



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 9 OF 2019**

**ROBAI SYALO LUTILO**

**(Suing on her own behalf and on behalf of the Estate of the late**

**EDWARD LUTILE (deceased).....1<sup>ST</sup> PLAINTIFF**

**PHYLIS KHALAI LUTILO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**WYCLIFFE WAKOLI SIMIYU.....DEFENDANT**

**RULING**

1. The application dated **1/2/2019** and filed in court on the same date has been brought by the plaintiff. It seeks an order of interim injunction to restrain the defendant and his agents from interfering in any manner with title no. **Kitale Municipality Block 7/194** and costs.
2. The applicant has brought the application pursuant to **Order 1A, 1B and 63 (e)** of the **Civil Procedure Act and Order 40 rules 1 and 2 and Order 50 Rule 1 of the Civil Procedure Rules and Section 3 and 13 (1) and 7 of the Environment and Land Court Act, 2011.**
3. The grounds upon which the application is made are contained at the foot of the application. Those grounds are that the plaintiffs purchased plots measuring 150 by 100 and 50 by 100 feet from the defendant and they have since taken possession and developed the properties; that the defendant has, without involving the plaintiffs, secretly surveyed the property and obtained the certificate of lease in his favour and that he intends to dispose of the same; that the action of the defendant is in clear breach of the sale agreements from which consideration has flowed and that unless an order of injunction is made the plaintiffs shall suffer irreparable damage.
4. The application is supported an affidavit of the 1<sup>st</sup> plaintiff dated **1/2/2019** which lays emphasis on the above grounds.
5. In reply to the application the defendant filed his sworn replying affidavit on **28/2/2019**. In that affidavit the deponent admits having sold one plot of **150 x 100 feet** at **Kshs.270,000/=** to one **Edward Lutilo** (the plaintiff's father) now deceased; that the deceased breached the sale agreement and paid only **Kshs.149,800/=** thereby leaving a balance of **Kshs.120,200/=** unpaid to date. He also admits that the 1<sup>st</sup> applicant bought a plot measuring 50 by 100 feet but denies that the full purchase price has been paid; in respect of this second plot he alleges that only **Kshs.466,000/=** was paid thereby leaving a balance of **Kshs.144,000/=** unpaid to date. Finally he admits that the 2<sup>nd</sup> applicant bought a portion of land measuring 50 by 100 feet at **Kshs.600,000/=** and paid the entire purchase price for it. The deponent avers that the 1<sup>st</sup> applicant is aware of the breach of the agreement dated **12/3/2015**. The deponent also avers that the applicants have occupied his entire land comprised of six plots of 50 by 100 feet instead occupying just two plots. According to the deponent the applicants have constructed permanent structures on the pieces of land that were not sold to them, thereby escalating the dispute. He therefore depones that he is ready and willing to refund the applicants part of the purchase price so far paid for their plots because of the alleged breach.
6. The plaintiffs filed their submissions on **29/3/2019**. I have examined the entire record and found no submissions filed on behalf of the defendant. I have considered the application and the response including the plaintiffs' submissions.
7. The plaintiffs rely on the well-known case of **Giella -vs- Cassman Brown And Co Ltd 1973 EA 358** and also the case of **Notco (Masai Ltd and another Vs Halima Bakari Ramadhani Civil Appeal No. 158 of 1992.**
8. It is clear from the documents on the record that there occurred three transactions which led to the occupation of the land by the plaintiffs. It is therefore not in doubt that the defendants have possession of land bought from the plaintiff. The main issues that arise in the entire litigation is whether the plaintiffs defrayed the entire consideration, if there is breach and if so by which party to those agreements, and whether the plaintiffs occupy the proper plots sold to them by the defendant in the mentioned transactions.

9. In my view since the defendant has admitted having sold plots to the plaintiffs and the plaintiffs have relied on the strength of the agreements and the consent of the plaintiff to occupy some land and develop them whereby they aver that they have erected rental structures thereon, I find that there is a dispute that should be resolved by this court in view of the questions for determination set out herein above. The plaintiffs have therefore raised a prima facie case against the defendant.

10. As to probability of loss and damage if the orders sought are not issued, I find that the plaintiffs have established, and the defendant has not denied, and that they are not only in possession of land but that they have erected rental structures on the land. Some of the land was passed on to them by their deceased father. No one land parcel is exactly like another. Even if the plaintiffs were evicted now, that exercise would be a discontinuation of possession of some land that they have known for some time as theirs, or as their inheritance. They would therefore suffer loss if the orders sought do not issue. Besides, the defendant who is not in possession has not demonstrated that he would suffer any greater loss than having to await for some time as this litigation is concludes, in order to find out if the determination favours him. It is notable that though he appears to state that he has been having grievances against the plaintiff's occupation of the land and default on a part of the purchased price in respect of two plots, he never galvanized himself into action before they did.

11. I therefore find that the plaintiffs have established that the two conditions requisite for the grant of an order of temporary injunction as set out in the case of **Giella vs Cassman Brown (supra)**, that is, the existence of a prima facie case and the probability of irreparable loss, exist, and that their application is merited.

12. I therefore grant the application dated **1/2/2019** and order that an order of interim injunction is hereby issued to restrain the defendant and his agents from interfering in any manner with title no. **Kitale Municipality Block 7/194**. The costs of the application will be in the cause.

**Dated, signed and delivered at Kitale on this 24<sup>th</sup> day of April, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**24/4/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

2<sup>nd</sup> defendant in person

N/A for the plaintiffs.

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**24/4/2019**