



**REPUBLIC OF KENYA**

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

**ELC NO. 450 OF 2017**

**IN THE MATTER OF REGISTRATION OF TITLES TO LAND BY ADVERSE**

**POSSESSION**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTION ACT**

**IN THE MATTER OF LAND PARCEL NUMBER LR. NO. MBOONI/KALAWANI/827**

**JEREMIAH WAMBUA.....PLAINTIFF/APPLICANT**

**VERSUS**

**PIUS MBENGEI MUSYOKI.....DEFENDANT/RESPONDENT**

**RULING**

- 1) The application before me is the one dated **6<sup>th</sup> October, 2017** and filed in court on the **9<sup>th</sup> October, 2017** for orders that:-
  1. The defendant or his servants be restrained from evicting the plaintiff, subdividing, or selling parcel no. Mbooni/Kalawani/827 pending the hearing and determination of the main suit.
  2. Costs do abide in the application.
- 2) The application is expressed to be brought under **sections 1A and 3B** of the Civil Procedure Act and **Order 40** of the Civil Procedure Rules. It is predicated on the grounds on its face and is supported by the supporting, further and further supplementary affidavits of **Jeremiah Wambua**, the applicant herein, sworn on the **6<sup>th</sup> October, 2017, 15<sup>th</sup> November, 2017** and **22<sup>nd</sup> January, 2018** respectively.
- 3) It is opposed by **Mbengei**, the respondent herein, vide his replying and further affidavits sworn on the **20<sup>th</sup> November, 2017** and **4<sup>th</sup> December, 2017** and filed in court on the **21<sup>st</sup> November, 2017** and **5<sup>th</sup> December, 2017** respectively.
- 4) On the **30<sup>th</sup> October, 2017**, the respondent filed a document which for all intent and purposes appears to be an affidavit though not clearly headed as one, the same having been sworn on the **30<sup>th</sup> October, 2017** at **Machakos**.
- 5) On the **22<sup>nd</sup> January, 2018** the court directed that the application be disposed off by way of written submissions. Consequently, the applicant and the respondent filed their respective submissions on the **12<sup>th</sup> February, 2018** and **8<sup>th</sup> February** respectively. I have read the submissions in question and they can be summarized as follows:-

§ That status quo be maintained pending the hearing and determination of the main suit. The applicant has met the threshold for the grant of injunction.
- 6) The respondent's submissions are that the interest of justice demands that the application be dismissed for being unmerited.
- 7) ***Giella vs Cassman Brown & co. Ltd [1973] EA 358*** has set out the principles upon which the grant of interlocutory injunction is to be based. These principles are:

a) **Prima facie case with probability of success**

b) **Interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not adequately be compensated in damages**

c) **That if the court is in doubt, it will decide application on a balance of convenience.**

8) Regarding the principle of prima facie case with probability of success, I do note that nowhere in the supporting, further and supplementary affidavits has the applicant shown that the respondent has threatened to evict him from land parcel number **Mbooni/Kalawani/827**. The applicant further prays that the respondent be restrained from subdividing or selling the said suit property. The respondent has in **paragraphs 7 and 22 and 23** of his replying affidavit deponed that he is the administrator of the estate of the late **Musyoki Mwini** and that having obtained a confirmation of grant, he cannot be restrained from subdividing the suit property to each of the beneficiaries named in the said grant marked as **PMM1**. I am persuaded by the respondent in that the confirmed grant has not been challenged. The respondent cannot be stopped from doing that which he has been authorized to do. To do otherwise would amount to this court sitting in appeal over another court of equal status. In the circumstances, I hold that the applicant has not shown this court that he has a prima facie case with probability of success.

9) Has the applicant shown that he might suffer irreparable injury which would not adequately be compensated by an award of damages? The answer is certainly not in that whatever developments the respondent has made on the suit property are quantifiable and thus he can be compensated. Even though the applicant has stated that he has established a matrimonial home on the said parcel of land, he has not shown that it is of such sentimental value that cannot be quantified. The applicant has failed to satisfy this principle as well.

10) This court is not in doubt and even if it were, the balance of convenience in any event tilts in favour of the respondent.

11) Arising from the foregoing my finding is that the application has no merit and same is dismissed with costs to the respondent.

Signed, dated and delivered at **Makueni** this **6<sup>th</sup>** day of **March, 2018**

**MBOGO C.G**

**JUDGE**

**In the presence of :**

Mr. Mutuve holding for Mr. Tamata for the applicant

Mr Muthiani holding for Mrs Nzau for the Respondent

Mr. Kwemboi Court Assistant

**MBOGO C.G**

**JUDGE**

**6/3/2018**