



**REPUBLIC OF KENYA**

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

**ELC CAUSE NO.565 OF 2017**

**KIRUTA NKARIO KONCHELLA.....PLAINTIFF**

**VERSUS**

**MENSA NAIGEYO KENDEYA.....1<sup>ST</sup> DEFENDANT**

**BENKI OLE NAIGEYO.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Application before me is the Notice of Motion dated 12<sup>th</sup> October, 2018 brought under order 40 Rule 1, 2 and 3 of the Civil Procedure Rules wherein the Applicant seeks for an order of injunction restraining the Defendants from trespassing into cultivating, grazing fencing and/or building on the parcel of land known as TRANS MARA/ENAENYIENY/881 and costs of the Application.

The Application is based on the grounds that the Applicant is the registered owner of the suit land by virtue of that he is entitled to exclusive and absolute rights of use of the same. The Applicant states that the Respondents have trespassed on the suit land and started cultivating the same and that this shall cause him irreparable loss and damage and hence he seeks the court's intervention to stop the same. The Application was also supported by the Affidavit of the Applicant in which he has annexed to the said affidavit a copy of his title.

The Applicant in his Affidavit avers that the Respondent has without any authority trespassed on the suit land and started cultivating the land.

The Application was opposed by the Respondent who had filed a replying affidavit and they contend that they entered into a sale agreement with the Applicant herein and they later together with the Applicant engaged a surveyor who fixed beacons and the Applicant handed over vacant possession of 10 acres of land he purchased.

The Respondent further aver that he purchased 2 more acres of land from the Applicant which the Applicant promised to be curved out once he obtained title.

The Respondent further contend that he has been in occupation of the land for the last 26 years and he has cleared bushes, cultivated the same and fenced the land and further that the Applicant's parcel has remained in his name after he was issued with title for the 10 acres that he purchased.

I have read the application before me and the submissions filed by counsel. Since the Application before me is for injunction the grounds for granting the same have already been established and is settled.

In the instant Application, I find that the Applicant has not established a prima facie case with a probability of success. It is not in dispute that the Applicant had sold a portion measuring 10 acres to the Respondents which the Respondents have been in possession and occupation and the same registered in the Respondents name.

I don't see how I can be able to issue an order of injunction against a person over a portion of land he lawfully purchased and has been in occupation for 26 years.

Further to the above the Applicant in the instant case is guilty of non-disclosure of material fact which in his application he did not disclose to the court that he sold a portion of land to the Respondents. This being a court of equity, a party must come before it with clean hands and where one does not, he should not expect to benefit from equity.

From the above I find that the application before me lacks merit and I therefore dismiss the same with costs.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 16<sup>th</sup> day of October, 2018.**

**Mohamed N. Kullow**

**Judge**

**16/10/18**

In the presence of:

Ms.Meingati holding brief for Onduso for the Defendant

Ms. Saika holding brief for Koske for the Plaintiff

CA:Chuma