



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 125 OF 2017

GEOFFREY WANYONYI.....PLAINTIFF

VERSUS

EDWARD LAGAT.....DEFENDANT

RULING

1. The application dated **11/7/2017** seeks an order of temporary injunction restraining the defendant and his agents from entering, remaining, trespassing, planting, erecting any structure, or otherwise wasting, damaging, alienating charging or in any other way interfering with the plaintiff's quiet possession of land Parcel No. **2116/1200 – Kitale Municipality** pending the hearing and determination of the main suit.
2. The grounds on which the application is brought are set out at the bottom of the application.
3. The applicant states that he bought the parcel of land registration number **2116/1200 – Kitale Municipality** on **16/4/2010** through a public auction from the **National Bank of Kenya** who sold the suitland in exercise of their statutory power of sale. Subsequent to the transfer of land to him, the applicant became the registered owner and has been paying the land rates and rent to the County Government of Trans-Nzoia in respect of the land.
4. On **9/5/2017**, the applicant states, when the applicant sent his agent to go and fence the land the respondent allegedly unlawfully arrested him, presented him to the police upon which he was charged with an offence of trespassing with an intention to commit a crime in **Kitale Criminal Case No. 1910/2017** which case is now ongoing. Further, the respondent has now fenced the suitland yet the applicant has never sold, leased out or parted with possession of the suitland. The applicant claims that the respondent has no colour of right, to fence the land without seeking his consent or authority.
5. The application is opposed by the respondent who filed his sworn affidavit dated 21/7/2017, on the same date. The respondent's defence is that he has been sued wronged as he has not trespassed on the applicant's property; that the plot that the respondent occupies is a different one; that the plot he occupies is Plot No. **Kitale Municipality Block 2116/Block 7/Plot No. USN 24**; which is still registered in the name of his now deceased father; that his father was allocated the plot by the County Council of Kitale on **16/6/1998**, and that he has been in occupation of the plot for over **15 years**, and that he is one of the administrators of his late father's estate.
6. In his submissions, the respondent states, and in my view, correctly so, that the applicant does not claim to have ever been in possession of the land. He submits that the orders sought cannot issue while he is in possession as that would disrupt the status quo. He relies on the case of **Devani –vs- Bhadressa & Another Civil Appeal No. 21 of 1971 (1972 EA,22)**. The respondent is in possession of a letter of allotment and a part development plan. However he does not have a Grant of the property.

7. The question that arises in the instant application is whether the applicant should be granted an order of temporary injunction to restrain the defendant's interference with the land. The conditions upon which an order of temporary injunction may issue were set out in the celebrated case of ***Giella –vs- Cassman Brown 1973 EA 358***. First the applicant must demonstrate that he has a *prima facie* case with probability of success, and secondly that he stands to suffer injury that cannot be compensated by way of damages if an order of injunction does not issue.

8.. In the instant case despite the averments that the respondent has made – that he has been in occupation for 15 years or more, that his father owned the land, that his brothers are the administrators of his late father's estate yet they are not enjoined in this suit, and lastly and most importantly, the applicant has never been in possession of the land and so issuance of the temporary injunction sought may disrupt the status quo - the applicant has not filed any further or supplementary affidavit to counteract these allegations.

9. It is true that an applicant may have a grant in his name in respect of the suitland but where another person has already been in possession thereof for a considerable period, and the act of fencing has been accomplished, and that other persons produces some documents evidencing some entitlement by way of allotment or otherwise, it would appear to me that the acts intended to be temporarily enjoined pending the hearing and determination of the suit having already been overtaken by events, and that what is being sought is no longer a temporary injunction but a mandatory injunction.

10. In the case of ***Moses Kiptanui & another v Evans Kamau Mwaura [2015] eKLR***, the court observed as follows:

“The applicants in their application contend that the respondent is attempting to re-enter the properties after he moved out when the same was sold. This is absolutely not the position. The respondent has been on the property and has never left at any moment. The letter of 13/2/2015 from the lawyer of the vendors is clear that the respondent is in possession.

“An injunction is an equitable remedy. Whoever wants to have it must approach the court with clean hands. It is clear that the applicants are seeking the injunction with the sole purpose of removing the respondent from the suit land. This is not the purpose of a temporary injunction. If the applicants wanted to remove the respondent from the properties which are now registered in the second applicant's name, they should have moved the court for a mandatory injunction which will then have to be decided based on the facts presented.

“There is the question of the respondent's entitlement in the Estate of Evans Kamau Mwaura which seems to have been taken by the applicants without his consent. The administrators cannot give the respondent 3 or 2 acres depending on which Evans he is and then purport to sell his entitlement without his consent. I find that the applicant's application is mischievously brought. It is intended to evict the respondent from the suit land.”

11. Further in respect of *prima facie* case, the applicant has failed to demonstrate that the ***LR No. 2116/1200 - Kitale Municipality*** is the same parcel as the ***Plot No. Kitale Municipality Block 2116/Block 7/Plot No. USN 24***.

12. Now that these facts have not been established, it cannot be said without doubt that the applicant has established a *prima facie* case with a probability of success.

13. The order of temporary injunction pending the hearing and determination of the application *inter partes* had been issued before the respondents reply was filed owing to the rosy picture created by the applicant's documents filed in the record.

14. Now the respondent's documents are on the record which show that there are real triable issues arising from the application, and that some doubt has been created as to whether the applicant, not ever having been in possession or occupation of the suit property has shown that he has a *prima facie* case that

entitles him to an order of temporary injunction.

15. In the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] Eklr* the Court of Appeal stated as follows:-

“With reference to the establishment of a prima facie case, Lord Diplock in the case of *American Cyanamid vs Ethicon Limited*[1975] AC 396 stated thus,

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”

18. The applicant has a grant. The true identity of the plot represented by the grant on the ground is in doubt. The rule in the celebrated case of *Giella -vs- Cassman Brown*1973 EA 358 is that if the court is in doubt, it will decide an application seeking orders of temporary injunction on a balance of convenience.

17. In my view the balance of convenience herein lies in not disturbing the status quo on the ground but rather preserving it pending the hearing and determination of the main suit herein.

18. For this reason the interim orders that have been in force in this suit are hereby discharged and the application dated **11/7/2017** is hereby dismissed. Costs shall be in the cause. The parties should comply with the Rules and set the main suit down for hearing at the earliest.

It is so ordered.

Dated, signed and delivered at Kitale on this 19th day of October, 2017.

MWANGI NJOROGE

JUDGE

19/10/2017

Before - Mwangi Njoroge -Judge

Court Assistant - Isabellah

Ms. Khaweo for applicant

Ms. Muniolo for respondent

COURT

Ruling read in open court in the presence of counsel for the Applicant only.

MWANGI NJOROGE

JUDGE

19/10/2017