compensated for by way of damages if the orders do not issue. The conditions for the grant of an order of temporary injunction as set out in the case of **Giella -vs- Cassman Brown 1973 EA 358** have been met.

11. I therefore grant the application dated **7/2/2019** and issue the following orders:

(a) An order of temporary injunction restraining the defendants, their agents or servants from trespassing in, fencing, dealing, selling or in any manner whatsoever interfering with the plaintiff's quiet use, possession and/or interest in the land known as Namanjalala Block 4 Plot No. 34 pending the hearing and determination of the suit herein.

(b) That costs of the application shall be in the cause.

Dated, signed and delivered at Kitale on this 24th day of April, 2019.

MWANGI NJOROGE

JUDGE

24/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for plaintiff (plaintiff also absent)

N/A for defendants

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/4/2019