

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 91 OF 2016

JOSEPH WANJALA FUKWO..... PLAINTIFF

VERSUS

DAVID TOBOO TOROITICH..... DEFENDANT

RULING

1. The applicant filed a Notice of Motion dated 30/5/2016 seeking to restrain the respondent from **ten (10) acres** comprised in **LR. No. 6136/5712** owned by **Sabaot Savings & Credit Co-operative Society**. The applicant contends that he bought **ten (10) acres** from the respondent on **14/7/1988** at a consideration of **Kshs.70,000/=**. He took possession of the land until **1992** when tribal clashes erupted in the Endebess area. He moved out of the land. When he came back, he sought to enter the land but he was prevented from doing so by the respondent who threatened him with dire consequences. This is why he came to court seeking injunctive orders.

2. The applicant's application is opposed by the respondent based on a replying affidavit dated 11/7/2016. The respondent denies ever selling the land described by the applicant. He contends that he only owns **five (5) acres** which are comprised in **LR. No. 5712/6136** owned by Sabaot Farmers Co-operative Society. He annexed a copy of Share Certificate **No. 2048** which shows that he is entitled to 5 acres. The respondent however concedes that in 1988 he intended to sell 5 acres to the applicant but that the transaction was rescinded and that in any case the transaction did not receive the consent of the land control board and that the applicant's claim is statute barred.

3. I have gone through the applicant's application as well as the opposition to the same by the respondent. To begin with, the applicant's application is not complete. There are no annexures to the same. The application itself is contradictory to the plaint filed by the applicant.

4. Whereas the applicant pleads in his plaint that he bought **5 acres**, in the application, he claims that he bought **10 acres**. There is no agreement of sale annexed to back his claims. Be that as it may this is an application for injunction. It is being sought at interlocutory stage. The principles for grant of the same are well set out in the case of **Giella -vs- Cassman Brown & Co. Ltd [1973] E.A 358**. First an applicant has to demonstrate a prima facie case with probability of success. Secondly, an injunction will not normally be given unless otherwise the applicant will suffer injury which will not be compensated in damages. Thirdly if the court is in doubt, it decides the application on a balance of convenience.

5. In the instant case, the applicant seems not to be sure of what he is claiming. In the plaint, he claims 5 acres. In the application he claims 10 acres. The parcel from which he allegedly bought the land is different and is owned by a different society from what the respondent is saying. The applicant has done nothing to clarify these contradictions. He has feebly tried to blame the respondent in his submissions that the issue of the land parcel came out a month after the agreement had been signed. Can one say in the circumstances that he has demonstrated a prima facie case with probability of success? I have no doubt that he has not made out a prima facie case.

6. The purpose of an interlocutory injunction is to preserve the property in issue. In the present case, the applicant seems to seek the injunction to assist him enter the land. This is why the injunction prayer is couched in such away as to include preventing the respondent from occupying the land. If the injunction were to issue, it will be used by the applicant to gain entry into the land thus evicting the respondent before the case is fully heard.

7. The respondent has stated that the applicant has already lodged a caution on the property. If this be the case, then the applicant's interests are protected in the meantime. If he were to succeed in his case, he will always be compensated in damages and be restored to the land. It cannot therefore be said that he will suffer injury which will not be compensated in damages.

8. Even on a balance of convenience, it is the respondent who is in possession. The balance of convenience tilts in favour of the respondent. It is therefore clear that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this **31st** day of **August, 2016**.

E. OBAGA

JUDGE

In the presence of Mr. Pukah for Defendant/Respondent. Court Assistant – Isabellah.

E. OBAGA

JUDGE

31/8/2016