



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC MISC. APPLICATION NO. 5 OF 2017

JOSEPH KISAULU NZESYA.....PLAINTIFF/APPLICANT

-VERSUS-

NZOUWA KISWII.....DEFENDANT/RESPONDENT

RULING

1. There is before me a notice of motion application expressed to be brought under Section 1A, 1B, 3A, 18 and 63(e) of the Civil Procedure Act and Order 41 Rules 1, 2 and 3 of the Civil Procedure Rules for Orders that:-

2) THAT a temporary order of injunction be issued restraining the Defendant, agents and/or his servants and or anyone claiming under him from entering, cultivating, grazing, selling and alienating and/or in any other manner interfering with the Plaintiff's Plot No.1794 Kyamuoso Adjudication Section within Makueni County pending the hearing and determination of this application.

3) THAT Makueni PMCC 195/2015 Joseph Kisauli Nzesya vs Nzouwa Kiswii be transferred to this court for hearing and determination.

4) THAT a temporary order of injunction be issued restraining the Defendant, agents and/or his servants and/or anyone claiming under him from entering, cultivating, grazing, selling and alienating and/or in any other manner interfering with the Plaintiff's Plot No.1794 Kyamuoso Adjudication Section within Makueni County pending the hearing and determination of the main suit herein being Makueni PMCC 195 of 2015.

5) THAT the costs of this application be provided for.

2. The application is dated the 11th April, 2017 and was filed in court on even date. It is predicated on the grounds on its face and is supported by the affidavit of Joseph Kisaulu Nzesya, the applicant herein, sworn on the 11th April, 2017 and filed in court on 12th April, 2017.

3. The application is opposed by Nzouwa Kiswili, the respondent herein vide his replying affidavit dated 09th May, 2017 and filed in court on 10th May, 2017.

4. On the 18th July, 2017, the court, by consent of the parties directed that the application be disposed off by way of written submissions. The applicant filed his submissions on 27th September, 2017 while the respondent filed his on the 17th October, 2017.

5. The applicant's counsel submitted that the application satisfies the principles enunciated in **Giela vs Cassman Brown's** case for the grant of injunction. I need not repeat the principles herein. On the other hand, the first respondent submitted that he has not been authorized by the owner of the suit land to respond to the dispute herein and as such, the application should be dismissed with costs to the applicant.

6. I have read the application together with supporting affidavit as well as the replying affidavit and the submissions filed. The issue is, should the orders sought be granted?

7. The application is for temporary injunction to issue against the defendants, agents and/or his servants and or anyone claiming under him from entering, cultivating, grazing, selling and alienating and/or in any other manner interfering with the applicant's plot number 1794 Kyamuoso Adjudication Section pending the hearing and determination of the main suit in Makueni PMCC 195 of 2015. In my view this can only be made in the aforementioned suit and not in a miscellaneous file. The application lacks legs to stand on in the absence of a plaint. It has not been shown that the Principal's Magistrate's court sitting in Makueni lacks jurisdiction to hear and determine Makueni PMCC 195/2015 and besides, the application for injunction ought to have been made under Order 40 which is for temporary injunctions and interlocutory orders instead of Order 41 which is for appointment of Receivers. No Receiver is sought to be appointed in the application before me. I also hold that there is no basis for this court to order for the transfer of Makueni PMCC No.195/2015 under Section 18 of the Civil Procedure Act. In my view, the miscellaneous civil application is mis-conceived and bad in law. In the circumstances, **I hereby proceed to dismiss it with costs to the respondent.**

Signed, Dated and Delivered on this 30th Day of January, 2018.

MBOGO C.G.,

JUDGE.

In the presence of:

Mr. Hassan holding brief for Mr. Mulei for the plaintiff/applicant

Respondents absent

Mr. Kwemboi – Court Assistant

MBOGO C.G.,

JUDGE.