



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 105 OF 2017**

**NDOVU ESTATES LIMITED.....PLAINTIFF**

**-VERSUS-**

**PETER LEMERIA OLE NTUTU.....DEFENDANT**

**RULING**

The Application before me is the Notice of Motion dated 31<sup>st</sup> January, 2018 brought under the judicature Act Cap 8, order 40 Rule 6 Order 51 of the Civil Procedure Rules. The Applicant was seeking orders declaring that the injunctive orders that were granted on 16<sup>th</sup> August, 2016 have lapsed and further that the Defendant/Applicant be granted orders to utilize his land for the planting season and further an order to vary and lift the orders made on 16<sup>th</sup> August, 2016.

The Application was based on the grounds that the Plaintiff/Respondent has been in the exclusive possession of the suit which he is not currently cultivating and didn't cultivate during the planting season of 2017 and he continues to deprive the Applicant to eke a living out of the land.

He further avers that the Applicant has severally tried to have an amicable settlement to the matter pursuant to encouragement by the court but the Respondent has frustrated the same and that the Applicant has children who are in school others are to join the universities and they may drop out due to lack of funds as the Respondent has also not been paying him any lease amounts.

The Respondent has opposed the Application at the hearing by filing a Replying Affidavit and a Notice of Preliminary Objection.

In the Preliminary Objection the Respondent stated the Supporting Affidavit to the Application be struck out as it contained materials which were contested by the parties and thus an advocate could not aver to such contented issues. The Respondent in the Preliminary Objection further alleged that the Application before the court was an abuse of the court process and be dismissed with costs.

The Respondent in the Replying Affidavit opposed the applicant alliterating that the prayers sought can't be granted as the court had confirmed the temporary injunctive orders. He further avers that the one year that the order contemplates was to end on 21<sup>st</sup> February, 2018 a day which the suit was to proceed for hearing but disrupted by the applicant.

The Respondent avers that the injunctive orders were to subsist pending the hearing and determination of the suit however effort to settle the matter amicably has failed at the instance of the defendant.

I have read the application before me and heard submissions by the counsel for the parties when the

application came before me for hearing and the issue for determination before me are twofold.

**1. Whether I should struck out the Applicants Supporting Affidavit due to incompetence.**

**2. Whether the Application is an abuse of the court process**

**3. Whether I should set aside, vary and vacate the orders made on 16<sup>th</sup> August, 2016.**

On whether the Preliminary Objection on the point of law has merit in so far as the applicant's supporting affidavit is concerned. The said affidavit was sworn by counsel on record for the Applicant the issues raised in the said affidavit are basically issues of law as relates to what transpired in court and others that have come to him by virtue of his engagement on advocate. I find the said affidavit properly filed and I see no incompetence on the same.

On whether the Application is an abuse of the court process the Respondent has not demonstrated what is the process. I have looked at the law and I find that the application is properly filed and the orders sought capable of being granted.

For the above reasons, I find that the Preliminary Objection is not merited and I therefore dismiss the same.

On the substantive orders that were sought by the Applicant it is not in dispute that the Applicant leased his land to the Respondent and a dispute arose leading to the filing of the suit herein and attempts to settle the matter has not been successful with each party blaming the other party.

It is not also indispute that subsequent to the grant of the injunctive orders made on 16<sup>th</sup> August 2016 none of the parties have been able to carry out any activity thereon.

This court has severally beseeched the parties to amicably settle the matter but the landline stand each has taken made the Applicant not able to cultivate the land and the Respondent not use the land for the reason he leased.

The Applicant has moved the court asking the court to vary/set aside and or vacate the aforesaid orders. I have read the application and heard the arguments by counsel in support and opposition of the same. The Applicant is seeking the court's intervention to help eke a living out of the land and move specifically on the planting season. The respondent is a cooperative entity and despite its lack of usage of the land in my mind will not be affected seriously as compared to an individual whose only source of income is the suit land.

In any event any loses that the Defendant will suffer can be compensated by way of damages.

In view of the above therefore I make the following orders:-

**1. That the preliminary objection dated 19<sup>th</sup> February, 2018 has no merit and thus dismiss the same with costs.**

**2. That the order of the court dated 20<sup>th</sup> February, 2017 is hereby varied in the following terms:-**

- **That the Defendant is allowed to use the land CIS MARA/NGORENGORE/46 during the current planting seasons beginning March, 2018 and upto 31<sup>st</sup> August, 2018 to enable him earn a living from the suit land.**
- **Each party to bear its costs for the application dated 21<sup>st</sup> March, 2018.**

**Mohamed Kullow**

**Judge**

**21/3/18**

**Dated, Signed and Delivered in open court at NAROK on this 21<sup>st</sup> day of March, 2018.**

**Mohammed Noor Kullow**

**Judge**

**21/3/18**

In the presence of:-

Mr Nchoe holding brief for CF Otieno for the Plaintiff

Defendant:present

CA:Chuma

**Mohammed Noor Kullow**

**Judge**

**21/3/18**