



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 18 OF 2017**

**RICHARD KHAMALA WAFULA .....PLAINTIFF**

**VERSUS**

**DISMAS WAFULA.....1<sup>ST</sup> DEFENDANT**

**BENARD WAFULA..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

By an application dated **8/2/2017** the plaintiff/applicant sought an order that the defendants be restrained by way of a temporary injunction from entering, constructing, claiming or in any other way using the **5 acres** situated on **Plot No. 86 Gidea** belonging to the applicant pending the hearing and determination of this suit.

The application is premised on the grounds that the applicant is the “legal owner” of **5 acres** situated in **Plot No. 86 Gidea** and that he has been using the said land since **2004**. Further the defendants on **20<sup>th</sup> January, 2017** trespassed on the applicant’s said land and chased away the applicant’s agents claiming ownership of the land.

The applicant stated in his affidavit that he had been leasing the said land to third parties. However on the **20<sup>th</sup> January, 2017** the defendants chased away the agent of the applicant from the land. He avers that he purchased the land in the year **2004** from one **A.A.A. Ekirapa** though the defendants executed the land purchase covenant on his behalf.

The **1<sup>st</sup>** defendant responded to the application by way of the sworn affidavit sworn on **14<sup>th</sup> February, 2017**. He denies that the plaintiff ever bought 5 acres of land, and avers that there is no express authority executed by the applicant granting the respondents power to sign documents on the applicant’s behalf. The **1<sup>st</sup>** respondent denies that the land is owned by the applicant and asserts that he owns it. He further avers that the plaintiff has never set foot on the land.

However I have noted that the plaintiff is silent in respect of exhibits “**RKW2**” and “**RKW3**” annexed to the affidavit of the applicant in support of the application. The **1<sup>st</sup>** respondent does not also attach any supporting documents to his affidavit to prove his statements. His statements amount to a mere denial of the applicants averments which are supported by documentary evidence.

The allegation that the applicant has never set foot on the land does not aid the **1<sup>st</sup>** respondent’s defence at all; it is noteworthy that it is part of the applicant’s case that he has been using agents in respect of transaction in respect of the land and that the respondents have chased them away. The **1<sup>st</sup>** defendant

acknowledged that he has other land nearby.

It is clear from the sketch map that the plot said to belong to the applicant is distinct and separated from the plot said to be owned by the 1<sup>st</sup> respondent. Further, a copy of a letter from Waruhiu K'Owade & Nganga Advocates identifies one "Richard Khamala" as having entered into an agreement with one Hon. A.A.A. Akirapa for purchase of 5 acres from Plot No. 86 Gidea Settlement Scheme.

The material adduced by the applicant at this interlocutory stage of these proceedings is in sheer contrast with the bare statements contained in the 1<sup>st</sup> respondent's replying affidavit. The said material is also not controverted by the 2<sup>nd</sup> respondent. There is strong probability that there could be some truth in the applicant's claim.

Injunctions are equitable remedies granted at the discretion of the court. An applicant must show a prima facie case with a probability of success. The applicant has demonstrated that he has a prima facie case with a probability of success.

An applicant must also show that he might otherwise suffer irreparable injury which would not be adequately be compensated by an award of damages. In the current case there is no material to show that the applicant might suffer irreparable injury that may not be compensated by an award of damages. However a third consideration was contemplated by the court in the case of *Giella -vs- Cassman Brown & Co. Ltd [1973 EA 358* where the court in addition to the above two principles stated that if a court is in doubt, it will decide the application on a balance of convenience.

Since the mere denial by the 1<sup>st</sup> respondent and the lack of response by the 2<sup>nd</sup> respondent are not sufficient to controvert the plaintiff's averments which are supported by documentary evidence, I find that the balance of convenience in this case tilts in favour of granting the order of temporary injunction sought.

For these reasons analyzed herein above, I hereby grant the applicant an order of temporary injunction to restrain the respondents and their agents from entering constructing on, claiming or in any other way using the 5 acres belonging to the applicant situated on **Plot Number 86 Gidea Settlement Scheme** until the hearing and determination of this suit. Costs of this application shall be in the cause.

Dated, signed and delivered at Kitale on this **21<sup>st</sup>** day of **February, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**In the presence of:**

**Mr. Wafula for the Applicant - present**

**Dismas Wafula, 1<sup>st</sup> Respondent in person - present**

**N/A for the 2<sup>nd</sup> Defendant**

**Court Assistant - Isabellah**

**MWANGI NJOROGE**

**JUDGE**

**21/02/17**