



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 112 OF 2018**

**MOHAMMED ISAAK ABDI.....PLAINTIFF**

**VERSUS**

**EXPORT PROCESSING**

**ZONES AUTHORITY (EPZA).....DEFENDANT**

**RULING**

1. In the Application dated 29<sup>th</sup> May, 2018, the Plaintiff is seeking for the following reliefs:

*a. Pending the hearing and determination of this suit, the Defendant/Respondent by itself, its agents and/or servants be restrained from entering, remaining disposing in anyway, transferring, constructing, leasing, charging or dealing in anyway or manner whatsoever and howsoever with the Plaintiff's property known as L.R. 337/3820 comprising by measurement approximately Nought Decimal Nought Three Nought (0.603) Ha or thereabout situate at Mavoko Municipality, Machakos District.*

*b. Pending the hearing and determination of this suit the Defendant be ordered to forthwith remove any writings wrongfully written on the suit property perimeter wall by its agents on the 26<sup>th</sup> May, 2018 in default whereof the Plaintiff shall be at liberty to remove of the same at the Defendant's costs.*

*c. The costs of this Application be awarded to the Plaintiff/Applicant.*

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that by an Agreement dated 5<sup>th</sup> March, 2010, he purchased parcel of land known as L.R 337/3820 (*the suit land*) from one Stanley Nziya Shibayilu for Kshs. 4,600,000.

3. It is the deposition of the Plaintiff that he took possession of the suit land in the year 2010 and erected a temporary fence and site house; that in the year 2015, the Machakos County Government approved the plans for the erection of a perimeter wall as well as gates and that he has since been issued with a letter of allotment and is in the process of acquiring a title document in his favour.

4. The Plaintiff has deponed that on the night of 26<sup>th</sup> May, 2018, the Defendant's agents trespassed on the suit land and made markings on his perimeter wall as follows: "EP2A, DEMOLISH."

5. The Plaintiff finally deponed that the Defendant has no genuine claim to the suit property; that he has heavily invested on the suit property and that the Application for injunction should be allowed.

6. In response, the Defendant's Chief Executive Officer deponed that land known as L.R. No. 337/3820 does not exist and that the Defendant is the absolute owner of land known as L.R. No. 18139 which was excised for a portion of L.R. No. 12197/9.

7. According to the Defendant's Chief Executive Officer, the Government of Kenya acquired via compulsory acquisition by way of Gazette Notice 2802 and 2803 of 13<sup>th</sup> June, 1991 for the Defendant a portion of L.R. No. 12197/9 from British American Tobacco Kenya Limited and that while awaiting the issuance of a title in its favour, the Defendant noted that L.R. No. 18139 had been illegally acquired by a private individual.

8. It is the Defendant's case that on 7<sup>th</sup> April, 2016, the National Land Commission asked the County Government of Machakos, to serve a notice to the person that had erected a perimeter wall around the suit land to remove the wall within thirty (30) days and that the alleged letter of allotment issued to the Plaintiff or Stanley Nziya Shibayilu is a forgery.

9. The Defendant's Chief Executive officer finally deponed that British American Tobacco has also confirmed that the Government acquired the suit land from it and that the Plaintiff has not demonstrated that he has a prima facie case with chances of success.

10. In his Further Affidavit, the Plaintiff deponed that he is a stranger to the title being claimed by the Respondent being L.R. No. 18139 or 12191/9; that he is not aware of any road from his property to the Defendant's property and that he is now in possession of a title for L.R. No. 337/3820.

11. Both the Plaintiff's and the Defendant's advocates filed submissions which I have considered. I have also considered the filed bundle of authorities by the two advocates.

12. The principles to guide a trial court in determining whether or not to grant an interlocutory injunction are captured in the celebrated case of *Giella vs Cassman Brown & Co. Ltd (1973) EA 358*. The Applicant must show not only that he has a prima facie case with chances of success, but also, that unless he is granted an injunction, he will suffer injury that is unlikely to be compensated in damages. Where the court is in doubt about the two principles, it is required to determine the Application on a balance of convenience.

13. The evidence before me shows that the Plaintiff acquired land known as L.R. No. 337/3320 comprising 0.603 Ha from one Stanley Nziya. However, it was later discovered that the letter of allotment that had been issued to the said Stanley Nziya was a forgery.

14. However, because the Plaintiff had developed the plot, the Chairman, National Land Commission, recommended for "formalization" of the allocation of the land to the Plaintiff. The said letter is dated 24<sup>th</sup> October, 2017.

15. Although the letter by the National Land Commission approving the "formalization" of L.R. No. 337/3820 is dated 24<sup>th</sup> October, 2017, the letter of allotment that was issued to the Plaintiff is dated 9<sup>th</sup> July, 1998. The issuance of a letter of allotment to the Plaintiff in 1998 has not been explained by the Plaintiff. Indeed, the copy of the letter of allotment dated 9<sup>th</sup> July, 1998 and annexed on the Plaintiff's Application is an incomplete document. The same does not show the person who signed it, if at all, or the supporting part development plan number.

16. From the survey plan number 476/81 annexed on the Plaintiff's Affidavit, it would appear that L.R. No. 337/3820 was created on 9<sup>th</sup> April, 2008. If that is so, it is improbable that the said portion of land was in existence in 1998 when the letter of allotment was issued to the Plaintiff. The Plaintiff did not explain how the letter of allotment dated 9<sup>th</sup> July, 1998 could therefore show that he had been allocated L.R. No. 337/3820 if the same was created in the year 2008.

17. On the other hand, the Defendant's case is that L.R. No. 337/3820 does not exist; that what is now known as L.R. No. 337/3820 is a portion of land known as L.R. No. 12197/9 which later on changed to be known as L.R. No. 18139 and that L.R. No. 12197/9 was compulsorily acquired by the Government for the Defendant in 1991.

18. Indeed, the Defendant has annexed the gazette notice showing the acquisition of L.R. No. 12197/9 by the Government from British American Tobacco Limited Company, and the payments that the Government made to British American Tobacco Limited. British American Tobacco Limited has confirmed that it originally owned L.R. No.12197/9 before the said land was acquired by the Government.

19. The Defendant has however not shown the nexus between land known as L.R. 337/3820 (*the suit land*) and L.R. No. 12197/9 (*or L.R. 18139*). That nexus can only be ascertained from a report of a Surveyor, which is not before the court.

20. If indeed L.R. No. 337/3820 is a portion of land that was compulsorily acquired by the Government for the Defendant, then this court will not hesitate to cancel the Plaintiff's title. I say so because where the Government acquires land compulsorily, then such land cannot be available for allocation to a private identity. However, that is an issue that can only be determined with finality after trial.

21. From the analysis of the evidence before me, I am not satisfied that the Plaintiff has established a prima facie case with chances of success. However, considering that he is likely to suffer irreparable injury if the perimeter wall is demolished, I shall grant to the Plaintiff limited orders of injunction in the following terms;

***a. Pending the hearing and determination of this suit, the Defendant/Respondent by itself, its agents and/or servants be restrained from entering, remaining disposing in anyway, transferring, constructing, leasing, charging or dealing in anyway or manner whatsoever and howsoever the Plaintiff's property known as L.R. 337/3820 comprising by measurement approximately Nought Decimal Nought Three Nought (0.603) Ha or thereabout situate at Mavoko Municipality, Machakos District.***

***b. The Plaintiff is restrained from developing, selling, transferring L.R. No. 337/3820 or dealing with the said property in any manner that will change its current status pending the hearing and determination of the suit.***

***c. Each party to bear his/its own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24<sup>TH</sup> DAY OF MAY, 2019.**

**O.A. ANGOTE**

**JUDGE**