



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 85 OF 2018

MICHAEL NYONGESA.....PLAINTIFF

VERSUS

STEVEN ODERO.....DEFENDANT

RULING

1. The plaintiff filed an application dated 31/8/2018. The orders sought in that application by the plaintiff are replicated herein verbatim :-

(a) That an order be issued declaring the applicant as the absolute and rightful owner of the land parcel known as Kolongolo/Kolongolo Block 4/Kolongolo 'A'/803 and that he be allowed to deal with the land and continue with the construction of his family house.

(b) That an injunctive order be issued restraining the respondent and his agents or assigns from preventing the applicant from accessing, occupying and using the land parcel known as Kolongolo/Kolongolo Block 4/Kolongolo 'A'/803 pending the hearing and determination of this application.

(c) That injunctive order be issued restraining the respondent and his agents or assigns from continued occupation of the land parcel known as Kolongolo/Kolongolo Block 4/Kolongolo 'A'/803 pending the hearing and determination of this application

(d) That an order restraining the respondent and his agents or assigns from entering, interfering with and/or in any other manner whatsoever dealing with the suit land pending the hearing and determination of this application and the main suit.

(e) That this honourable court be pleased to issue a permanent injunction to restrain the respondent and his agents or assigns from entering, interfering with and/or in any other manner whatsoever dealing with the suit land.

(f) That the OCS Kwanza Police Station to oversee the implementation of these orders

(g) That the respondent to meet the costs of this application.

2. The application is brought under *Section 1A, 3 & 3A, 63 (e) of the Civil Procedure Act, Order 22 Rule 22(1), Order 50 Rule 6, Order 10 Rule 11 of the Civil Procedure Rules and Article 23, 41 of the Constitution of Kenya 2010.*

3. The application is premised on the grounds that the applicant is the registered owner of parcel of land known as **Kolongolo/Kolongolo Block 4/Kolongolo 'A'/803** measuring 0.04 Ha situated at Kwanza Sub-County within Trans-Nzoia County; that the applicant lawfully purchased a parcel of land from **Johnson Ngereso** and a further parcel from **Kolongolo Farmers' Co-operative Society (KFCS)** and that the parcels of land were adjacent to each other and add up to 0.04 Ha and which he was issued with one title deed number **Kolongolo/Kolongolo Block 4/Kolongolo 'A'/803** upon survey and mutation; that the applicant and his sellers agreed that payment of the consideration to be made in instalment and which were done between the year 2007 and 2017; that the applicant, prior to issuance of title deed and preceding processes, the respondent was illegally and unlawfully occupying a portion of the suit land on which he had erected some temporary structures and the respondent has since continued in unlawful occupation of the said portion of the suit land denying the applicant rights of access, use and enjoyment, and right to lawful ownership and peaceful occupation and as a result the plaintiff has suffered immense loss and damage; that the actions of the respondent amounting to voluntary intrusion onto the portion of the suit land owned by the applicant are unlawful, illegal and amounts to abetting the diminution of title held by the applicant and trespass; that the respondent's actions have rendered the applicant homeless and landless which has subjected him to adjacent poverty, destitution and lack of peace of mind; that the applicant has been residing on a temporary structure which has exposed him to and his family to risk of contracting diseases associating with cold weather and heavy rains and further, as a result of heavy rains, the applicant is apprehensive that the structure is likely to collapse and has since moved to a rental house for which he is facing difficulties in servicing the monthly rent; that the applicant stands to suffer irreparable should the respondent be allowed to continue in illegal occupation of **Kolongolo/Kolongolo Block 4/Kolongolo 'A'/803** and that

the application has been brought timeously and without undue delay.

4. The application is supported by the sworn affidavit of the plaintiff also dated **31/8/2018**.

5. The defendant/respondent filed his sworn replying affidavit on **2/10/2018**. He averred that he is a member of Kolongolo Co-operative Society Limited and that he has occupied the suit land since 2004 after buying it from one John Linyulu; that he has developed and improved the land; that the plaintiff was wrongly registered as the owner of the said plot which facts has been confirmed by the society; that this court has no jurisdiction to determine this matter and that he has never been served with pleadings in this matter.

6. The plaintiff's submissions in respect of the application were filed on **11/10/2018**. The defendant submissions were filed on **23/10/2018**. I have considered the parties submissions.

7. In the plaintiff's submission it is averred that the plaintiff is the absolute proprietor of the suit land referred to as **Kolongolo/Kolongolo Block 4/Kolongolo 'A'/803**. The plaintiff has annexed title to the land as **Exhibit "MN6"** in his supporting affidavit which is registered in his name. The same was issued on **5/7/2017**.

8. The plaintiff avers that the society does not dispute his title, that there are no inhibitions cautions or restrictions registered against the title and that the illegal occupation of the land is rendering the plaintiff's family destitute hence the need for an injunction. He cites the case of **Hoffman LaRoche & Company Industry -vs- Secretary of State for Trade and Industry 1975 AC 295, Vic Preston Muriithi Ruchabi -vs- Mary Wangare & Other 2018 eKLR and Panari Enterprises Ltd -vs- Lijoodi & 2 Others 2014 eKLR**.

9. The defendant's submission is that the plaintiff's application does not satisfy the condition of a grant of injunction set in **Giella -vs- Cass Brown**. He avers that he has been in occupation of the suit land and that the applicant seeks his eviction through the back door. He maintains that the court lacks jurisdiction to entertain this matter.

10. The issue of jurisdiction is to be dealt with first. None of the parties have addressed the issue of jurisdiction in depth; for the plaintiff it is understandably because he is the one who has come to law and relies on the decision of this court to uphold his position. This court must nevertheless consider that the last submission of the defendant is that "both the plaintiff and the defendant are members of a co-operative society.....we contend that the court lacks jurisdiction in this matter".

11. The defendant's submission must no doubt arise from the provision of **Section 76 of Act 490** which this court addressed in similar circumstances in the case of **Dismas Namiti -vs- Basale Farmers' Co-operative Society Kitale ELC No. 175 of 2017**, and in **Stanley Misigo Maunda - Kitale ELC 175 of 2017**.

12. In the **Dismas Namiti** case an objection was raised that the jurisdiction to handle a dispute raised against a society should have been lodged the co-operative tribunal. The court in that case held that it had jurisdiction.

13. However it is noteworthy that the dispute herein is between members of a co-operative society. The question is whether that dispute is exempt from the provisions of **Section 76 of the Act Cap 490. Section 76 (1) (a)** of the Act stipulates as follows:

(1) If any dispute concerning the business of a co-operative society arises-

(a) among members, past members and persons claiming through members, past members and deceased members;
or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society, it shall be referred to the Tribunal.

(2) A dispute for the purpose of this section shall include-

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

14. I find that the defendant has not persuaded this court that there is a dispute within the meaning of the definition set out in **Section 2** as follows of the Act and this objection is therefore overruled.

15. However in my view as the matter herein involves land, there is no difference between this dispute and the one in **Dismas Namiti** case and I find that this court has jurisdiction.

16. It is observed that the grant of **prayer No. 2** and tantamount to determining the rights of the parties which are otherwise sought to be determined by the plaintiff.

17. **Prayers 3, 4 and 5** expressly seek injunctive orders yet the plaintiff acknowledges that the defendant is in possession of the suit premises.

18. The orders sought by the plaintiff are drastic in nature and may result in a mandatory injunction at interlocutory stage of this suit which is discouraged by courts.

19. In the oft quoted case of *Beatrice Ngina Mwai & Another -vs- Gichine Mwai & Another 2010 eKLR* the court cites the case of *Shariff Abdi Hassan -vs- Nadhif Jama Adan C.A. No. 121 of 2005 (unreported)* where the Court of Appeal restates the position that:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”.

20. This position has not changed.

21. I find that the applicant’s application has no merits and the same is hereby dismissed with costs.

Dated, signed and delivered at Kitale on this 29th day of November, 2018.

MWANGI NJOROGE

JUDGE

29/11/2018

Coram:

Before -Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

N/A for the defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

29/11/2018