



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT GARISSA**

**CIVIL CASE NO. 48 OF 2017**

**DANIEL MANGUI KITEME.....PLAINTIFF**

**VERSUS**

**SYENGO MUTHENGI.....DEFENDANT**

**RULING**

**BACKGROUND**

The plaintiff has instituted this suit against the defendant by way of a plaint dated 10<sup>th</sup> July 2017. In his plaint the plaintiff is seeking the following orders.

- (a) A declaration that the plaintiff is the rightful owner of all that unsurveyed piece of land situated at Kyamulutu Sub-location, Usueni Location of Tseikuru Sub-county in Kitui County measuring approximately 10 acres.
- (b) A permanent injunction restraining the defendant by himself, through family members, servants, or agents from encroaching, entering, fencing, clearing vegetation or in any way interfering with the plaintiff's quiet possession of all that un-surveyed piece of land at Kyamulutu Sub-location Usueni location of Tseikuru Sub-county in Kitui County measuring approximately 10 acres.
- (c) Cost of and incidental to this suit.
- (d) Further relief as the Honourable court deems fit and just to grant.

Filed simultaneously with this suit is a Notice of Motion application brought under Order 40 CPR. The application is supported by an affidavit sworn by the plaintiff/applicant. The same date. That application is further supported by a certificate of urgency and numerous documents attached to the supporting affidavit. When the application was placed before me sitting as the duty court I certified the same urgent and directed the same to be served for inter-parties hearing.

After service of the said application, the defendant, respondent filed a replying affidavit opposing the said application sworn on 2<sup>nd</sup> August 2017. Attached to the replying affidavit are numerous letters and minutes of a meeting conducted in Kikamba dialect. When the matter came up for hearing of the said application, the lawyers appearing for the plaintiff/applicant and the defendant/respondent agreed by consent to dispose of the application by way of written submissions.

## **APPLICANT'S CASE**

In his supporting affidavit, the applicant contends that he acquired the un-surveyed suit land measuring approximately 10 acres way back in the year 1957 when it was a bare land and has since been in actual possession to date. He stated that he has over the years developed the same by farming mangoes, bananas, sugarcane, pawpaws, pumpkins, and sweet potatoes.

The applicant further argues that sometimes on or about 31<sup>st</sup> March, 2017, the defendant without his consent trespassed and encroached on the suit land claiming ownership and embarked on grazing livestock and has done wanton destruction by burning down his fence and cutting down trees and poisoning plants. He attached numerous correspondences various administrative offices.

## **RESPONDENT'S CASE**

The respondent on the other hand stated that he is the proprietor of an un-surveyed piece of land measuring approximately 15 acres situated along Tana River in Kyamalutu Sub-location, Usueni location Tseikuru Sub-county, Kitui County. He said that he inherited the said parcel of land from his grandfather Kyooryo Kimundu who acquired the same in 1953. The respondent further stated that sometime in 1993, there arose a dispute as to the ownership of the suit property which dispute was resolved in his favour. He attached documents and minutes of the alleged meeting marked SM1. The respondent further stated that sometime on 22<sup>nd</sup> July 2016 the applicant laid claim to a riparian land located inside his land along River Tana. The respondent avers that the applicant started erecting a temporary fence hiving off approximately 30 metres of the land adjacent to the river and began farming on the riparian. The fence erected by the applicant blocked his access to the river which caused him to make a report to the Sub-chief one Mr. Munyoki Kimanzi on 2<sup>nd</sup> August, 2016.

## **APPLICABLE LAW**

1. Civil Procedure Rules
2. Land Registration Act
3. The Constitution of Kenya, 2010
4. Community Land Act.

## **ISSUES FOR DETERMINATION**

1. Under which law the land in question is governed?
2. Whether the applicant has satisfied the principles for the grant of injunctive orders?
3. Who shall bear the costs of the application?

## **ANALYSIS AND DETERMINATION**

Before an order of injunction is issued the court must be satisfied that the principles as set out in the celebrated case of **Griella –Vs- Cassman Brown Company Ltd (1973) EA** have been established by the applicant. In this case, the applicant avers that he is the owner of all that un-surveyed piece of land measuring approximately 10 acres situated at Kyamalutu sub-location, Usueni location in Tseikuru Sub-county of Kitui County. He further stated that he acquired the suit land sometime in the year 1957 when it was a bare land and that he has been in actual possession since then to date. Under Article 61(1) of the Constitution of Kenya 2010, land is classified into Public, Community, and Private. The applicant states that he gathered the land himself in the year 1957 and wishes the court to declare him as the owner of the land. Under Article 64 of the Constitution of Kenya 2010, private land is defined as follows:

- (a) Registered land held by any person under any freehold tenure.
- (b) Land held by any person under leasehold tenure and
- (c) Any other land declared private land under an Act of Parliament.

The land which the plaintiff is seeking this court to declare as belonging to his has not been registered or declared private by any Act of Parliament. The plaintiff/applicant has not satisfied this court on the first principle for the grant of an injunction order. The applicant has not also shown that he will suffer injury for which damages will not be an adequate remedy. As such, the second principle has not also been satisfied. Deciding this case on a balance of convenience, I am persuaded that the interest of justice demand that the case be heard on merit at the full hearing. In the upshot the application dated 14/7/2017 facts and the same is hereby dismissed. The costs to abide the event.

**Read and Signed in the Open Court this 24<sup>th</sup> October, 2017.**

**E.C Cherono (Mr.)**

**ELC Judge**

**In the presence of**

1. Mr. Nyaga
2. Mr. Ngata.