



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 38 OF 2019**

**PHILIP MELI RONO.....PLAINTIFF**

**VERSUS**

**JOHN CHEBAI MWELA.....1<sup>ST</sup> DEFENDANT**

**KENETH SAISI MUDAKI.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, TRANS-NZOIA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of an application by way of Chamber Summons dated 29/4/2019 brought under *Articles 36, 47, 48 of the Constitution of Kenya, 2010 and Section 1, 3(a) of the Land Registration Act, Order 1 Rule 10 (2) (4) and 14 of the Civil Procedure Rules*. The plaintiff is seeking the following orders:-

(1) ...spent

(2) That pending the hearing and determination of this application and suit, an injunctive order do and is hereby issued directed at the defendants restraining them from selling, transferring, mortgaging or in any way dealing with those parcels of land known as. (sic)

(3) That pending the hearing and determination of this application and suit, an injunctive order do issue directed at the defendants prohibiting them from entering, cultivating, interfering with the quiet possession or in any way dealing with those parcels of land known as KWANZA/KWANZA BLOCK 5/KOROSI 3, 4 and 6.

(4) ...spent

(5) That such other and or further orders do issue in the interest of justice.

(6) That costs of this application be provided for.

2. The application is premised on the plaintiff's supporting affidavit sworn on even date and a further affidavit sworn on 18/9/2018.

3. The grounds relied upon are that the applicant is the beneficial owner of that parcel of land known as **Kwanza/Kwanza Block 5/Korosi 3, 4 and 6** which is registered in the name of his father **Charles Rono Misoi** and his grandfather **Mr. Chepkwony Misoi** (deceased); that one of the registered owners has since passed on and his estate is subject of Succession Law and has not been distributed; that the defendants have embarked on a process of putting up for sale, alienating, building on, disposing and transferring the suit parcels of land without any colour of right whatsoever; that the plaintiff has lodged a caution with the 3<sup>rd</sup> defendant but despite the existence of said registration, the defendants continue to interfere with the suit parcels and it is only upon the grant of the orders sought that the rights of the applicant can be safeguarded; that the plaintiff shall continue to suffer great and irreparable damage if this application is not allowed and that the defendants will suffer no prejudice at all upon grant of the orders sought herein.

4. The 1<sup>st</sup> defendant further filed a Notice of Preliminary Objection, Grounds of Opposition on 16/7/2019 and a replying affidavit dated 16/7/2019 which shall all be collectively referred to as "*the response*".

5. In his response he stated that the plaintiff has no *locus standi* to institute the claim; that the plaintiff's father whose name is Charles Rono is the registered owner of the suit land herein; that he has not sold any portion thereof as alleged; that however, the plaintiff's father has been

selling the suit lands on his own volition; that there are 16 families currently residing on the land, having purchased the land from Charles Rono; that the 1<sup>st</sup> defendant is just a purchaser granted vacant possession by Charles Rono; that no fraud has been proved against him; that the plaintiff has no *prima facie* case, and will not suffer irreparable loss if the orders sought are not granted. Numerous documents are attached to that affidavit. They include sale agreements that cite “Charles Rono Misoi” as “vendor” to various persons, a copy of postal money order payable to Charles Rono dated 22/7/2000 and a copy of an identity card of a purported buyer of land.

6. In the further affidavit of the plaintiff he avers that he does not dispute that he is the grandson to Chepkwony Misoi and son to Charles Rono and that therefore he is a dependant and beneficiary to his father’s estate, that he was born on the suit land and his family has been cultivating it for their livelihood and subsistence; that he has *locus standi* as he is only attempting to safeguard the land which belongs to a deceased person from intermeddling by the 1<sup>st</sup> defendant; that the 1<sup>st</sup> defendant has continued selling portions of the land by misleading the plaintiff’s father; that the annexures to the replying affidavit show that the 1<sup>st</sup> defendant is the one who, purporting to be an agent, has been offering the land for sale to other persons; that going by the annexures his father did not sell any land to the 1<sup>st</sup> defendant and most of the agreements are not signed by his father but by other persons who are not registered owners of the land; that the exhibited agreements do not indicate the specific land sold, its location and title number and therefore do not meet the required threshold and are not binding; that spousal consent has not been shown to have obtained prior to the sales; that the caution is sufficient to restrain the 1<sup>st</sup> defendant from any encroachment on the suit land; that Charles Rono requires the consent of the family to sell the land if he requires to do so; that the land occupied by the 1<sup>st</sup> defendant belongs to a deceased person and he is intermeddling with it.

7. The plaintiff filed submissions on **3/10/2019**. I have perused the court record and found no submissions filed on behalf of the defendants.

8. The main question that arises in the instant application is whether an order of temporary injunction should issue against the defendants restraining them from dealing with suit property pending the hearing of this suit.

9. I have observed that the applicant has already acknowledged that the 1<sup>st</sup> defendant is in occupation of some of the suit land which he alleges to belong to his grandfather; the applicant claims that he is intermeddling with it since the said land has not been distributed upon succession.

10. Regarding this claim I have noted that the land comprised in **Kwanza/Kwanza/5/Korosi/6** is registered in the name of Chepkwony Arap Misoi whose estate is said to be yet to be distributed.

11. The 1<sup>st</sup> defendant’s response to the claim is that he bought the land from the plaintiff’s father and he is in occupation thereof alongside 16 other families who also acquired land in similar manner. However he does not indicate which parcel he is in occupation of.

12. The affidavits of the applicant relate to two owners of different parcels and it would have been helpful to this court to expressly provide the parcel numbers in respect of which the 1<sup>st</sup> defendant is claimed to be in occupation. This not having been done, the court is not able to issue specific orders against the 1<sup>st</sup> defendant.

13. Besides, the admission that the 1<sup>st</sup> defendant is already in occupation and the claim by the 1<sup>st</sup> defendant that he purchased the land from the plaintiff’s father compels this court to the conclusion that issuance of the order sought may amount to issuance of mandatory injunction against the 1<sup>st</sup> defendant. A mandatory injunction should issue only in very clear cases and I do not consider this to be one of them.

14. The second claim by the plaintiff is that the 1<sup>st</sup> defendant is selling the land belonging to the plaintiff’s father. Looking at the exhibits to the 1<sup>st</sup> defendant’s replying affidavit this court is unable to conclude at this stage that the same have not been executed by the plaintiff’s father who is named therein as a vendor and this left to determination on the basis of the evidence after the main hearing.

15. Regarding the claim against the 2<sup>nd</sup> defendant, the plaintiff has exhibited a copy of a title deed to LR. No. **Kwanza/Kwanza/5/Korosi/227** which is registered in his name. It would have been quite beneficial to the plaintiff’s case to attach a copy of the green card or other evidence demonstrating the origin of that parcel.

16. A look at the plaint does not reveal any specific claim of wrong doing against the 2<sup>nd</sup> defendant. Indeed plot No. **Kwanza/Kwanza/5/Korosi/227** has not been mentioned on the body of the plaint and if it is a subdivision of the other properties mentioned no evidence of a mutation has been attached to the affidavit. The only paragraph I find to be relevant is in the statement of the plaintiff which alleges that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have mislead and blackmailed his brothers so as to allow the defendants to enter the land and create title in favour of the 2<sup>nd</sup> defendant notwithstanding the registered caution.

17. This court cannot assume that parcel no. **Kwanza/Kwanza/5/Korosi/227** arose out of subdivision of any of the suit lands mentioned. Evidence of demise of Chepkwony arap Misoi is also lacking.

18. There are considerable gaps in the evidence presented by the plaintiff which make it impossible to grant the orders sought. From the foregoing, it is clear that the application dated 29/4/2019 does not meet the conditions set out for the grant of a temporary injunction as stated in the celebrated case of **Giella -vs- Cassman Brown [1973] EA 358**.

19. The application dated **29/4/2019** is hereby dismissed with costs.

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

**MWANGI NJOROGI**

**JUDGE**

**24/10/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Teti for the plaintiff

Mr. Bisonga holding brief for Ambutsi for 1<sup>st</sup> defendant

N/A for 2<sup>nd</sup> and 3<sup>rd</sup> defendants

**COURT**

The Ruling is read in open court at 3.10 p.m.

**MWANGI NJOROGI**

**JUDGE**

**24/10/2019**