



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 18/2017

FORMERLY NAIROBI ELC NO 471/2016

STANLEY M. KITETO=====APPLICANT

VERSUS

NDILA MULWA===== RESPONDENT

RULING

1) On the **18th May, 2016** , **Stanley M. Kilelu**, the Applicant here filed a notice of motion application dated **16th May, 2016** seeking the following orders against **Ndila Mulwa** the Respondent herein;

3. That this Honourable Court do issue an Order stopping any compensation relating parcel No. KALAWA/KATHULUMBI/577 for construction of Thwake Multipurpose project pending the hearing and determination of the main suit.

4. Costs do abide.

Prayers 1 and 2 are spent.

2) The application is predicated on the grounds on its face and is supported by Applicant's affidavit sworn on the **16th May, 2016** as well as the supplementary affidavit sworn on the **28th June, 2016**. The application is opposed by the Respondent vide her replying affidavit sworn on the **15th June, 2016** and filed on even date.

3) By an order of the court issued on the **20th June, 2016** both parties were directed to canvass the said application by way of written submissions. Parties were further directed to appear in court on **12th September, 2016** to fix a date for ruling. The court file appears not to have been produced in court on the said date such that by the time it was mentioned on the **24th November, 2016** the Respondent was yet to file her submissions. The matter was fixed for further mention on the **16th February, 2017** when the court directed that this file be transferred from **Milimani Environment and Land Court** to this court.

4) The above being the case, it now falls upon me to write and deliver the ruling.

5) The Applicant has in **paragraphs 2 and 3** of his supporting affidavit deponed that he is the owner of the suit land and having purchased it from the husband of the Defendant/Respondent. He goes on to

depone that he has developed the suit land extensively. He further depones that the Respondent has been listed as beneficiary by virtue of being the registered owner of the suit land, an issue he is opposed to.

6) In his supplementary affidavit, the Applicant has depone in **paragraph 5** that the Respondent has admitted that the Applicant is in actual possession of the suit premises though evasively. He goes on to depone in **paragraph 5** of the supporting affidavit that he purchased the suit land when it was **parcel Number 104** in the name of **Munguti Ndavi**. He goes on to depone that the Respondent and her late husband, **Mulwa Ndolo** gave him vacant possession in **2005**. He goes on to depone in **paragraph 10** of the affidavit that the Respondent and her husband voluntarily sold to him the suit premises in **2001** and **2007**. He further depones that although the Respondent has indicated that she is willing to transfer a portion of the suit **land (8 acres)**, she has failed to state the reason behind her offer on even to annex any agreement.

7) On her part, the Respondent has in **paragraph 3** of her replying affidavit depone that land Parcel Number **Kalawa/Kathulumbi557** resulted from subdivision of land Parcel Number **Kalawa/Kathulumbi/104** which belonged to **Munguti Ndavi Kingu** who died on **22/10/2002**. She goes on to depone in **Paragraphs 4** and **5** that following the death of **Munguti Ndavi Kingu**, grant of letters of administration were issued to members of his family on **14/06/2012** and upon confirmation of the grant by the High Court at **Machakos** in **Succession Cause No. 270 of 2012**, the court ordered that land Parcel Number **Kalawa/Kathulumbi/104** be registered in her name and hence land parcel Number **Kalawa/Kathulumbi/557**. She goes on to depone in **Paragraph 9** that the Applicant thereafter started to attempt to grab her land by taking advantage of her age and the fact that she is widow who does not have a child. She goes on to depone in **Paragraph 12** that translations of the agreement marked “**SMK 1**” show the agreements were entered into on **13/2/2001** and **21/12/2007** and do not show which land was involved and who the owner was and in any case as at **21/12/2007** and **13/2/2001**, the land in question was still the property of the late **Munguti Ndavi Kingu**. She depones in **Paragraph 20** that the Applicant entered into her land without her consent and whatever developments he alleges to have initiated were at his own risk. She also depones in **Paragraph 10** that she was willing to transfer **8 acres** of land to the Applicant which offer she later withdrew.

8) In his submissions filed in court on the **11/7/2016** the Applicant’s Counsel submitted that the issues in dispute are acres of land sold, how much was paid and whether the Respondent had the capacity to sell it. The counsel opined that the Respondent and her husband the capacity to sell the land. Regarding the acreage of the land that was allegedly sold, the Applicant’s counsel submitted that these are issues to be determined in the main suit.

9) The counsel filed further submissions were he has tabulated the development carried out by the Applicant on the suit premises. However, in my view these submissions are misplaced as they are not based on the affidavit evidence tendered by the Applicant in support of the application. The counsel also touched on the issue of adverse possession which is not pleaded in the plaint and in any case this is an issue which cannot be determined at interlocutory stage.

10) On their part the Respondent’s counsel correctly submitted that the principles for granting injunctions are as laid in the case of ***Giella Vs Cassman Brown & Co. Ltd [1973] EA 358***. On whether or not the Applicant was met the conditions for the grant of injunction, the counsel answered in the negative.

11) The counsel went on to submit that the sale agreements relied upon by the Applicant do not disclose any link between them and the suit premises. The counsel relies on the case of ***Thomas Gatura Gathu Vs Jareth Limited & 2 others [2010] eKLR***. The counsel further opined that there was no evidence to show that the Respondent had the capacity to sell land and that no consent was obtained from the land control board as is provided by the law. On this score, the counsel referred the court to the cases of ***Shamalla Vs Chibeu [1988] KLR251***, ***Simiyu Vs Watambamala [1988]eKLR*** and ***Leonard Njonjo Kariuki Vs Njoroje Kariuki*** alias ***Benson Njojo in Nairobi Court of Appeal Civil Appeal Number 26 of 1979***.

12) From the above, the issue is, has the Applicant shown that he has a prima facie case with probability

of success? My answer to this question is in the negative. It is clear that from the evidence of both the Applicant and the Respondent that the suit land is registered in the name of the Respondent even though the sale agreement annexed to the Applicant's affidavit as annexure "SMK 1" shows that the Respondent was one of the witnesses to a sale agreement between the Applicant and **Mulwa Ndolo**, it does not identify the land from which the Applicant was to acquire a portion from. Other than the agreement marked "SMK 1", the Applicant has nothing else to prove ownership. The other issue to consider is whether or not the Applicant will suffer irreparable injury if injunction is not granted. My answer to this question is also in the negative. If anything, it is Respondent who is likely to suffer irreparable injury if the injunction is granted due to the fact that she has title document to the suit premises. In my view the developments, if any, that the Applicant has made on the suit premises are quantifiable and as such, he can be compensated by way of damages. This court is not in doubt and even if it were, from the affidavit evidence before me, the balance of convenience tilts in favors of the Respondent because of the reasons that have been given in principles 1 and 2 herein above.

13) Arising from the above, my finding is that the application lacks merit and same is dismissed with costs to the Respondent.

Signed, Dated and Delivered this 26th **day of** September, 2017

MBOGO C.G

JUDGE

In the presence of;

Kwemboi – Court Assistant

Plaintiff present

Defendant absent

Mr. Tamata for the plaintiff/Applicant absent

Mr. Mutia for the Defendant /Respondent absent

Mr. Mulandi h/b for Mr. Mutia for the Respondent

MBOGO C.G

JUDGE