



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 3 OF 2017**

**AUGUSTINE BARASA KHISA NAWANJE....PLAINTIFF/APPLICANT**

**VERSUS**

**EUNICE MUGURE MUCHORI**

*(Suing as the Administrator of the Estate of the late*

**JOHN MUCHORI BAIYA).....DEFENDANT/RESPONDENT**

**R U L I N G**

1. By an application dated 22/3/2018 the plaintiff/applicant sought the following orders:-

- (1) That this honourable court be pleased to certify the application herein as urgent and service thereof be dispensed with in the first instance.
- (2) That pending the hearing and determination of this application interpartes, this honourable court be pleased to issue a temporary injunction to restrain the defendant, her agents, servants or any other person acting for or on her behalf from cutting trees, transferring and/or in any other manner changing the nature of Land Title No. Trans-Nzoia/Nyasi/30.
- (3) That pending the hearing and determination of this suit herein this honourable court be pleased to issue a temporary injunction to restrain the defendant, her agents, servants or any other person acting for or on her behalf from cutting trees, transferring and/or in any other manner changing the nature of Land Title No. Trans-Nzoia/Nyasi/30.
- (4) That the suit herein be fixed for hearing and disposal expeditiously owing to its urgency.
- (5) That costs be in the cause.
- (6) Any other further orders the court may deem fit and just to grant in the circumstances.

2. The grounds on which the said application is made are as follows:-

- (a) That the defendant holds the title to the suit land Title Number Trans-Nzoia/Nyasi/30 in trust for the plaintiff/applicant.
- (b) That the defendant has fenced off the land and started demolishing the plaintiff's houses on the said land without a court order.
- (c) That the defendant has also started harvesting and/or destroying the plaintiff's trees on the said land yet the main suit herein has not yet been determined.
- (d) That the defendant is also in the process of disposing the suit land herein to other people having already brought purchasers to the said land for viewing
- (e) That the defendant is determined and intends, unless restrained by this court to dispose of the suit land and which is the subject matter of this suit yet the suit herein is yet to be determined.
- (f) That the no prejudice shall be visited upon the defendant herein if the orders sought are granted.

**(g) It is just and fair that the orders sought be granted.**

3. The application is supported by the affidavit of the plaintiff/applicant dated 22/3/2018. In that affidavit it is averred that the plaintiff is the legal and beneficial owner of the suit land. The grounds that have been set out at the foot of the application are also reiterated in the supporting affidavit. However what emerges is that the plaintiff is not in possession of the land as at the time of the making of the application and he is still not in possession. The defendant is the registered owner and she is now in possession.

4. In his plaint the plaintiff states that he learnt from the ground report dated 16/5/2016 from the Ministry of Lands Housing and Urban Development that the suit land was transferred to the defendant's late husband on 4/7/1991. He alleges fraud in the registration of the defendant as owner. It must be noted that fraud is normally proved at the hearing of the substantive suit. The plaint seeks a declaration that the suit land belongs to the plaintiff among other prayers.

5. The plaintiff avers that the defendant has fenced off the land and commenced the demolition of the plaintiff's structures which were upon the said land as well as harvesting the trees thereon.

6. In reply to the application the defendant/respondent filed a replying affidavit dated 9/4/2018. She states that a similar application was dismissed by this court earlier in this matter, that the plaintiff has failed to fix his case for hearing after that ruling and came up with this application seven months down the line, that she is the absolute registered owner, that the land formed the estate of her husband of which she is administratrix, that all the procedures leading up to the transfer of the land to the her deceased husband had been followed, that the land was transferred to the deceased following the approval of the Land Control Board, that the claim that she was in the process of demolishing houses on the said land were addressed in the earlier dismissed application, that the houses do not belong to the plaintiff and that her title to the land is indefeasible.

7. I have considered the application before this court and I find that there was a previous application in this very suit dated **4/4/2017** in seeking an injunction against the defendant. That application was dismissed with costs on **28/9/2019** on the ground that the plaintiff had not established a prima facie case against the defendant. this court stated as follows in that ruling:-

**“The rights of a registered proprietor are protected by law, and are only subject to leases charges and other encumbrances and to the conditions and restrictions shown in the register and to such liabilities, rights and interest as affect the same and are declared by Section 28 of the Land Act not to require noting on the register unless the contrary is expressed in the register. None of these rights are claimed herein**

**Though the plaintiff claims fraud in the plaint, it is subject to proof at the main hearing of the suit. However the claims of fraud herein appear quite weak; the plaintiff himself acknowledges that the land was transferred to the defendant's deceased husband in the year 1991 while the decree he has is dated December, 1992. The seller had also refused to sell the land to the plaintiff. The defendant's late husband had also not been made a party in Kitale SRMC No. 181 of 1991 Augustine Barasa Nawanje -vs- Stephen Fwamba.**

**In my view, all the circumstances analysed above do not reveal the plaintiff has a prima facie case with probability of success against the defendant and there is no need therefore to go into the second test for the grant of a temporary injunction laid in the celebrated case of Giella -vs- Cassman Brown quoted above”.**

8. This application does not appear much different from the dismissed application. The question the court must ask itself is if there is anything new in the current application that may make it take a different view from that held in the dismissed application.

9. In my view, having outlined the history of the matter and found the plaintiff's claims of fraud to be rather weak in the dismissed application, and having outlined the rights of a registered proprietor in that ruling, it would not be property to arrive at an incongruent holding in this application solely on the basis of the material in the supporting affidavit to the instant application.

10. It suffices is that this court has already found before in another application that the plaintiff has not established a prima facie case.

11. However, even with all that said, there would be little harm in having the current status of the land maintained pending the hearing and determination of this suit.

12. Having said enough, I order that the defendant shall maintain the status of the land as it currently is pending the determination of this suit. This suit shall be set down for hearing on a priority basis. It shall be mentioned on the **31<sup>st</sup> July 2018** for the purpose of issuance of pretrial directions.

**Dated, signed and delivered at Kitale on this 18<sup>th</sup> day of July, 2018.**

**MWANGI NJOROGI**

**JUDGE**

**18/7/2017**

Coram:

Before - Mwangi Njoroge Judge

Court Assistant - Collins

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**18/7/2018**