



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 185 OF 2017**

**DISMAS NAMITI.....PLAINTIFF**

**VERSUS**

**BASALE FARMERS COOPERATIVE SOCIETY.....1<sup>ST</sup> DEFENDANT**

**ELIAS SITATI WANJALA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application dated 27/11/2017 has been brought by the plaintiff. It seeks the following orders:-

(a) That while pending the inter partes hearing and determination of the application herein, this honourable court be pleased to issue a temporary injunction restraining the defendants their agents and servants from occupying, cultivating, disposing, charging or in any other manner whatsoever interfering with the applicant's user of the land occupied by him and comprised in Titles Nos. Kimondo/Kimondo Block 5/Basale 122 (1.565 Hectares) as well as part of Title No. Kimondo/Kimondo Block 5/Basale 117.

(b) That upon interpartes hearing of the application, the temporary injunction be extended pending the hearing and determination of the pending suit.

(c) That costs be in the cause.

2. The applicant has brought the application under *Sections 1A, 3, 3A and 63(c)* of the *Civil Procedure Act* and *Order 40 Rules 1 and 4 and Order 51 Rules 1 and 2* of the *Civil Procedure Rules 2010*. The application is supported by the sworn affidavit of the plaintiff.

3. The grounds upon which the application is made are contained at the foot of the application. They are that the plaintiff and the 2<sup>nd</sup> defendant have been members of the 1<sup>st</sup> respondent's society which was the beneficial owner of the land comprised in **LR. Nos. 5565/7, 6472 and 6653** and which parcels had been bought by funds raised by the society members; that during or about 1975 and pursuant to the subdivision of the society land, the applicant was allocated a **Plot No. 17** measuring **5.2 acres** with a road separating the said plot into two. Whereas one portion measured **4.1 acres** the other one measured **1.1 acres**. Vide *Nairobi Cooperative Tribunal Case No. 7 of 2005* the 1<sup>st</sup> (*Basale Farmers' Cooperative Society -vs- Dismas Namiti*) respondent sought the expulsion of the applicant from the membership of the society as well as his eviction from the 5.2 acres parcel of land. The applicant contested the claims and counterclaimed for a permanent injunction to restrain the 1<sup>st</sup> defendant herein from any further interference with his Plot No. 17. Vide its judgment of 23/6/2007 and against which there was no appeal, the tribunal dismissed the 1<sup>st</sup> defendant's suit with costs and allowed the applicant's counterclaim. It ruled that the applicant was a member of the society and further permanently enjoined the 1<sup>st</sup> respondent society through its then or future officials from interfering with the applicant's Plot No. 17 or any other number that could be allocated to that parcel; that the 1<sup>st</sup> respondent in total disregard of the subsisting Tribunal judgment of 23/05/2007, submitted an area list to the Department of Surveys and the Chief Land Registrar for titling purposes that totally excluded the applicant. According to the Registry Index Map that got prepared, the applicant's portion measuring 4.1 acres was given No. 122 while the portion measuring 1.1 acres was amalgamated with the 2<sup>nd</sup> respondent's land to create parcel No. 117; that on the 24/5/2017 the 1<sup>st</sup> defendant obtained title for **Kimondo/Kimondo Block 5/Basale/22** in its own name and the same being the 4.1 acre parcel (part of Plot No. 17) that the Tribunal awarded to the applicant herein; that on the 24/5/2017 the 2<sup>nd</sup> defendant obtained title for **Kimondo/Kimondo Block 5/Basale 117** and which parcel included the applicant's 1.1 acre portion that partly comprised Plot No. 17. It is stated that the issuance of title Nos. **Kimondo/Kimondo Block 5/Basale 122 and 117** has totally deprived the applicant of his 5.2 acre piece of land and also that the registration was obtained fraudulently and in violation of a subsisting order and which was never appealed against.

4. In a ruling on the preliminary objection filed in the instant suit this court earlier stated as follows:

*“The jurisdiction of this court as can be seen from the said Section is quite broad, and as I have stated before in this ruling, when the Tribunal was handling the expulsion and eviction dispute, that preceded this suit, there was no title issued in favour of the defendants then. The plaintiff’s grievance in this suit has arisen after a decision was made by the Tribunal and it has been apparently prompted by a violation of the terms of the Tribunal decision by the defendants. However what matters in this application is that the Co-operative Society was formed for the purpose of acquiring land for its members and the plaintiff is not here about mere membership but about a parcel of land he has been occupying, he is threatened with eviction from, and in respect of which fraud is alleged against the defendants for the manner in which they acquired title to the said parcel. This, to me, is not an abstract or theoretical problem but an issue relating to real property and this court is in my view the appropriate forum having a higher jurisdiction for the parties to ventilate their cases, which supersedes that of the Co-operatives Tribunal.*

*Besides, the powers of the Tribunal, as submitted by the plaintiff, may not extend to cancellation of title. The plaintiff has relied on the cases of Machakos ELC No. 7 of 2003 - Luis Muthini Kitonyi -vs- Konza Ranching & Co-operative Society Ltd, Nyeri ELC No. 545 of 2014 - Kennedy Kimani Ndarwa -vs- Methi & Swani Farmers Co-operative Society Ltd & Another and Eldoret ELC Petition No. 2 of 2013 - Mohamed Said -vs-County Council of Nandi & Another. I approve of those decisions.”*

5. In my view, it is unnecessary to go beyond the dicta of the court in the above mentioned passage in determining whether the plaintiff has established a prima facie case. In my view, he has. There is also clear evidence from the record that if the orders sought are not granted the plaintiff may suffer irreparable injury.

6. Even if the above were to be later found to be an erroneous conclusion, this court prefers to hear this matter on the merits and the defendants have demonstrated that they are almost ready for the hearing by filing their defence and list of documents.

7. I therefore grant the application dated 27/11/2017 and I hereby issue a temporary injunction restraining the defendants their agents and servants from occupying, cultivating, disposing, charging or in any other manner whatsoever interfering with the applicant’s user of the land occupied by him and now comprised in **Titles Nos. Kimondo/Kimondo Block 5/Basale 122 (1.565 Hectares)** as well as part of **Title No. Kimondo/Kimondo Block 5/Basale 117** pending the hearing and determination of the main suit herein.

8. The costs of the application shall be in the cause.

Dated, signed and delivered at Kitale on this 19<sup>th</sup> day of September, 2018.

**MWANGI NJOROGE**

**JUDGE**

**19/9/2018**

Coram: Before Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Kiarie for plaintiff

N/A for the defendant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**19/9/2018**