



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 53 OF 2018**

**DISMAS NYONGESA NASURUTIA ..... PLAINTIFF**

**VERSUS**

**NELSON AMUGUNE LWAGO.....DEFENDANT**

**R U L I N G**

1. The applicant brought an application dated 24/5/2018 seeking the following orders:-

(1) .....(spent.)

(2) That this honourable court be pleased to issue an order of temporary injunction against the respondent restraining himself, his agents, servants, employees and/or any other persons claiming through him encroaching, trespassing and or in any other manner interfering with the plaintiff's/applicant's possession and occupation of his land known as Mung'oma Farm Plot No. 51 measuring 0.06 Hectares pending full hearing and determination of the application herein.

(3) That this honourable court be pleased to issue an order of temporary injunction against the defendant/respondent restraining himself, his agents, servants, employees and/or any other persons claiming through him encroaching, trespassing and or in any other manner interfering with the plaintiff's/applicant's peaceful possession and occupation of his portion of land known as Mung'oma Farm Plot No. 51 measuring approximately 0.15 acres pending full hearing and determination of this matter.

(4) That costs of the application be borne by the respondent.

2. The application is based on the grounds set out at the foot of the notice of motion as follows:-

(a) That the plaintiff/applicant is the registered owner of that parcel of land known as Mung'oma Farm Plot No. 51 measuring about 0.06 Hectares.

(b) That the plaintiff/applicant acquired and assumed possession, occupation and ownership of the suit land measuring 0.15 acres from the respondent herein on 4<sup>th</sup> June, 2006 when they had an oral agreement with the applicant to build a five roomed residential house for the respondent in exchange for the said land in question, a house that the applicant build and completed immediately in which the respondent lives upto date.

(c) That the plaintiff/applicant lived so peacefully on the suit land with the respondent for twelve (12) good years now until on 25<sup>th</sup> November, 2017 when he was summoned by the Assistant County Commissioner to his office in company of the Area Chief and the respondent herein who all together asked the applicant to sign on a document purportedly an agreement requiring him to pay the respondent Kshs.110,000/- being consideration for the extra 0.05 acres of land allocated to him.

(d) That on 25<sup>th</sup> April, 2018 the respondent without any justifiable cause whatsoever, color or right and without consent and/or knowledge of the plaintiff trespassed and or encroached on the applicant's land and sold the same.

3. The plaintiff's case is that he built a house for the defendant. In return for the work done the defendant gave him the parcel of land in question. Later on the defendant sold the parcel of land to another person.

4. The contract between the plaintiff and the defendant is said to have been oral. The defendant avers in his response that the plaintiff was a licensee who constructed for him a house for the sum total of Kshs. 70,000/= in terms of his labour and whom he paid Kshs. 30,000/= and that the plaintiff house that the he built on the defendant's land was for his occupation during the period of construction of the defendant's house.

5. Having regard to all the evidence before me I find that there were contractual relations between the parties regarding the construction of the defendant's house. It is ordinary for a landowner to avail accommodation for a person who is constructing a house for him. It is not natural for a land owner for whom a house has been constructed to give away his land in return for the construction of the house. And that is the observation that makes me look for more beyond the allegation of an oral agreement between the parties in this case to signify that there was an exchange of land for services rendered.

6. However, I have nothing to conclude that there was an agreement for the exchange of land between the two parties herein.

7. In my view the application before me amounts to only the plaintiff's word against the defendant's and it is not safe in the circumstances to grant an injunction on the basis of that weight of evidence.

8. I therefore find that the plaintiff has failed to prove that he has a prima facie case with probability of success.

9. Regarding the issue of loss I have not seen it demonstrated by way of evidence that the plaintiff would suffer loss that is not capable of being compensated for by way of damages.

10. I therefore dismiss the application dated **24<sup>th</sup> May 2018** with costs to the defendant.

Dated, signed and delivered at Kitale on this **17<sup>th</sup> day of July, 2018**.

**MWANGI NJOROGI**

**JUDGE**

**17/7/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Ndarwa for the defendant

Plaintiff in person present

**COURT**

Ruling read in open court.

**MWANGI NJOROGI**

**JUDGE**

**17/7/2018**