



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 21 OF 2017**

**DAVID CHEMWAMI MUKHWANA..... PLAINTIFF**

**VERSUS**

**SINGH RANDEEP..... 1<sup>ST</sup> DEFENDANT**

**PROMEO KIPKEMEI ISAAC..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The plaintiff filed a plaint dated 9/2/2017. Alongside that plaint he filed an application dated 9/2/2017 for interim orders. According to the plaintiff/applicant, he had leased **30 acres** from one **David Kipchirchir Muge** out of **LR. No. 9154-Koidilion Farm, Endebess** for a total of **Kshs.300,000/=**. He then took possession of the land. He started preparing the land for planting for the 2017 season. He states that on 2/2/2017 the defendants trespassed on the 30 acres he had ploughed and harrowed the same land. On 4/2/2017, they completed the harrowing work on the land. In the plaint the plaintiff seeks orders of declaration that the plaintiff is the rightful lessee of **30 acres** out of **LR. No. 9154 -Koidilion Farm, Endebess** for the year 2017, and an order of injunction restraining the defendants or their agents from trespassing on the land.

2. Two agreements dated 20<sup>th</sup> April, 2016 and 3<sup>rd</sup> May, 2016 are exhibited in the affidavit of the plaintiff sworn on 9/2/2017. The plaintiff in that affidavit avers that the defendants are likely to plant on the land and he would suffer irreparable if they did so.

3. A replying affidavit of the 1<sup>st</sup> defendant/respondent has been filed. The deponent avers that he and the 2<sup>nd</sup> defendant leased 50 acres of the land parcel described as **Provisional Block 12 in Koidilion Farm LR. No. 9154** by virtue of a lease agreement between the defendants and David Kipchirchir Muge whom he terms as the equitable owner and proprietor of the said property. This lease was entered into on 21/9/2016. A copy is annexed to the affidavit as exhibit "SK1". The 1<sup>st</sup> defendant avers that the defendants took possession of the land on 23/9/2016 after visiting the land and establishing beacons thereon. He denies any act of trespass. In their defence the defendants pray for an order for a declaration that they are the rightful lessees of 30 acres out of LR. No. 9154 Koidilion Farm Endebess for the year 2017.

4. The plaintiff filed a further affidavit on the 16<sup>th</sup> March, 2017. He states that by the time the respondents were leasing the land, he was in possession thereof. He denies that the defendants took possession on 23/9/2016. He avers that they did so on 2/2/2017. He avers that the respondents could not have been shown the land that he had leased because he had already taken possession thereof and ploughed it.

5. The question that arises is whether the applicant has shown that he has a *prima facie* case with

probability of success, whether he will suffer irreparable loss which may not be compensated in monetary terms, and, finally where the balance of convenience lies in considering whether or not to issue an injunction as sought by the plaintiff.

6. The defendants do not deny that the plaintiff/applicant was in possession of the land at the time that they went to harrow on 2/2/2017 and 4/2/2017. They are perfectly silent on this issue. They do not deny that the plaintiff's lease agreements were executed earlier than their lease agreement. They do not deny the serious flaws pointed out by the plaintiff in respect of their lease agreement, with regard to failure of execution by one party and the lack of date of attestation. The defendants also do not deny that the plaintiff is in possession of the 30 acres he leased from David Kipchirchir Muge.

7. What I understand the defendants to be saying is that they are not culpable for any act of trespass because they had a lease agreement with the owner of the land in respect of a portion of 50 acres. With due respect I disagree with this argument. If there is no denial of the plaintiff's lease agreement with the same owner, and the plaintiff leased the land before the defendants, and took possession of his leased portion before the defendants came to the farm, the tentative conclusion may be appropriately made, that the plaintiff had already acquired an interest in the 30 acres which he had already taken possession of. The defendants place much emphasis on the allegation that the plaintiff's interest in the land was not registered and hence they could not have known of the same at the time they entered into a lease agreement with the land owner. They also claim that the transaction between the plaintiff and the owner of the land, being a disposal of an interest in land in a controlled area, was void for want of a Land Control Board Consent. With due respect, the facts relating to the issue of want of consent were not raised in the pleadings filed on behalf of the defendants. They should not be raised at the submissions stage since they amount to an ambush of the plaintiff.

8. Besides, it would be an issue for this court at the hearing as to whether, in the absence of joinder of the owner of the land, any other party, being a lessee of a portion of the same land, may effectively raise the argument that there was no Land Control Board Consent. That issue should not, in view of the circumstances currently prevailing, be raised in this application.

9. I therefore find that the plaintiff has shown that he has a *prima facie* case with a probability of success.

10. Would the applicant suffer irreparable injury? The defendants make light of this issue by stating that the plaintiff's loss is quantifiable and capable of being atoned in damages. They cite **Section 7 of the Land Control Act** and argue that the plaintiff is entitled to a refund of the sum of Kshs.290,000/= which he had paid to the owner of the land as consideration for the lease. But is the issue as simple as the defendants put it? I doubt it. Investments do not only comprise of the seen, but also the unseen. By unseen is meant the plans, the strategies, the preparations that may not be so obvious to the eye that sees, for example the ploughed shamba, the renovated shop, the fully paid for matatu or the leased kiosk. Disregarding the legal provisions in **Section 7 of the Land Control Act** for a while and in my view it is appropriate to disregard it completely in this application since the same was not pleaded in defence, it would be improper to view sums of money paid as the sole expense in any named enterprise. The complexity of the modern world of finance and the growing difficulty of tracing increasingly scarce resources, including land, for investment may render any enterprise that would otherwise look simple and straightforward to become a great burden to any investor whose travails are only known to the self.

11. For this reason the simple answer raised by the defendants that a refund of Kshs.290,000/= to the plaintiff is panacea for the problem created by the concurrent leases is not acceptable at this juncture. In any event, it is not to be forgotten that between two equities of equal rank, the first in time prevails. I therefore find that there is likelihood that the plaintiff may suffer irreparable injury if the injunction is not granted and that the balance of convenience therefore lies in granting the injunction sought.

12. A temporary injunction will therefore issue to restrain the respondents, their agents or servants from trespassing onto, ploughing, harrowing, planting, or in any other manner interfering with the applicant's use of the 30 acres in LR. No. 9154 Koidilion Farm Endebess he has leased and of which he is in possession pending the hearing and determination of the main suit herein. Costs of the application shall

be borne by the respondents.

Signed, dated and delivered at Kitale on this **13<sup>th</sup>** day of **April, 2017**.

**MWANGI NJOROGI**

**JUDGE**

**Ruling delivered in the absence of the parties who were notified but failed to attend.**

**Court Assistant - Isabellah.**

**MWANGI NJOROGI**

**JUDGE**

**13/4/2017**