



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 82 OF 2018**

**MARTIN MACHARIA KAMAU.....APPLICANT/PLAINTIFF**

**VERSUS**

**PETERSON NJORGE.....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**KITALE LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT/DEFENDANT**

**R U L I N G**

1. The amended Notice of Motion dated 5/9/2018 has been brought by the applicant/plaintiff. It seeks the following orders:-

a. That this honourable court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents by themselves, agents, servants and/or any other body claiming through them from developing, trespassing, constructing, selling, charging, disposing-off, transferring, letting, leasing alienating or tampering with the register and/or in any other manner interfering with all that parcel of land LR. No. Kitale Municipality Block 2/Tuwan/2756 until hearing and determination of this application.

b. That this honourable court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents by themselves, agents, servants and/or any other body claiming through them from developing, trespassing, constructing, selling, charging, disposing-off, transferring, letting, leasing alienating or tampering with the register and/or in any other manner interfering with all that parcel of land LR. No. Kitale Municipality Block 2/Tuwan/2756 until hearing and determination of this suit.

c. That this honourable court be pleased to issue an order directing and/or compelling the Registrar of Land - Kiambu Kitale to withdraw caution and restriction placed by the

d. That costs be provided for.

2. The applicant has brought the application under *Order 40 Rules 1, 2, 3 and 9 Order 51 Rules 1 and 4 of the Civil Procedure Rules, Section 133(1) of the Registered Land Act No. 12 of 2012 Laws of Kenya.*

3. The grounds upon which the application is made are contained at the foot of the application. In brief they are that the applicant is the registered proprietor of l r number having bought the same for consideration; that the respondent has placed an unlawful caution on the suit land; that through malice on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, a restriction has been placed over the title to the suit land for undisclosed reasons thus restricting the applicant from transacting using the land and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have blatantly refused or neglected to withdraw the caution and restriction on the title deed. It is alleged that the applicant has suffered untold loss damage and mental anguish. These grounds have been substantially reiterated in the supporting affidavit dated 5<sup>th</sup> September 2018 which substantially has the same contents as the supporting affidavit sworn by the plaintiff on the 15<sup>th</sup> August 2018.

4. In the further affidavit of the plaintiff filed on the 29<sup>th</sup> august 2018 the deponent states that he paid survey fees to the office of the Chief Tuwan, and complied with all the requirements from the land registry in respect of the suit land; that he is in occupation of the premises and that various correspondences have been written to the 1<sup>st</sup> respondent by the plaintiff's advocates demanding removal of the caution to no avail.

5. The replying affidavit of the 1<sup>st</sup> defendant sworn on 19/9/2018 was filed on the same day. It states that the app;licasnt has unclean hands and is undeserving of equitable orders, that the caution protects his interests as he and the applicant are joint owners of the suit land; that he

purchased the property while it had not yet been allocated a number; that allowing the application will allow the main suit to be finalised at the interlocutory stage; that the applicant is under no risk as the only way the 1<sup>st</sup> respondent can deal with the land is restricted to lodging of a caution; that the orders sought would be in vain; and that the applicant bought the other owners of the land out and failed to buy out the 1<sup>st</sup> respondent.

**The response of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.**

6. I have perused the entire record and I have found no response filed on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**Submissions.**

7. The plaintiff filed his written submissions on **27/9/2018**. I have perused through the record and I have found no submissions on the application filed on behalf of the respondents.

8. I have examined the plaint and the application before me and I find that the main issue in the main suit is whether or not the caution and the restriction lodged respondents against the suit title should be removed by an order of this court.

9. It is my view that prayer number 4 of the notice of motion now under consideration is not merited for the reason that, as argued by the 1<sup>st</sup> respondent, issuance of an order of the nature sought therein would finally determine the suit at an interlocutory stage. In the case of **Stephen Kipkebut T/A Riverside Lodge and Rooms vs. Naftali Ogola [2009] EKLR** the court held that an order which results in the granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage.

10. However prayer number 3 seeks an injunction and I must consider it in depth to establish if the applicant has demonstrated that he merits the injunction sought.

11. In this regard I note that the applicant's affidavit states that the applicant is in occupation of the suit land. The 1<sup>st</sup> respondent's reply in this issue is the one that matters; the other respondents are only sued as the custodian of the register and the issue of occupation does not concern them. The 1<sup>st</sup> respondent however does not assert that he is in occupation of the suit property in his replying affidavit. The fact that the applicant is in possession of the land is also not denied. The defence of the 1<sup>st</sup> defendant does not deny those facts also, but it pleads fraud and misrepresentation to the 2<sup>nd</sup> respondent on the part of the applicant. I am of the view that it is admitted that the applicant is in possession of the suit property and has title and therefore he has established a prima facie case.

12. In my view having regard to the pleadings, the allegations of fraud have yet to be proved at the main hearing of the suit. As long as the applicant is the registered owner of the land he is entitled to the protection of this court through an injunction to prevent any interference with his possession of the land.

13. However as the title held by the applicant is under challenge by the 1<sup>st</sup> respondent it is my view that an order of injunction as per prayer number 3 in the notice of motion while unaccompanied by an order that protects the defendant's right to ventilate the serious issues of fraud raised in the 1<sup>st</sup> defendant's counterclaim would also leave the land exposed.

14. I am of the view that the existence of the caution and the restriction registered over the title to the suit land suffice to check the plaintiff's ability to dispose of the suit land while the suit is still pending.

15. I am also of the view that as the 1<sup>st</sup> defendant has shown no title registered in his name, no interference with the suit land by the 1<sup>st</sup> respondent should be allowed before the allegations of fraud are firmly established at the hearing of the main suit. Any interference of that nature may harm the applicant but not on a scale that would not be capable of being compensated for by way of an award for damages.

16. In the final analysis I find that the plaintiff's application, having not met the second condition laid down in the celebrated case of **Giella Vs Cassman Brown**, can only be determined on the balance of convenience.

17. In my view the proper balance of convenience to all the parties is that the injunction prayed for in prayer number 3 be granted but that the caution and restriction registered against the title should remain in place first, so as to avert the premature conclusion of this suit and secondly, to balance against the liberty that would otherwise enable the plaintiff to dispose of the suit land during the pendency of this suit.

18. The amended notice of motion dated **5<sup>th</sup> September 2018** is therefore granted but only in terms of **prayer number 3**. The costs of the application shall be in the cause.

**Dated, signed and delivered at Kitale on this 14<sup>th</sup> day of November, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**14/11/2018**

Coram:

Before -Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Munialo for 1<sup>st</sup> defendant/respondent

N/A for the plaintiff

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**14/11/2018**