



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC NO. 75/2017**

**JOHN SILA NGANDA.....APPLICANT**

***VERSUS***

**ALFRED MUEMA MAKAU.....RESPONDENT**

**RULING**

1. There is before me a notice of motion application expressed to be brought under **Order 40 Rules 1,2(1) and (2) Order 51** of the Civil Procedure Rules and Sections **1A, 1B, 3A** of the Civil Procedure Act **Chapter 21** and all enabling laws for order's that the court be pleased to issue an order of injunction restraining the Defendant/Respondents by themselves committees members, agents and/or Servants from changing the registered owner of the suit land parcel **number 153** approximately **2.96 hectares Kiboko B** settlement scheme **Kibwezi** in the current registered which reads **John Sila Nganda** as the registered owner pending the hearing and determination of this suit and that the court be pleased to issue an order injunction restraining the Defendants/Respondents themselves, committee members, agents and/or servants from evicting the Applicant or trespassing, stepping foot, using , alienating, selling, transferring suit land parcel at **Land No. 153 approximately 2.96 hectares Kiboko "B"** settlement scheme in **Kibwezi** currently registered in the names of the **1<sup>st</sup> Applicant** pending the hearing and determination of this suit with costs of the application being borne by the Respondents. The application is dated 14/4/2016 and was filed on 13/4/2016.

2. Prayers 1,2 and 3 of the application are spent. The application is predicated on the grounds on its face and is supported by the affidavit of **John Sila Nganda**, the first Applicant herein. It is opposed by the first Respondent vide his replying affidavit sworn on the **29<sup>th</sup> June, 2016** and filed in court on the **28<sup>th</sup> June, 2016**. The second respondent filed a notice of preliminary objection the **18<sup>th</sup> October, 2016** the same being dated **14<sup>th</sup> October, 2016**. The Second contends that the matters raised before this court are the same matters raised before it and as such, the matter is subjudice.

3. The first Applicant's counsel submitted that the Applicants have a genuine and arguable case and therefore a prima facie case is that the first Applicant has produced a copy of an entry in the register of the owners of the plots in **Kiboko "B"** settlement scheme and pointed out that the first Respondent had failed to do so. On the other hand, the first Respondent's counsel submitted that a cursory look at the documents for ownership will confirm that the first defendant is the original allotter of **plot number 153 Kiboko** settlement **B** scheme and asserted that that the conditions for granting injunction which are well settled in the case of **Giella Vs Cassima Brown [19173] EA 358** have not been satisfied by the Applicants to which the first Applicant's counsel differs based on the case of **Stephen Abo Mukhobi Vs Daniel Orié Odhiambo & Another [2016] eKLR**.

4. On the issue of irreparable harm which cannot be compensated by way of damages, the applicant's counsel submitted that the second Applicant has been in occupation of the suit premises since **2012** and has built **2 houses** of a permanent structure, formed vastly and is rearing goats, planted an extensive plantation of trees which the Applicants contend there is both a fortune and a natural resource. The counsel pointed out that destruction of the permanent houses and deterioration is an issue which falls under irreparable loss. The counsel referred the court to the case of **Mbira Vs Gachuhi [2002], EA page 138** to assert that the Applicants were in actual possession of the suit land.

5. Regarding the balance of convenience, the Applicant's counsel submitted that the Applicants have satisfied all the three conditions for the grant of interlocutory injunction enunciated in the **Giella Vs Cassman Brow**. The Counsel termed the notice of preliminary objection by the second Respondent as one that is baseless as it raises no points of law on the face of it. The counsel referred the court to the case of **Rafiki Enterprises Limited Vs Kingsway Tyres & Another CACA no. 375 of 1996 (OR)** where the court of Appeal stated that, "Every court has a duty to determine whether or not it has jurisdiction in a particular matter".

6. The counsel cited the case of the owners of the **Lilia(S) Vs Caltex Oil Kenya [1989] eKLR 1,14** where it was held that a court with no jurisdiction downs its tools.

7. I have read the submissions filed and the authorities that were referred to me. I have also read the application, the supporting affidavit, the replying affidavit and the notice of preliminary objection. It is clear that this is a case of competing claim of ownership between the Applicants one hand and the first Respondents supported by the second Respondent on the other hand. As the counsel has pointed the issue of ownership of the suit premises cannot be determined at interlocutory stage. It can only be determined after full trial but of importance to note is that the Applicants are in physical possession of the suit land. The preliminary objection raises no points of law. This court has jurisdiction to entertain this matter. The applicants have shown that they have carried some development on the suit land. The purpose of granting a temporary injunction under **order 40 rules 1(a)** is to restrain the Respondents from wasting, damaging, alienating, selling of the suit property pending the determination of an application of a suit as the case may be.

8. In my view, the Applicants have shown that they have a prima facie case with a probability of success. I agree with the Applicants counsel that the development undertaken on the suit premises fall under the irreparable loss as submitted by the Applicants counsel. On the issue of balance of convenience, the same tilts in favour of the Applicants due to the reason that I have indicated in condition number two for the grant of temporary injunction. I am, therefore, inclined grant prayers 4 and 5 of the application on condition that the Applicants ceases to undertake further developments on the suit premises in terms of construction pending the hearing of this suit.

9. Further, the injunction herein shall lapse within period of **12 months** from today if the suit herein is not determined within the same period.

**Signed, Dated and Delivered this 16<sup>th</sup> day of June, 2017**

**MBOGO C.G**

**JUDGE**

**In Presence of :**

Mr. Kwemboi - Court assistant

1<sup>st</sup> Plaintiff/Applicant - absent

2<sup>nd</sup> Plaintiff/Applicant - Absent

1<sup>st</sup> Defendant /Respondent – Absent

2<sup>nd</sup> Defendant /Respondent – absent

3<sup>rd</sup> Defendant /Respondent – Absent

4<sup>th</sup> Defendant /Respondent – Absent

Ms Mwanzia holding brief for Mutua Makau for the plaintiff /applicant present

Pareno &Co. Advocates for the 1<sup>st</sup> defendant /Respondent Absent

**MBOGO C.G**

**JUDGE**