



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 282 OF 2017**

**JULIUS KYALO MUSYOKI.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH MUSAU MUSYOKI.....1<sup>ST</sup> RESPONDEN/DEFENDANT**

**ROSE NDUKU KILAVI.....2<sup>ND</sup> RESPONDENT /RESPONDENT**

**NOEL MULWA.....3<sup>RD</sup> RESPONDENT/RESPONDENT**

**RULING**

1) By his notice of motion application expressed to be brought under order 40 Rule 1 (a) of the Civil Procedure Rules 2010, the applicant prays for orders:-

**1. Spent**

**2. Spent**

**3. That the defendants be restrained either by themselves or through their agents, servants, employees or any one acting on their behalf from invading, encroaching, working on, construction on, using , alienating or in any other way interfering with part or whole of all that parcel of land known as Makueni/Kiou/1677 until hearing and determination of this suit.**

**4. That the defendants do pay costs of this application.**

The application is dated 9<sup>th</sup> January, 2017 and was filed in court on the 23<sup>rd</sup> May, 2017. It is predicated on the grounds on its face and is supported by the affidavit of Julius Kyalo Musyoki sworn on the 9<sup>th</sup> May, 2017. The application is opposed by the replying affidavits of Joseph Musau Musyoki, Rose Nduku Kilavi and Noel Mulwa , the first, second and the third respondents herein, all sworn on the 12<sup>th</sup> October, 2017 and filed in court on the 13<sup>th</sup> October, 2017.

2) This being an application for interlocutory injunction, the parties herein are agreed that the principles enunciated in the famous case of ***Giella vs Cassman Brown and company Ltd [1973] EA 358*** are applicable. Those principles are:-

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

**b) Interlocutory injunction will not normally be granted unless the applicant might suffer irreparable injury would not adequately be compensated by an award of damages,**

**c) If the court is in doubt, it will decide the application on a balance of probabilities**

3) The counsel for the applicant submitted that land parcel number Makueni/Kiou/1677 is registered in the name of the applicant. He went on to submit that the applicant has deponed in paragraph 2 and 3 of his supporting affidavit about how he acquired the title deed to the suit premises. He added that apart from the allegation that the title deed was obtained by fraud, the respondents have not shown their stake on the suit property. The counsel further submitted that the first respondent had deponed in paragraph 10 of his replying affidavit that the area was not registered in the registry at the time of their purchase of 1/8 of the land in Muani, Kiou Location. The counsel pointed out that if this was true, it would mean that demarcation and registration process was not yet done and the question would arise as to why the first respondent or the group did not lay claim over the land or raise objection during the survey, demarcation and registration exercise. The counsel relies on the case of ***William Omala Vs Dr. Oluoch Okeyo [2010] eKLR*** where the court held that where adjudication process is on, there is a machinery available for identification of rights under the Land Adjudication Act Cap 284 and that this is the procedure which the respondents should

have used if they allege that the land had not been adjudicated at the time the alleged transaction took place. The counsel added that the register is now closed and the respondents cannot question the title deed without filing proper proceedings and pointed out that in this suit, the respondents have not filed a counter claim.

4) The counsel attributed the failure to file objections due to the fact that the land had already been registered in which case consent from the land control board would have been required. The counsel cited the case *Elijah Kipkorir Barmalel Vs John Kiplagat Chemweno & Others [2010] eKLR* where the Court of Appeal restated the importance of the consent of the Land Control Board and held,

*“want of consent for any transaction listed in the Act will therefore render the transaction void and the only remedy under section 7 of the Act is for recovery of any valuable consideration as a debt”.*

The counsel pointed out that this is the situation that obtains in the suit herein since the alleged agreement, if any, touching on the suit land was a nullity by dint of sections 3(3) of the law of Contract Act as it was witnessed by one witness instead of at least two as is required.

5) The counsel further submitted that the alleged 1/8 of land has not been surveyed and no boundaries have been fixed and as such, the respondents who have threatened to invade the applicant's land are likely to affect the applicant's entire land thereby causing him irreparable damage. Lastly, the counsel submitted that the balance of convenience tilts in favour of the applicant.

6) On the other hand, the counsel for the respondents submitted that the applicant has failed to demonstrate prima facie case with probability of success and same should be dismissed with costs.

7) Having read the application together with the supporting and the replying affidavits as well as the submissions by the counsel on record, my finding is as follows:-

- On whether or not the applicant has shown a prima facie case with probability of success, there is a copy of title deed number Makueni/Kiou/1677 issued on 1<sup>st</sup> December, 2016 to one Julius Kyalo Musyoka annexed to paragraph 2 of the supporting affidavit. The respondents in paragraphs 5 and 10 of the first respondent's replying affidavit have deposed that there was sale agreement ( Mu-(a) and (b) ) between themselves and the applicant. They further indicated that at the time of entering into the sale agreement , the suit land was not registered in any land registry and hence there was no need to seek consent from the land control board to either subdivide or transfer the suit property. That being the case; it presupposes that the land was still under adjudication. I agree with the applicant's counsel that there was nothing to stop the respondents from filing their objection during the demarcation , surveying and registration exercise. Equity does not aid the indolent and as such, I am satisfied that the applicant has shown that he has a prima facie case with probability of success.
- On the issue of whether or not the applicant might suffer irreparable injury which would not adequately be compensated by an award of damages, I would agree with the applicant's counsel that the respondents cannot be allowed to enter into his land since the 1/8 of acre was not clearly identified in the agreement from which part of the suit property it was to be excised from. As such, it is clear that the applicant will suffer irreparable injury which cannot adequately be compensated in damages if the order for injunction is not granted.

8) I wish to state that this court is not in doubt and even if it were, the balance of convenience based on the affidavit evidence before me tilts in favour of the applicant. As such, I hold that the application has merits and I proceed to allow it in terms of prayers 3 and 4.

Signed, dated and delivered at **Makueni** this **1<sup>st</sup>** day of **March , 2018**

**MBOGO C.G**

**JUDGE**

**In the presence of :-**

Mr Muthiani holding brief for Mr. Nzaku for the Respondent

No appearance for B.M Musyoki for the applicants

Mr. Kwemboi Court Assistant

**MBOGO C.G**

**JUDGE**

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