



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 429 OF 2016**

**JOEL KIVULA KING'OO .....PLAINTIFF**

**VERSUS**

**JOSEPH NGAI KITONYO ..... DEFENDANT**

**RULING**

The application under consideration is the plaintiff's Notice of Motion dated 26<sup>th</sup> April 2016 in which the plaintiff is seeking an order of injunction to restrain the defendant from entering, trespassing, damaging, interfering and/or carrying out any works howsoever in land parcel No. 49 Ngulu adjudication section (hereinafter "the suit property"). The plaintiff has also sought a further order that the OCS Kibwezi Police Station does ensure compliance by the defendant with the order.

The application is supported by the plaintiff's affidavit and supplementary affidavit sworn on 26<sup>th</sup> April 2016 and 21<sup>st</sup> June 2016 respectively. The plaintiff's case is that he is the registered owner of the suit property which he bought from Aron Muthama, Lucas Musyoki and David King'oo in 1989. The plaintiff has annexed to his affidavit a copy of certificate of ownership dated 21<sup>st</sup> December 2015 issued to him by the Kibwezi Sub-county Land Adjudication & Settlement Officer on 21<sup>st</sup> December 2015 confirming his ownership of the suit property. The plaintiff has also exhibited a sale agreement dated 12<sup>th</sup> June 1989 between the plaintiff and the immediate former joint owners of the suit property, Aron Muthama, Lucas Musyoki and David King'oo.

The plaintiff has stated that the said Aron Muthama, Lucas Musyoki and David King'oo bought the suit property from the defendant's deceased father, Stephen Kitonyo Nthuku (deceased) in 1984. The plaintiff has exhibited a copy of the sale agreement dated 8<sup>th</sup> September 1984 between the said Aron Muthama, Lucas Musyoki and David King'oo and the defendant's said father. The plaintiff has contended that he took possession of the suit property in the year 1989 soon after purchasing the same and enjoyed quiet possession until April 2016 when the defendant without any colour of right trespassed on a portion of the property with the intention of cultivating the same. The plaintiff has averred that the defendant has by use of violence prevented and denied him access to the suit property claiming that the land was sold by his father, Stephen Kitonyo Nthuku (deceased) cheaply. The plaintiff has stated that the suit property was surveyed in the year 1991 and demarcated in his name. The plaintiff has stated that the defendant did not raise any objection to his ownership of the suit property during his father's lifetime and that the defendant's actions complained of are unlawful and malicious.

In his supplementary affidavit, the plaintiff has stated that contrary to the defendant's assertion that his father had let the suit property to Aron Muthama, Lucas Musyoki and David King'oo, the defendant's father had sold the property to the said persons from whom he bought the property. The plaintiff has annexed to his supplementary affidavit, the affidavits of David King'oo and Samuel Wambua Kituku

both sworn on 21<sup>st</sup> June 2016 to show that the suit property was sold and not let to Aron Muthama, Lucas Musyoki and David King'oo. He has contended that the defendant has no legal capacity to claim the land in dispute on behalf of his deceased father since he is not the administrator of his father's estate.

The application is opposed by the defendant through a replying affidavit sworn on 21<sup>st</sup> May 2016 in which he has stated that the suit property is part of Plot No. 1729 Ngulu Adjudication Section which is registered in the name of his mother, Mutunge Kitonyo. The defendant has stated that his late father Kitonyo Nthuku was the original owner of the suit property and that he had let the same to Aron Muthama, Lucas Musyoki and David King'oo for purposes of horticultural farming. The defendant has denied that his father sold the suit property to the aforementioned persons and has contended that his father was illiterate and used to sign documents using a thumb print instead of a signature. The defendant has stated that the agreement dated 3<sup>rd</sup> September 1984 exhibited by the plaintiff is a forgery. The defendant has denied that the plaintiff had occupied the suit property and has contended that the plaintiff trespassed on the suit property in April 2016 when he brought a tractor to plough the same.

The defendant has also denied having used force and/ or unlawful means to deny the plaintiff's access to the suit property. The defendant has contended that the land in dispute is agricultural land and that no Land Control Board Consent was obtained as required by the Land Control Act when the same was purportedly sold by his father to those who sold the same to the plaintiff. The defendant has contended that he has planted trees on the disputed land where also he has been grazing cattle. The defendant has contended further that the plaintiff did not obtain consent from the area Land Adjudication Officer before instituting this suit and that the suit is an attempt to dispossess him of the land and as such is an abuse of the court process.

The application was argued orally before me on 11<sup>th</sup> July 2016 when only the plaintiff's advocate, Mr. Muia was present. In his submission, Mr. Muia reiterated the facts giving rise to the suit as set out in the plaint and the affidavits in support of the application and submitted that the defendant had in his replying affidavit referred to a parcel of land which was not in dispute and which the defendant claimed to belong to his mother. Mr. Muia submitted that the suit property was not let to Aron Muthama, Lucas Musyoki and David King'oo as claimed by the defendant. He submitted further that the plaintiff had been in continuous occupation of the suit property. On the issue of consent of the Land Adjudication Officer, counsel submitted that the adjudication process which took place in 1991 is complete and the plaintiff was waiting for the issuance of a title to the suit property. He submitted that the defendant did not raise any objection to the registration of the suit property in the plaintiff's name. Counsel submitted that the plaintiff has established a prima facie case with high chances of success and that it is necessary for the plaintiff who is in possession of the suit property to be protected.

What is before me is an application for interlocutory injunction. The principles upon which this court exercises its discretion in applications of this nature are now well settled. In the case of Giella vs. Cassman Brown and Co. Ltd. (1973) E.A 358 which was cited by the Plaintiff in support of his submissions, it was held that an applicant for a temporary injunction must establish:-

- (i) A prima facie case with a probability of success.
- (ii) That if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages and;
- (iii) If in doubt, the court shall determine the application on a balance of convenience.

In the case of Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125, the court defined a prima facie case as;

*“a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2others[2014]eKLR, the court stated that;-

*“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”*

The court went further to state that;

*“.....in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”*

I have considered the Plaintiff's application together with the affidavit and supplementary affidavit filed in support thereof. I have also considered the defendant's affidavit sworn on 21<sup>st</sup> June 2016 in opposition to the application. Finally, I have considered the submissions by the plaintiff's advocate. On the material before me, I am satisfied that the Plaintiff has established a prima facie case against the defendant with a probability of success. It is common ground that the suit property was originally owned by the defendant's deceased father, Kitonyo Nthuku. The plaintiff has placed convincing evidence before the court that he purchased the suit property from Aron Muthama, Lucas Musyoki and David King'oo in the year 1989. The plaintiff exhibited a sale agreement dated 12<sup>th</sup> June 1989 that he entered into with Aron Muthama, Lucas Musyoki and David King'oo in respect of the suit property. Clause 1 of the said agreement made reference to an earlier agreement dated 8<sup>th</sup> September 1984 between Stephen Kitonyo Nthuku on the one hand and Aron Muthama, Lucas Musyoki and David King'oo on the other hand. A sketch map of the land which was being sold was also annexed. In his supplementary affidavit, the plaintiff annexed the affidavit of Samuel Wambua Kituku sworn on 21<sup>st</sup> June 2016 in which he stated that he was a witness during the execution of the agreement between Stephen Kitonyo Nthuku and, Aron Muthama, Lucas Musyoki and David King'oo. The plaintiff contended that the suit property was adjudicated and demarcated in his favour in the year 1991. The plaintiff produced a letter from Kibwezi Sub-County Land Adjudication Officer dated 21<sup>st</sup> December 2015 confirming that the suit property was demarcated and recorded in his name during the land adjudication.

As I have mentioned earlier in this ruling, the defendant has contended that his father did not sell the suit property to Aron Muthama, Lucas Musyoki and David King'oo. He has contended that the land was leased to the said persons. There is no evidence placed before the court in support the defendant's assertion that his father leased the suit property to the said persons. The defendant's averment the agreement dated 3<sup>rd</sup> September 1984 is a forgery for reasons that his father was illiterate and did not append his signature on the agreement was also not supported by evidence.

I am satisfied that the plaintiff has established a prima facie case with high probability of success against the defendant. I am also satisfied that the plaintiff stands to suffer irreparable loss if the orders sought are not granted. The suit property was demarcated and recorded in the name of the plaintiff during the land adjudication process. The plaintiff is in possession of the same. The defendant's activities on the suit property complained of amount to dispossession of the plaintiff of the suit property. If the injunction sought is not granted, the dispossession would continue and the plaintiff would no doubt suffer irreparable injury which cannot be compensated in damages. See, the Court of Appeal case of George Orango Orago -vs- George Liewa Jagalo & 3 Others[2010]eKLR. For the foregoing reasons, I am satisfied that the plaintiff has satisfied the conditions for granting the interlocutory injunction sought.

The upshot of the foregoing is that the plaintiff's application dated 26<sup>th</sup> April 2016 is well founded. The same is allowed in terms of prayer 4 thereof. The plaintiff shall have the costs of the application. Due to the fact that the suit property is situated at Kibwezi in Makueni County, I hereby transfer this suit to Makueni Environment and Land Court for hearing and final determination.

**Delivered and Signed at Nairobi this 17<sup>th</sup> day of February, 2017.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Mutai h/b for Muia            for the Plaintiff

N/A                                        for the Defendant

Kajuju                                    Court Assistant