



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 3 OF 2019**

**ISAAC NYAGARA NYAMWAYA**

**(Suing as the Legal Attorney of**

**LEAH BOYANI RATEMO KEBASO).....PLAINTIFF**

**VERSUS**

**STEPHEN KWEMOI MATUI.....DEFENDANT**

**RULING**

1. The application dated **29/3/2019** and filed in court on the same date has been brought by the plaintiff. It seeks an order of temporary injunction be issued against the defendants, their relatives, servants, agents and/or any other person claiming through them from using in any manner prejudicial to the plaintiff, interfering, blocking and/or barring the plaintiffs, their relatives, servants or agents from ploughing, tilling, occupying, using **KWANZA/NAMANJALALA/BLOCK 5/119** in any manner beneficial (sic) to **LEAH BOYANI RATEMO KEBASO** pending the hearing and determination of the main suit. He also prays for costs.
2. The application has been brought under **Section 3 and 3A** of the **Civil Procedure Act and Order 40 Rules 1, 2, 3 and 4** of the **Civil Procedure Rules 2010**.
3. The grounds on which the said application is made are that the plaintiff/applicant is the registered absolute owner of land parcel **Kwanza/Namanjalala Block 5/119**; that since September, 2018, the defendant/respondent has been trespassing into the plaintiff's parcel with an intention of ploughing; that the defendant has no proprietary rights and that the plaintiff will suffer prejudice owing to the acts of the respondents.
4. The application is supported by an affidavit of the plaintiff dated **29/3/2019** which lays emphasis on the above grounds.
5. In reply to the application the defendant filed sworn replying affidavit on **25/4/2019**. In summary he deponed that the application is *res judicata* it being similar to the application dated 19/1/2019 (should be 15/1/2019) which was dismissed by this court; that there is no new evidence on the basis of which the ruling on the application dated 15/1/2019 can be altered; that the plaintiff purchased plot No. Kwanza/Namanjalala Block 5/1019 but illegally acquired title over the defendant's plot No. Kwanza/Namanjalala Block 5/119 which the defendant had purchased on 27/2/2016, paid for in full and taken immediate possession, of and which he is still on occupation of; he thus believes that his proprietary rights have crystallized and only a substantive determination of the suit on its merits after the hearing of evidence can affect his rights and not any interlocutory orders such those sought in the application. He further avers that the application has been overtaken by events as he is already in possession and eviction would issue at an interim stage if the prayers sought were granted which is untenable in law and equity. He also avers that Hassan Kisogochi Service has confirmed in a letter to the court that he never sold the land to the plaintiff.
6. The defendant filed his submissions on **29/4/2019** while the plaintiff filed his on **7/5/2019**. I have considered the application and the response, including the plaintiff's submissions.
7. What emerges from this application is that though the plaintiff is the registered absolute owner of Plot No. Kwanza/Namanjalala Block 5/119, he admits that the defendant is in possession of the suit land since September, 2018. The plaintiff has not shown that he has ever been in possession of the land. The facts in this case are multiple and they require to be considered before a final decision that affects the rights of the defendant over the land, even the rights to mere occupation, can be made. Any order of temporary injunction might have the effect of causing the eviction of the defendant in the suit. This eviction would be tantamount to a mandatory injunction. A mandatory injunction can only be granted in the clearance of cases. In the current case the title deed in the name of Ratemo Boyani Lenah is said to have been issued on 12/7/2018. There are documents that place the date of alleged purchase by the defendant as 22/8/2017 which is also the alleged date of the defendant's commencement of occupation of the suit land.

8. In the light of the above facts this court finds that this is not a clear cut case in which temporary injunction can be issued against the defendant. The plaintiff has satisfied this court that the land is registered in his name. However the presence of the defendant on the land militates against the grant a temporary injunction for the reasons stated above. In my view the proper way of proceeding would to fix the main suit for hearing on its merit.

9. Though in the eyes of the court the plaintiff has established a *prima facie* case this court is in doubt as to whether he would suffer loss that would not be capable of compensation by way of damages if the orders sought were not granted. This court is therefore entitled to decide on the application on a balance of convenience and the balance of convenience lies on maintaining the *status quo* prevailing on the land at the moment. I therefore order that the *status quo* shall be maintained and that other than the normal use of the suit land, whose legality shall in any event shall be determined upon hearing of evidence, the defendant shall not dispose of or make substantial changes to or waste the suit land pending the hearing and determination of this suit.

**Dated, signed and delivered at Kitale on this 30<sup>th</sup> day of September, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**30/9/2019**

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Teti for Respondent

N/A for Applicant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**30/9/2019**